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Brexit: the proposed UK-EU security treaty

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Sub-Committee Staff

The current staff of the Sub-Committee are Tristan Stubbs (Clerk), Megan Jones (Policy Analyst), Katie Barraclough (Policy Analyst until 4 June 2018), George Stafford (Committee Assistant) and Sam Lomas (Committee Assistant until 24 June 2018).

Contact Details

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. Telephone 020 7219 5791. Email euclords@parliament.uk

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SUMMARY

The UK and the EU share a deep interest in maintaining the closest possible police and security cooperation after Brexit: protecting the safety of millions of UK and EU citizens must be the over-riding objective. Negotiations on security are not a 'zero sum game': we all stand to gain from agreement, and we all stand to lose if negotiations fail. As the EU Commissioner for Security Union, Sir Julian King, told us, security cooperation should be unconditional.

But time is short, and neither side has yet approached the negotiations in this spirit. The UK Government's 'red lines', and the EU's response, appear to have narrowed the scope for agreement. Both sides now need to focus on finding common ground and making pragmatic compromises.

Operational continuity is vital, and we welcome the agreement of both the UK Government and the EU that UK participation in EU justice and home affairs measures should continue during the transition period, from March 2019 to December 2020.

We note, however, that the terms of the transition agreement would disbar the UK from retaining a governance role in EU agencies, reducing its influence on policy and decision-making. We note also that Article 168 of the Withdrawal Agreement would authorise EU27 States to refuse to extradite their nationals to the UK during the transition period, in accordance with domestic constitutional requirements. The practical impact of this change is unclear, and we shall look further at it in coming months. In the meantime, we recommend that the Government publish a contingency plan, to include the effect of any disruption on UK extradition arrangements.

We support the Government's aim to secure a future relationship with Europol that retains as far as possible the operational status quo, on both sides. But we are concerned by the Government's transactional approach to negotiations on this issue: the fact that the UK is a major contributor of data to Europol should not lead the Government to underestimate the impact of Brexit upon the UK's role and influence in Europol, as in other EU institutions.

The closer the integration that the UK seeks with Europol, the more compromises the Government will have to make. Any agreement will have to take account of the accountability of Europol to the Court of Justice of the EU, and is likely to require continuing alignment with EU data protection legislation, as well as budgetary contributions.

The Government has been clear that it wishes to retain all the benefits of the European Arrest Warrant. But this is unlikely to be achievable: even the EU's agreement with Norway and Iceland (which has yet to be brought into force) allows an 'own-national exemption'. It also provides an indirect but influential role for the CJEU. Compromises will be needed—the alternative is to fall back on the 1957 Council of Europe Convention on Extradition, which would lead to delay, higher cost, and potential political interference.

We support the Government in prioritising three areas for future UK-EU security cooperation: extradition; access to law enforcement databases; and partnerships with EU agencies such as Europol. The Government seeks to realise these objectives by negotiating a single, comprehensive treaty.

We have, however, seen no evidence that sufficient progress has yet been made towards negotiating a comprehensive security treaty. On balance, given the time taken to negotiate EU agreements with third countries in the past, and the range and complexity of the available models and precedents, we believe that it is unlikely that such a treaty can be agreed in the time available.

The Government therefore needs to adopt an evidence-based approach, showing realism about what it can achieve in the time available. Any UK-EU agreement will be judged less on its form than on its success in protecting the security of the UK and EU27. If a comprehensive treaty cannot be agreed, a series of *ad hoc* security arrangements could help to mitigate reduced operational capacity.

Future UK-EU security cooperation will have to be underpinned by an agreement on data-sharing. We support in principle the Government's objective of securing a cross-cutting agreement on data protection, but negotiations on data-sharing are notoriously complex, and we stress that pursuit of a cross-cutting agreement on data should not come at the expense of an agreement on security.

We also note that any perceived reduction in the rights enjoyed by criminal suspects in the UK could have a significant operational impact on those working to protect the country's security: the Government needs urgently to explain how fundamental rights will be protected after Brexit, and how those rights will cohere with the proposed security treaty.

Given the hurdles ahead, we are concerned that there is no mechanism in the draft Withdrawal Agreement for extending it, either in whole or in part, beyond the end date of 31 December 2020. We call on the Government and the EU to consider options for allowing such an extension, at least in respect of key security measures, where any interruption to ongoing operational cooperation could cost lives.

In the meantime, we commend the contingency planning being undertaken by the Crown Prosecution Service, National Crime Agency, Metropolitan Police and others to prepare for the possibility of an operational 'cliff-edge'.

Security forces in Northern Ireland and the Republic of Ireland have a decades-long history of cooperation in combating terrorism and cross-border crime. While we are confident that informal cooperation will continue, we note that the EU instruments, databases and agencies have become increasingly important in providing formal mechanisms for cooperation. It is vital for both sides that any UK-EU treaty or agreements should support this cooperation, including effective extradition arrangements between the UK and Ireland.

Brexit: the proposed UK-EU security treaty

CHAPTER 1: INTRODUCTION

1. In our December 2016 report, *Brexit: future UK-EU police and security cooperation*, we outlined the areas for future security cooperation that we believed the Government should prioritise in its negotiations with the EU.[1] These included agencies, mechanisms and resources such as Europol, Eurojust, the second generation Schengen Information System (SIS II), the European Criminal Records Database (ECRIS), Passenger Name Records (PNR), the Prüm Database, and the European Arrest Warrant (EAW).

2. In this report we examine the Government's proposal to negotiate a treaty between the UK and the EU that would provide an overarching legal basis for continued cooperation in these vital areas of internal security. We build on and update our 2016 findings by assessing how the negotiations up to this point have dealt with internal security. Our primary concern is the long-term UK-EU security relationship, but we also touch on the draft Withdrawal Agreement, the first iteration of which was published on 28 February 2018, and in particular on the arrangements proposed for security cooperation during the transition period, from 30 March 2018 to 31 December 2020. We consider how the Government might prioritise particular areas of cooperation when negotiating the shape of the future relationship, in the face of EU27 concerns about third-country involvement in its security structures. We ask whether a treaty is indeed the best means for the Government to achieve its aims. We look at cross-cutting issues such as data protection and human rights, and their possible effects on a future agreement on security. And we analyse the specific circumstances of Northern Ireland, raising as yet unresolved concerns about the security of what will be the UK's sole land border with the EU (though similar issues will arise in respect of the border between Gibraltar and Spain).

3. The focus of this report is on internal police and security cooperation rather than external defence and foreign policy cooperation, which is likely to be the subject of a separate agreement between the UK and EU.[2] It is also important to note that national security is a Member State, not an EU competence. Article 4 of the Treaty on European Union (TEU) requires the EU to respect Member States' "essential State functions, including … safeguarding national security", adding that "national security remains the sole responsibility of each Member State". Title V (Area of Freedom, Security and Justice[3]), Article 72 of the Treaty on the Functioning of the European Union (TFEU) further states that "this Title shall not affect the exercise

1 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77)

2 HM Government, *Framework for the UK-EU Security Partnership* (May 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides__SI__FINAL.pdf [accessed 18 June 2018]

3 The term 'Area of Freedom, Security and Justice' was introduced by the Treaty of Amsterdam and reproduced in the Lisbon Treaty, which incorporated the previous 'third pillar' arrangements into the EU treaties (see Box 1). Nevertheless, the term 'Justice and Home Affairs' (JHA) remains in common use, and is generally adopted in this report.

of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". In many areas, such as intelligence gathering and sharing, we would expect extensive cooperation between security and police forces of the UK and the remaining 27 Member States to continue, regardless of any agreement between the UK and the EU.[4]

4. However, Article 73 TFEU provides that Member States are also free to "organise between themselves" any forms of cooperation and coordination for the safeguarding of national security, and the EU now plays a key role in fostering cooperation between Member States. On 7 March we heard from the then Director of Europol, Rob Wainwright, that Europol had been taking an ever-greater role in tackling terrorism and cybercrime, and was invited by the French government to support the investigation into the Paris terror attacks of 2015: "That was the first time Europol was invited by such an important Member State to provide such significant support in an investigation of a major terrorist attack."[5]

5. This report is part of a series of Brexit-themed inquiries launched by the European Union Committee and its six Sub-Committees following the referendum on 23 June 2016, which have sought to shed light on the main issues likely to arise in negotiations on the UK's exit from, and future partnership with, the European Union. It draws on a series of evidence sessions that the Home Affairs Sub-Committee held between 7 March 2018, when the inquiry was launched, and 14 June 2018, when Sir Julian King appeared before the Sub-Committee.

6. **We make this report to the House for debate.**

4 Q 21, Q 94
5 Q 1

CHAPTER 2: INTERNAL SECURITY: A SHARED AIM?

A shared aim

7. In September 2017 the Government published its future partnership paper on UK-EU cooperation on security, law enforcement and criminal justice. It argued that it was "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". The paper therefore called for a relationship between the UK and the EU "that goes beyond the existing, often *ad hoc* arrangements for EU third country relationships", concluding that "it is vital that the UK and the EU maintain and strengthen their close collaboration" after the UK leaves the EU.[6]

8. Giving evidence on 14 June, Sir Julian King, the EU Commissioner for Security Union, also affirmed the "deep, shared self-interest" in continuing the "closest possible cooperation" on security. He noted that, while there might be winners and losers in trade negotiations, "on security, cooperation should be unconditional".[7]

The UK Government's position

9. Cooperation between EU Member States on internal security goes far deeper than any comparable international arrangements. The Government wishes to continue this cooperation once the UK leaves the EU, as part of its proposed "deep and special partnership".[8] The Prime Minister, the Rt Hon Theresa May MP, announced for the first time in her Lancaster House speech 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".[9]

10. In Florence on 22 September 2017 she fleshed out this ambition. She sought "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". This agreement would be built on "our shared principles, including high standards of data protection and human rights".[10]

11. The future partnership paper, which appeared just before the Florence speech, set out the Government's key proposal: an over-arching internal security treaty between the UK and the EU, to be agreed as part of the 'Phase 2' negotiations on the future UK-EU relationship. It claimed that such a treaty on internal security was needed, because it would provide "a legal basis" for continued cooperation, and "could include provisions on scope

6 HM Government, *Security, law enforcement and criminal justice: a future partnership paper* (September 2017), p 2: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF [accessed 18 June 2018]

7 Q 115

8 HM Government, *Joint article: a deep and special partnership* (January 2018), https://www.gov.uk/government/news/joint-article-a-deep-and-special-partnership [accessed 18 June 2018]; cf. Q 22

9 Rt Hon Theresa May MP, speech on 'The Government's negotiating objectives for exiting the EU', 17 January 2017: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech [accessed 20 June 2018]

10 Rt Hon Theresa May MP, speech on 'A new era of cooperation and partnership between the UK and the EU', 22 September 2017: https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu [accessed 24 June 2018]

and objectives; the obligations for each side; and what mechanism should apply to resolve disputes".[11] The proposed treaty would incorporate and replicate existing arrangements such as the European Arrest Warrant, and provide the UK with access to the Second Generation Schengen Information System database (SIS II), as well as some form of continued participation in Europol and Eurojust, the EU agencies for police and judicial cooperation. The Government has also suggested that it hopes to maintain some form of access to the European Criminal Records Database (ECRIS), Passenger Name Records (PNR), and the Prüm databases containing fingerprint, DNA and vehicle registration information.[12]

12. The Government's proposals came with a caveat. One of the Government's overarching 'red lines' for the Brexit negotiations is to bring to an end the jurisdiction in the UK of the Court of Justice of the European Union (CJEU): as the Prime Minister also said in her Lancaster House speech, "laws will be interpreted by judges not in Luxembourg but in courts across this country".[13] A year later, in her speech to the Munich Security Conference on 17 February 2018, the Prime Minister indicated that she planned to respect the "remit" of the Court of Justice of the European Union when participating in EU agencies (which would presumably include agencies such as Europol).[14] But as we note below, the Government's 'red line' could still restrict the UK's continued involvement in those security cooperation frameworks where the CJEU acts as a dispute resolution mechanism. Other Government policies, such as the refusal to incorporate the Charter of Fundamental Rights of the European Union in domestic law post-Brexit,[15] could also reduce the UK's room for manoeuvre in specific areas, such as extradition.

The EU's position

13. In its Brexit negotiating guidelines of April 2017, the European Council 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".[16] In subsequent guidelines adopted at the December 2017 European Council meeting this position was reaffirmed.[17]

14. Yet the EU's substantive contributions to the discussion on UK-EU security, in reacting to the UK Government's 'red lines', have served mainly to

11 HM Government, *Security, law enforcement and criminal justice: a future partnership paper* (September 2017), para 38: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF [accessed 18 June 2018]

12 HM Government, *Framework for the UK-EU Security Partnership* (May 2018), p 14: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides__SI__FINAL.pdf [accessed 18 June 2018]

13 Rt Hon Theresa May MP, speech on 'The Government's negotiating objectives for exiting the EU', 17 January 2017: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech [accessed 20 June 2018]

14 Rt Hon Theresa May MP, 'Speech at Munich Security Conference', 17 February 2018, https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018 [accessed 23 June 2018]

15 House of Lords Library Briefing, 'Human Rights Priorities in the Light of Brexit', LLN-2017–0092, December 2017, p 1

16 European Council, *Special meeting of the European Council (Art. 50) (29 April 2017)—Guidelines*, p 8: https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf [accessed 18 June 2018]

17 European Council, *European Council (Art. 50) meeting (15 December 2017)—Guidelines*, p 3: http://www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf [accessed 23 June 2018]

underline the difficulties in reaching an agreement. Speaking at the Berlin Security Conference in November 2017, the EU's Chief Negotiator, Michel Barnier, said that the UK would no longer be a member of Europol post-Brexit and that there would be "no horsetrading" on security. In slides released on 29 January 2018,[18] the Commission listed "factors determining the degree of EU cooperation with third countries". These included the security interest of the EU27; shared threats and geographic proximity; the existence of a common framework of obligations with third countries (for example membership of Schengen, or of the European Economic Area (EEA)); the risk of upsetting relations with other countries; a respect for fundamental rights; the degree to which data protection standards were equivalent; and the strength of enforcement and dispute settlement mechanisms. The principles contained within this presentation were later reaffirmed in the European Council guidelines on negotiations on future relations on 23 March 2018,[19] and in the Commission's updated slides on police and judicial cooperation in criminal matters, published on 18 June.[20]

15. For Camino Mortera-Martinez, of the Centre for European Reform, "The EU's main guiding principle for negotiations with the UK is 'no better out than in'. In justice and home affairs, this means that a non-EU, non-Schengen country cannot have more rights and fewer obligations than an EU Member State or a Schengen country."[21] Sir Julian King also noted that the EU faced "inherently difficult issues", including in protecting its "strategic autonomy", while continuing close security cooperation with the UK.[22] In a speech to the EU Fundamental Rights Agency, on 19 June 2018, Mr Barnier attacked those in the UK who "want to maintain all the benefits of the current relationship, while leaving the EU regulatory, supervision, and application framework". He affirmed the "need to cooperate strongly with the UK", but was clear that such cooperation would be "on a different basis".[23]

Sequencing

The draft Withdrawal Agreement

16. On 28 February 2018 the European Commission published a draft Withdrawal Agreement under Article 50 of the Treaty on European Union, setting out the terms of the UK's exit from the EU. Further iterations of the Agreement were published on 15 and 19 March, and all references are to the 19 March text.[24] During the transition period provided for in this

18 European Commission, 'Police and judicial cooperation in criminal matters', 29 January 2018: https://ec.europa.eu/commission/sites/beta-political/files/police_judicial_cooperation_in_criminal_matters_0.pdf [accessed 19 June 2018]

19 European Council, *European Council (Art. 50) (23 March 2018)—Guidelines:* https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf [accessed 18 June 2018]

20 European Commission, 'Police and judicial cooperation in criminal matters', 18 June 2018: https://ec.europa.eu/commission/sites/beta-political/files/slides_on_police_and_judicial_cooperation_in_criminal_matters.pdf [accessed 22 June 2018]

21 Camino Mortera-Martinez, 'Plugging in the British: EU justice and home affairs', (May 2018), p 1: http://www.cer.eu/sites/default/files/pbrief_plugin_jha_31.5.18.pdf [accessed 3 July 2018]

22 Q 110

23 Michel Barnier, 'Speech at the European Union Agency for Fundamental Rights', 19 June 2018: http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm [accessed 22 June 2018]

24 European Commission, *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: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en [accessed 18 June 2018]

Agreement, the UK will remain subject to EU law (Part 4). The text that the two sides have agreed so far permits the UK to continue to participate, during this transition period, in justice and home affairs measures to which it has already opted in before the UK leaves the EU (Article 122(5)).

17. Essentially, this provision means that the UK will retain the responsibilities of a Member State without its current institutional rights. For example, as the text currently stands, the UK will be able to cooperate with Europol during transition, but will lose its place in the organisation's governance structures. We explore below how the Agreement might affect security cooperation during transition, and consider whether the forms of cooperation established during transition are likely to be reflected in a final future UK-EU agreement on security.

The 'political declaration'

18. Article 50(2) TEU requires that any Withdrawal Agreement must take account of the framework for the future UK-EU relationship. The framework will be inscribed in a formal 'political declaration',[25] which the European Council plans to finalise at its meeting on 18–19 October (though this timetable could yet slip). The political declaration will be considered alongside and will be referenced within the Withdrawal Agreement, on which the UK Parliament and the European Parliament will then vote.

19. Although the precise legal status of the political declaration has yet to be clarified, it will form the basis of the Guidelines to be given by the European Council to the Commission to open negotiations with the UK (once it has left the EU) on the future relationship. The UK will need to give its assent to the political declaration, and, as Andrew Duff has written, will be "bound indirectly" by its terms.[26] It is therefore in the Government's interest to ensure that the political declaration accurately reflects its own position. The framework decided in coming months will have an important, if not decisive influence upon the long-term internal security relationship.

The future UK-EU relationship

20. The EU can only commence formal negotiations with the UK on the future relationship once the UK becomes a 'third country'. Therefore, if an operational gap in security cooperation is to be avoided, any agreements or treaty between the EU and UK on security cooperation will need to be negotiated and ratified between 29 March 2019, when the UK leaves the EU, and the end of the transition period, which is currently fixed for 31 December 2020. We consider the feasibility of reaching agreement within this timescale in more detail in Chapter 6 of this report.

Conclusions

21. **Both the UK Government and the European Commission have publicly confirmed that there is a deep shared interest in maintaining the closest possible security cooperation between the UK and the EU after Brexit. Protecting the safety of millions of UK and EU citizens must be the over-riding objective.**

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25 European Council, *European Council (Art. 50) (23 March 2018)—Guidelines*, p 3: https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf [accessed 18 June 2018]

26 Andrew Duff, 'A special relationship?', *Policy Network*, (14 May 2018): http://policynetwork.org/opinions/essays/a-special-relationship/ [accessed 19 June 2018]

22. **Security is thus not a 'zero sum game': we all stand to gain from agreement, and we all stand to lose if negotiations fail. We therefore agree wholeheartedly with the EU Commissioner for Security Union, Sir Julian King, that security cooperation should be "unconditional".**

23. **Neither side, however, has yet approached the negotiations in this spirit. The UK Government's 'red lines', and the EU's response, appear to have narrowed the scope for agreement. While we do not underestimate the difficulty of the issues facing both sides, the current mindset urgently needs to change.**

24. **Time is now short: the UK and EU need to agree within the next three months on a political declaration, which will be annexed to the Withdrawal Agreement, and which will determine the shape of future negotiations on security. But the distance between the UK and EU positions is considerable. Negotiators on both sides need to focus now on finding common ground and making pragmatic compromises, in order to achieve the over-riding objective of protecting the safety of UK and EU citizens in years to come.**

CHAPTER 3: CURRENT UK-EU SECURITY COOPERATION

Overview

25. EU justice and home affairs (JHA) policy aims to protect internal security and fight criminal activity that crosses national borders. It does this by promoting cooperation between Member States and through supranational institutions established by the EU, such as Europol. It also promotes the principle of mutual recognition in criminal matters. Box 1 provides a brief background to the development of EU JHA policy.

Box 1: A brief summary of European cooperation on Justice and Home Affairs

European cooperation on Justice and Home Affairs matters originated in the early 1970s, following a number of terrorist attacks such as that on the 1972 Munich Olympic Games. In December 1975, the various justice and interior Ministers of the (then EEC) Member States established the TREVI Group,[27] an intergovernmental committee that met biannually outside the formal EEC framework. Although it focused on coordinating an effective anti-terrorism response, it gradually began to consider wider cross-border policing and security issues. It met regularly until it was superseded by the Maastricht Treaty in 1993.

The Maastricht Treaty formally brought Justice and Home Affairs cooperation into the EU's structure under the auspices of the so-called Third Pillar. Cooperation remained primarily intergovernmental: legislation was adopted by unanimity in the Council; each Member State enjoyed a veto; and there was no oversight by the EU's other institutions, the Commission and the (then) European Court of Justice.

In 1999 the Amsterdam Treaty introduced the concept of an 'Area of Freedom, Security and Justice'. Immigration and asylum, border controls and the areas of family and civil law moved into the First Pillar (the UK and Ireland negotiated an opt-in arrangement governing participation in any subsequent measures),[28] and the Third Pillar was renamed 'Police and Judicial Cooperation in Criminal Matters'; cooperation remained intergovernmental.

The Treaty of Lisbon entered into force on 1 December 2009. It collapsed Maastricht's three-pillar structure and applied uniform institutional arrangements across the EU. Almost all JHA matters are now dealt with by Qualified Majority Voting (QMV)[29] in the Council, with the European Parliament enjoying equal rights with the Council in the Ordinary Legislative Procedure.[30] Both the Commission and the CJEU enjoy their full EU Treaty powers to oversee Member States' cooperation in this field.

27 TREVI stands for *Terrorisme, Radicalisme, Extrémisme et Violence Internationale*, but the name derived from its first meeting in Rome, which took place near the Trevi Fountain.

28 Protocol (No 4) to the Treaty of Amsterdam on the position of the United Kingdom and Ireland (1997)

29 Exceptions to this general rule include measures concerning operational police cooperation (Article 87(3), Treaty on the Functioning of the European Union, OJ C 326 (consolidated version of 26 October 2012) and those concerning the establishment of a European Public Prosecutor's Office (Article 86(1) Treaty on the Functoning of the European Union. Both Articles apply a 'special legislative procedure' under which the Council must act unanimously.

30 Article 294, Treaty on the Functioning of the European Union

The UK and Ireland negotiated a new Protocol to the Lisbon Treaty (Protocol 21), which allowed them to control their participation in JHA measures. As the post-Lisbon adoption of most JHA measures no longer required unanimity in the Council, the UK Government could not block them alone; however, if the Government of the day objected to the proposed legislation it could choose not to participate.

Today, the EU's JHA *acquis* covers a wide-ranging spectrum of police, judicial criminal, civil and family law matters. The EU has legislated to create a complex system of cooperation in criminal and civil legal matters that interacts with and is interwoven into the EU's and the Member States' constitutional and institutional frameworks—not least because this EU legislation is interpreted and applied uniformly by the CJEU.

26. Some EU Member States have attempted to strike a balance between holding on to certain existing powers and sharing others with the rest of the EU. Thus the UK and Ireland have negotiated an opt-out from various measures, and, as Chapter 4 shows, Denmark has agreed a bespoke relationship with Europol that enables it to maintain its permanent opt-out of JHA measures. The UK currently does not participate in EU justice and home affairs measures by default. With the ratification of the Lisbon Treaty in 2009, the UK secured an automatic opt-out from all new measures, but is permitted to opt into those that it decides are in its interest.

27. The UK also secured the right to decide whether to continue to be bound by EU police and criminal justice measures that it had already agreed to under the pre-Lisbon 'third pillar' arrangements.[31] In 2014 the Government decided to opt out of all measures pre-dating the Lisbon Treaty, but immediately opt back into 35 of them.[32] This chapter outlines the JHA measures that the UK uses most frequently, and describes their current operational importance.

Key JHA measures

28. In our December 2016 report, *Brexit: future UK-EU police and security cooperation*, we highlighted a number of measures in which the UK now participates, and which, we suggested, the Government should aim to "retain or replace" once the UK leaves the EU.[33] The evidence received during the current inquiry suggested that the UK's priorities for a future security relationship had changed little since we published that report:

    - The **European Arrest Warrant (EAW)**, a legal framework that facilitates the extradition of individuals between EU Member States to face prosecution for a crime that they are accused of, or to serve a prison sentence for an existing conviction. We stated in our previous report that the EAW was a "a critical component of the UK's law enforcement capabilities".[34] Jim Brisbane of the Crown Prosecution Service (CPS)

31 European Union Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159)

32 See our two reports on the UK's 2014 Protocol 36 decision: *EU police and criminal justice measures: The UK's 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159); and *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision* (5th Report, Session 2013–14, HL Paper 69).

33 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 37

34 *Ibid.*, para 141

called the EAW "extremely important", as did Lord Evans of Weardale, former Director General of MI5.[35]

- **Europol**, an agency that 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 other EU countries. In December 2016 our witnesses suggested that the UK's future relationship with Europol was a "critical priority".[36] In evidence to the current inquiry, Lord Evans told us that "law enforcement cooperation through Europol seems to me, from a national security perspective, the top of the list" of JHA measures.[37]

- **Eurojust**, an agency tasked with supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States. Our earlier report concluded that "a continuing close partnership with Eurojust is … likely to be essential".[38] Jim Brisbane described the UK's role in this agency as "significant", while the Law Society of Scotland felt that "Eurojust lies at the heart of the efforts to tackle the threats emerging across Europe".[39]

- The **Europol Information System (EIS)**, which pools information on criminals and terrorists from across the EU.[40]

- The **Passenger Name Record Directive**, which mandates the collection of information by air carriers as part of the travel booking process, which may include details of how travel was booked and for whom, contact details, and travel itineraries. We noted before that "losing access to intra-EU PNR data would be a serious handicap".[41] Steve Smart, Director of Intelligence at the National Crime Agency (NCA), thought that the data generated was "really powerful".[42]

- The **Prüm Council Decisions**, establishing a mechanism that allows for the searching of DNA profiles, fingerprints and vehicle registration information against other Member States' databases.[43]

- The **Second Generation Schengen Information System**, a database of alerts about individuals and objects of interest to EU law enforcement agencies. The Centre for European Studies wrote that maintaining access to SIS II was a "top priority" for the UK; we heard from Steve

35 Q 103, Q 94; cf. Q 2, Q 11, Q 62, Q 72, written evidence from BrexitLawNI (PST0007), Law Society of England and Wales (PST0006), Law Society of Scotland (PST0009) and the Centre for European Studies (PST0005)
36 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 68
37 Q 99; cf. Q 62; Q 94; Q 96, written evidence from the Law Society of England and Wales (PST0006), Law Society of Scotland (PST0009), BrexitLawNI (PST0007) and the Centre for European Studies (PST0005)
38 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 82
39 Q 107, written evidence from Law Society of Scotland (PST0009); cf. Q 105
40 Q 11, Q 21, Q 24; written evidence from Law Society of England and Wales (PST0006)
41 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 123
42 Q 65
43 Q 11, Q 71

Smart that the law enforcement community made "extensive use" of the database and that the NCA would "desperately like to keep some access" to it.[44]

- The **European Criminal Records Information System**, a secure electronic system for the exchange of information on criminal convictions between Member States' authorities, which Richard Martin, Deputy Assistant Commissioner at the Metropolitan Police and the National Police Chiefs' Council Lead for the International Criminality Portfolio, told us had "led to some really crucial arrests".[45]

Key principles of JHA cooperation

29. As we have already noted, all EU Member States retain responsibility for safeguarding national security: there are thus strict limits to EU competence in the areas of internal security and many aspects of criminal law. Moreover, considerable cooperation, for instance between security services, takes place outside formal EU frameworks, not only between Member States, but between Member States and third countries. Nevertheless, the EU and its Member States have developed various routes to ensure greater cooperation, to many of which the UK has actively contributed. The most important routes to closer cooperation are outlined in Box 2.

Box 2: Existing UK-EU cooperation on policing and criminal law: an overview

EU law in this field can be broken down into five main areas. **Mutual recognition in criminal matters** refers to judicial cooperation based on the shared legal values of all the EU Member States, particularly those articulated in Article 2 TEU. Cooperation is founded on the principle of mutual respect for each Member State's legal system. This, in turn, leads to the automatic recognition of relevant court orders issued by each Member State's judiciary. The system is overseen by the Court of Justice of the European Union (CJEU).

In this area, the UK participates in the European Arrest Warrant (fast-track extradition),[46] the European Investigation Order (the exchange of evidence),[47] mutual recognition of freezing and confiscation orders,[48] mutual recognition of non-custodial sentences (for example, criminal fines),[49] mutual recognition of

44 Written evidence from the Centre for European Studies (PST0005), Q 59
45 Q 59; cf. Q 11; Q 72; written evidence from the Centre for European Studies (PST0005)
46 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18 July 2002)
47 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130/1, 1 May 2014)
48 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2 August 2003); and, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328/59, 24 November 2006). A proposed draft Regulation replacing this legislation is currently passing through the EU's legislative institutions (Document 15816/16).
49 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327/27, 5 December 2008)

custodial sentences (which means that sentenced persons can be transferred)[50] and mutual recognition of pre-trial supervision orders.[51] It also applies an EU law on taking account of criminal sentences handed down in another Member State.[52]

The UK also participates in the EU legislation on trafficking in persons,[53] child abuse[54] and attacks on information systems.[55]

In the field of **legislation setting minimum standards for criminal procedural rights**, the UK has opted into two of the six[56] EU laws: one dealing with interpretation and translation for foreign language suspects[57] and another introducing a right to information for defendants.[58] It has also opted into the Directive on crime victims' procedural rights.[59]

As for **EU agencies**, the UK participates in Europol and Eurojust. The UK Government decided not to opt into the proposed Regulation re-establishing Eurojust, but might opt into it post-adoption.[60]

Finally, with regard to the **exchange of information**, the UK participates in the law enforcement aspects of the Schengen Information (known as SIS II), which contains alerts on persons subject to a European Arrest Warrant or otherwise wanted or under surveillance by the authorities, as well as stolen objects like cars and passports. It also participates in ECRIS (the European Criminal Record Information System), the Prüm system (exchange of fingerprints, licence plate information and DNA records), and the law on passenger name records.

50 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327/27, 5 December 2008)

51 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294/20, 11 November 2009)

52 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220/32, 15 August 2008)

53 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1, 15 April 2011)

54 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335/1, 17 December 2011)

55 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218/8, 14 August 2013)

56 The UK does not participate in: (i) the Directive on access to lawyer in criminal and EAW proceedings (Directive 2013/48/EU, OJ L 294/1, 6 November 2013)); (ii) the Directive on the presumption of innocence (Directive (EU) 2016/343, OJ L 65/1, 11 March 2016); (iii) the Directive on procedural safeguards for children (Directive (EU) 2016/800, OJ L 132/1, 21 May 2016) and (iv) the Directive on the right to legal aid (Directive (EU) 2016/1919, OJ L 297/1, 4 November 2016).

57 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280/1, 26 November 2010)

58 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142/1, 1 June 2012)

59 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57, 14 November 2012)

60 Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), (COM(2013) 535 final. This Committee produced a report arguing that the UK should opt in to this proposal: *The Eurojust Regulation: Should the UK opt-in?*, (4th Report, Session 2013–14, HL Paper 66)

Operational importance of existing arrangements

30. A consequence of the opt-in is that every EU police and criminal justice measure in which the UK participates has been the subject of a positive decision by the Government to join, based on its perceived benefit to the UK.[61] Most of our witnesses were supportive of current arrangements.[62] Rob Wainwright told us that in an "ideal world there would be no change to the UK's current arrangements" with Europol, though he suggested that this scenario was "not realistic". It would therefore be "essential" to preserve as much operational cooperation between the UK and EU as possible.[63]

31. Several witnesses cited the number of people who had been extradited to or from the UK since the introduction of the EAW. Nick Vamos, former Head of Extradition at the CPS, said that "we are talking about 2,000 people a year or more being surrendered from the UK to the EU, and 200 to 300 coming back".[64] Richard Martin informed us that "pre-2004, before we had the legislation, we extradited 60 people a year on average under the old convention. From 2004 to now, we have extradited over 10,000 people into Europe".[65]

32. In our report *Brexit: future UK-EU security and police cooperation*, we noted that access to EU law enforcement databases and data-sharing platforms was integral to day-to-day policing, and that the loss of access could pose a risk to the safety of the public.[66] The UK currently has access to the most significant EU databases and agreements facilitating data-sharing among EU law enforcement agencies. Richard Martin told us that law enforcement officers in the UK accessed SIS II 539 million times in 2017, and that tools such as SIS II and ECRIS were vital for keeping communities in the UK safe. He also said that "data flow" facilitated by ECRIS, where criminal records were checked in the UK and then again "with our European partners and vice versa", had led to "sex offenders being put on sex offender registers".[67]

33. Steve Smart highlighted not only the size of the EU JHA datasets, but the extent of the UK's contribution to them:

> "If we look at the Schengen Information System II, SIS II … as of the end of 2017 there were 765 million alerts[68] in relation to people and objects sitting on that dataset. It is a very big dataset and very important

61 House of Lords Library Briefing, 'Proposed UK-EU Security Treaty', LLN-2018–0058, May 2018, p 1

62 Q 2, Q 11, Q 21, Q 24; Q 59, Q 62, Q 65, Q 71, Q 72, Q 94, Q 96, Q 99, Q 103, Q 105, Q 107, written evidence from BrexitLawNI (PST0007), Law Society of England and Wales (PST0006), Law Society of Scotland (PST0009) and the Centre for European Studies (PST0005)

63 Q 2

64 Q 37

65 Q 59

66 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 120

67 Q 59

68 This is a historical figure for the total number of records ('alerts') held in the SIS II database. According to the European Commission, each alert "consists of three parts: firstly a set of data for identifying the person or object, subject of the alert, secondly a statement why the person or object is sought and thirdly an instruction on the action to be taken when the person or object has been found". See European Commission, 'Alerts and data in the SIS': https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/alerts-and-data-in-the-sis [accessed 17 June 2018].

> to us. There were 1.2 million alerts in circulation that had been put on there from the UK. In 2017 … we had 5,000 hits on UK alerts."[69]

34. Though witnesses including Lord Evans and Robert Hannigan, former Director of GCHQ, underlined that intelligence should remain outside the remit of any UK-EU security treaty, they acknowledged the importance of access to such databases for the security services' efforts against organised crime and terrorism.[70] Lord Evans said:

> "You cannot understand the counterterrorism work of MI5 in isolation from the law enforcement and policing work because we have an extremely interrelated model between the intelligence agencies and the police. The dependence of the law enforcement community on Europol, the European Arrest Warrants, law enforcement cooperation and so on was therefore extremely important to the overall efforts that we made collectively, although MI5 was not itself a member of Europol because we are not a law enforcement agency."[71]

35. The Government has also highlighted EU databases. As recently as 2015 it opted into the Prüm system, describing it as "in the national interest as it would help us to identify foreign criminals and solve serious crimes",[72] and more recently it opted into the proposed Regulation on interoperability between EU information systems,[73] which aims to integrate police and judicial cooperation, asylum and migration databases so that they can be used more efficiently by law enforcement authorities.

36. Indeed, the operational benefit of the JHA instruments is so significant that witnesses were in many cases unable to identify adequate alternatives. In the words of Richard Martin, "If we lost the Schengen Information System, one of the areas that the Government are working on is whether we would use a thing called I-24/7, the Interpol database, which is slightly different. It is suboptimal compared to what we have now, but it is a database."[74]

37. He continued:

> "If the UK's access to [JHA] measures is switched off, [it] is going to be very difficult. Government will have to negotiate with the European Union about what access we have and what systems we will be left with. There is no real alternative if we lose SIS II, other than I-24/7, because there is nothing else that people input into, even though they input in a very limited way. We would have to rely on partners if we lost all the European tools."[75]

38. Witnesses also suggested that other EU Member States derived a significant benefit from security cooperation with the UK, confirming the finding of our December 2016 report: "The UK and the EU-27 share a strong mutual interest in sustaining police and security cooperation after the UK leaves the

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69 Q 59
70 Q 94; cf. Q 13; Q 53
71 Q 94
72 HC Deb, 16 November 2015, HCWS336
73 Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration), COM(2017) 794
74 Q 62
75 Q 63

EU."[76] The Rt Hon Nick Hurd MP, Minister of State for Policing and the Fire Service, was confident that "mutual interest is accepted and understood by our operating partners at Member State level. I know that from my own contacts with Interior Ministers; they absolutely get this argument, because they are living with the risk day to day."[77]

39. In a statement on 19 June, the Director of GCHQ, Jeremy Fleming, provided striking corroboration of the Minister's arguments. He noted that the threats facing western democracies were "complex and … global and none of us can defend against them alone. They require a pooling of resource, expertise, and, critically, data, so that we can investigate and disrupt our adversaries." He then underlined the contribution of UK intelligence services to European security: "In the last year we've played a critical role in the disruption of terrorist operations in at least four European countries. Those relationships, and our ability to work together, save lives."[78]

Conclusions

40. **In our December 2016 report, *Brexit: future UK-EU security and police cooperation*, we concluded that the arrangements currently in place to facilitate police and security cooperation between the UK and EU Member States were "mission-critical" for the UK's law enforcement agencies. That conclusion remains valid today.**

41. **Police and security cooperation are also mission-critical for the EU and its 27 remaining Member States. As the Director of GCHQ, Jeremy Fleming, said in a statement released on 19 June, intelligence provided by UK agencies saves European lives.**

42. **Given the UK's significant operational dependence on EU systems and databases, we welcome the Government's decision to opt into the proposed Regulation on interoperability between EU information systems.**

76 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 38

77 Q 82; cf. Q 96, written evidence from Law Society of Scotland (PST0009)

78 GCHQ, 'GCHQ Director addresses NATO on shared security threats', 19 June 2018: https://www.gchq.gov.uk/news-article/gchq-director-speaks-about-security-cooperation-nato-headquarters-brussels [accessed 22 June 2018]

CHAPTER 4: SECURITY COOPERATION DURING THE TRANSITION PERIOD

Introduction

43. In her September 2017 Florence speech, the Prime Minister proposed that after the UK left the EU there should be a time-limited transition period, or implementation period, during which the UK would continue to take part in existing security measures.[79] In 26 January 2018, the Secretary of State for Exiting the European Union, the Rt Hon David Davis MP, also emphasised the importance of continued cooperation during the transition period:

> "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 cybercrime … 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."[80]

44. Shortly afterwards, on 29 January 2018, the Council of the European Union set out its views on transition. It stated that if a transition period were agreed, the UK would remain bound by EU legislation that it had already joined, and could choose to opt into 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. In addition, during such a transition period, the UK would not participate in the decision-making of EU agencies or institutions, but would continue to be subject to them, including the Court of Justice of the European Union. The Council stated:

> "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 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."[81]

45. In this chapter we describe UK-EU cooperation on JHA measures during transition, with a particular focus on extradition. We consider how the UK's influence in JHA governance structures will change during transition, and the impact upon the UK's hand in negotiations on the future relationship.

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79 House of Lords Library Briefing, 'Proposed UK-EU Security Treaty', LLN-2018–0058, May 2018, p 2

80 Rt Hon David Davis MP, 'Teesport Speech: Implementation Period—A bridge to the future partnerships between the UK & EU' (January 2018): https://www.gov.uk/government/news/david-davis-teesport-speech-implementation-period-a-bridge-to-the-future-partnership-between-the-uk-eu [accessed 20 June 2018]

81 European Council, 'Annex to the Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of the negotiations with the United Kingdom', 29 January 2018, p 6: http://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf [accessed 20 June 2018]

JHA measures during transition

46. Article 122(5) of the latest text of the draft Withdrawal Agreement (published on 19 March), closely follows the approach set out by the Council in January. It stipulates that during the transition period, JHA measures by which the UK is bound shall continue to apply: "The United Kingdom shall, however, not have the right to notify its wish to take part in the application of new measures."[82] Part Four, of which Article 122 forms a part, sets out the general principles of the transition period, during which, in effect, the UK will retain the responsibilities of EU membership but will lose the associated privileges. These include the right to opt into new JHA measures. By virtue of Article 123(1) of the draft Agreement, which cross-refers to Article 6, the UK will also be excluded during transition from participating in the decisions-making or governance of any of the bodies or agencies of the EU (including those in the field of internal security). All these Articles in the draft Agreement are highlighted in green, indicating that they have been agreed.

47. The UK will, however, be able to opt into any measures which amend, replace or build on existing JHA measures in which the UK already participates. Thus it will be able to maintain full participation in measures that it has already opted into even if those measures are amended, replaced or expanded. The text also confirms the CJEU's jurisdiction over ongoing JHA measures during the transition period, including in relation to criminal justice.[83]

48. It is also significant that the draft Agreement maintains Article 4a of Protocol 21 TFEU. Under this article, the EU institutions can "urge" the UK either to opt in, or to "bear the financial consequences" if the UK's non-participation "makes the application of that measure inoperable for the other Member States of the Union". Member States can also urge the UK to do both of these things.

49. As for new JHA measures, the draft Agreement provides that the EU may invite the UK to participate, but only "under the conditions set out for cooperation with third countries".[84] This underlines the fact that the UK will be a 'third country' on 30 March 2019, and even though, as we show in the next chapter, certain EU frameworks permit the involvement of third countries, they are given little if any say in decision-making.

50. Commenting on these provisions, Dr Marco Stefan, of the Centre for European Policy Studies, warned that the UK stood to lose influence during the transition period: "The current negotiating position of the EU is that, as of Brexit day, 29 March 2019, the UK will no longer be allowed into the agencies' management structure; it will be out of the Europol management board and the Eurojust college." He pointed out that "there are no cases of a third country vis-à-vis the agency being allowed into these structures with a voting right".[85]

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82 European Commission, *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, Article 122(5): https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en [accessed 18 June 2018]

83 *Ibid.*, Article 126

84 *Ibid.*, Article 122(5)

85 Q 23; cf written evidence from the Law Society of England and Wales (PST0006); cf. Q 107

51. Similarly, the Information Commissioner's Office told us that it was unclear what role the Information Commissioner would have on oversight boards during transition. The Information Commissioner is currently a member of the Europol Cooperation Board, the Eurojust Joint Supervisory Body, and the SIS II Supervision Coordination Group, among other boards. The Office noted that "non-EU/EEA countries have limited or no influence in terms of the oversight groups". It also argued that if the UK continued to have access to JHA data-sharing systems during transition, "then the Information Commissioner will need to continue to be included in the relevant supervision groups".[86]

Conclusions

52. **Operational continuity and the security of both the UK and the EU would be seriously undermined were there to be an abrupt end to cooperation in March 2019. We therefore welcome the agreement of both the UK Government and the EU that UK participation in those JHA measures in which the UK currently participates should be extended during the transition period. We note, however, that the draft Withdrawal Agreement would prevent the UK from opting into new JHA proposals, unless these build on or amend existing measures.**

53. **The transitional arrangements contained in the draft Withdrawal Agreement would also disbar the UK from retaining a governance role in Europol, Eurojust and on the boards of JHA data-sharing frameworks. From this diminished position, the UK will be unable to influence policy and decision-making, and this in turn could make it more difficult to secure long-term access.**

Extradition during transition

54. Though the Withdrawal Agreement seeks in large part to extend the status quo of UK participation in justice and home affairs measures, a notable exception is the operation of the European Arrest Warrant.

55. Article 168 of the draft Agreement (which is highlighted yellow, meaning that the policy objective has been agreed, though drafting changes are still needed) would allow an EU27 Member State to decide not to surrender its own nationals to the UK during transition, if to do so would be contrary to its "fundamental structures". Such structures might include constitutional bars to the extradition of own-nationals, which the existing EAW framework over-rides.[87] It would also allow the UK to reciprocate, by refusing to extradite British citizens to that Member State.[88]

56. It is important to note, however, that Article 168 relates only to nationals of the EU Member State receiving an extradition request from the UK: it would have no bearing on a UK EAW issued in respect of a Spanish (or indeed British) citizen resident in Germany. Figures published by the

86 Written evidence from Information Commissioner's Office (PST0002)
87 Q 37
88 European Commission, *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, Article 168: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en [accessed 18 June 2018]

National Crime Agency show that, of the 956 surrenders made to the UK in response to EAWs in the years 2010–16, 538 (56%) were of British citizens; the next largest group by nationality was Irish (86, or 9%), followed by Polish (69), Romanian (50) and Dutch (49). At the other end of the scale, only two German nationals were surrendered over this period, and one each from Finland and Slovenia. The published statistics do not indicate which countries made the surrenders.[89]

57. Professor John Spencer of the University of Cambridge told us that Article 168 was most likely to apply to Germany, which has a strict constitutional bar on extradition of German nationals to non-EU states.[90] He also flagged up five other EU Member States—the Czech Republic, France, Romania, Slovenia, and Slovakia—that might invoke Article 168 during transition.[91] Debbie Price, Head of International Justice at the CPS, suggested that an even greater number of Member States could take advantage of the provision: "We do not know the position with other countries; there may be more. We have been doing some work on this basis because we understand that there are 22 EU Member States that have some sort of nationality bar."[92]

58. Professor Spencer cautioned against the Government exercising the reciprocal right contained in Article 168 to refuse to extradite its citizens to an EU27 Member State, saying that "refusing to hand back our [wanted] nationals … would be a piece of useless gesture politics". Nick Vamos added: "It would be a gesture in practice, as well, because the number of UK nationals surrendered to other EU countries is relatively small."[93]

59. On 3 May 2018 we wrote to the Minister, the Rt Hon Nick Hurd MP, asking for clarification on Article 168. We asked whether the Home Office had assessed whether criminals might take advantage of Member States' ability to refuse to extradite their own nationals to the UK during the transition period, and what assessment the Department had made of which Member States would not extradite their own nationals during the transition period.[94] He replied on 18 May, saying that because the text on Article 168 was not yet agreed, he could not speculate about "the effect that the Agreement may have on the extradition of own-nationals to the UK during the [transition] period or the likelihood of changes to EU Member States' constitutions". He added that "a range of approaches currently exist to tackle criminals who seek to escape justice by becoming fugitives. The UK will continue to work with European partners with the objective of reducing the risk of impunity for such criminals."[95]

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89 National Crime Agency, 'European Arrest Warrant Statistics': http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics [accessed 3 July 2018]

90 Article 16(2) of the German Basic law states: "No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed."

91 Q 31

92 Q 107

93 Q 33

94 Lord Jay of Ewelme, Letter to Rt Hon Nick Hurd MP, 3 May 2018 https://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/brexit-proposed-security-treaty/lord-jay-european-arrest-warrant.pdf [accessed 3 July 2018]

95 Rt Hon Nick Hurd MP, Letter to Lord Jay of Ewelme, 18 May 2018, https://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/brexit-proposed-security-treaty/nick-hurd-european-arrest-warrant.pdf [accessed 3 July 2018]

60. In a related development, on 1 February 2018 the Irish Supreme Court referred an extradition case to the CJEU.[96] In this case the UK had issued a European Arrest Warrant in respect of an Irish national resident in the Republic of Ireland—one of 20 people resisting extradition on similar grounds. The legal principle here did not centre on the defendant's nationality, but on the fact that, should his sentence last longer than 29 March 2019, he would effectively have been extradited, using the EAW, to a non-EU Member State.[97]

61. We asked the Government for its analysis of what was likely to happen to EAWs that had already been issued at the time of Brexit. In response, we were referred to Title V of the Withdrawal Agreement—though this in fact deals with ongoing judicial cooperation matters at the end of the transition period, rather than those that will be underway on 29 March 2019.[98]

Conclusions

62. **In our July 2017 report, *Brexit: judicial oversight of the European Arrest Warrant*, we expressed concern over how the issue of own-nationals would be addressed in any transition period. That concern has now materialised, and the inclusion of Article 168 of the draft Withdrawal Agreement, which would allow EU27 States to refuse to extradite their nationals to the UK during the transition period, in accordance with domestic constitutional requirements, is significant, illustrating the disengagement in police and judicial cooperation between the UK and EU27 that will begin on the day that the UK leaves the EU.**

63. **At the same time, the practical impact of Article 168 upon the UK's extradition requests is unclear. We therefore urge the Government to ascertain the precise effect of Article 168 of the Withdrawal Agreement on the UK's extradition arrangements, including on cases pending on the date of the UK's withdrawal. We shall look again at this issue in coming months, and in the meantime recommend that the Government publish a contingency plan, addressing the effect of any disruption to the UK's extradition arrangements.**

64. **We agree with our witnesses that it would be counterproductive for the Government to retaliate against any EU Member State that decided not to extradite own-nationals to the UK by refusing to extradite British citizens to that country, as provided for by Article 168 of the draft Agreement. Such a course of action might appear politically opportune in the short term, but could be detrimental to the UK's security. It could also jeopardise the good will that will be needed if a successful outcome is to be achieved in negotiations on the long-term security relationship.**

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96 On 30 May 2018 the CJEU refused to fast-track consideration of this case (Case C-191/18); the Irish High Court then referred a second case (Case C-327/18), which the CJEU has agreed to fast-track. A CJEU hearing in this case is set for 12 July 2018.

97 Owen Bowcott, 'Irish court refuses man's extradition because of Brexit', *The Guardian* (1 February 2018): https://www.theguardian.com/politics/2018/feb/01/irish-court-refuses-mans-extradition-because-of-brexit [accessed 20 June 2018]

98 Rt Hon Nick Hurd MP, Letter to Lord Jay of Ewelme, 18 May 2018, https://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/brexit-proposed-security-treaty/nick-hurd-european-arrest-warrant.pdf [accessed 3 July 2018]

CHAPTER 5: THE UK AS A THIRD COUNTRY—CONSEQUENCES FOR SECURITY COOPERATION

65. In this chapter we discuss the various existing models of security cooperation between the EU and third countries, and analyse the extent to which they might meet the Government's ambitions for future UK-EU security cooperation. We look in particular at the feasibility of continued UK involvement in Europol and the European Arrest Warrant after the end of the transition period, and briefly consider whether the UK's new third country status will bring any security advantages.

The UK's influence on security cooperation post-Brexit

66. Despite its opt-in arrangements, the UK has always attempted to influence wider EU justice and home affairs policy. In her speech to the Munich Security Conference on 17 February 2018, the Prime Minister said that "the UK has been at the forefront of shaping the practical and legal arrangements that underpin [the UK and the EU's] internal security co-operation".[99] This Committee has also described the UK as a "leading protagonist in driving and shaping the nature and direction of cooperation on police and security matters under the auspices of the European Union",[100] and an influence on the establishment of measures such as Europol and the PNR Directive.

67. Rob Wainwright, out-going Director of Europol, agreed that the UK was "the lead Member State in a number of important projects that coordinate the activities of many Member States, Europol, and others, in the field of modern slavery, for example … and in combating certain forms of large-scale fraud and cocaine-trafficking. The UK is in the driving seat in coordinating highly complex, large-scale multinational operations."[101]

68. Debbie Price of the CPS said that "if you look at the relationships that our counterterrorism police and prosecutors have all over the world, we have influence because we are at the cutting edge and we perform so well".[102] Dr Helena Farrand-Carrapico, of Aston University, believed that although the UK had always been seen as a bit of an "awkward partner", it had "always been able to have a leadership position and shape instruments in EU counterterrorism and cybersecurity, just to mention two".[103]

69. This leadership role will, of course, become more difficult once the UK is 'outside the room', as Lord Evans told us:

> "The UK will, obviously, seek to ensure that our voice is heard when Europe is considering its policies in the same way that the British voice is heard when America is considering its policies. But providing advice and influence is very different from being at the table with a vote. Clearly, we will do everything that we can to influence European policies and laws

99 Rt Hon Theresa May MP, 'Speech at the Munich Security Conference', 17 February 2018: https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018 [accessed 3 July 2018]

100 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 27

101 Q 3

102 Q 109

103 Q 17

> in directions that we think are good for us and for Europe, but at the end of the day they will go into the room and we will not be there."[104]

70. Rob Wainwright suggested that "the Commission will … insist on some change. That is most likely to be felt in the level of strategic influence."[105] Dr Anna Bradshaw, of the Law Society, expressed a similar concern: "The possibility exists that post Brexit there may be a change of emphasis. It is difficult to predict … but the key point is that the UK would not be in a position to influence the further direction of human rights considerations in the criminal justice cooperation sphere."[106]

71. Dr Farrand-Carrapico concluded that the UK should "try to maintain as much as possible our current levels of influence and leadership in the area of security, which means trying to find alternative ways of maintaining our influence".[107] She argued that it was possible

> "to continue having a great amount of influence by doing what the UK has done until now, which is to provide solutions when problems arise. The EU will continue to have problems in the area of security, so if the UK, even outside, recommends solutions and is ahead of the EU, it would be a sound strategy to try to influence the EU."[108]

Similarly, Rob Wainwright insisted that "we should not underestimate the level of indirect influence which the UK can still enjoy through its very close partnerships around Europe".[109]

Precedents for security cooperation between the EU and third countries

72. In May 2018, the Government released a detailed technical note, outlining various precedents for participation by third countries in EU security and justice tools, including agreements based on existing EU measures, and bilateral arrangements with third countries, but found each of them inadequate for the UK's purposes. It argued that existing levels of cooperation on individual measures—or lack thereof—could be broken down into the following broad categories.[110]

No precedent for an EU-third country agreement

73. In some cases there is no precedent for an EU agreement with a third country. For example, there is currently no precedent for EU Member States to exchange criminal records with third countries under the European Criminal Records Information System (ECRIS), or any other EU instrument.

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104 Q 99; cf.Q 66
105 Q 2; cf. Q 25
106 Q 74; cf. Q 76
107 Q 11
108 Q 17
109 Q 2
110 HM Government, 'Technical Note: Security, Law Enforcement, and Criminal Justice', pp 2–7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710802/FINAL_INTERNAL_SECURITY_COMBINED.pdf [accessed 18 June 2018]

Precedent for EU-third country agreement for Schengen Associated States only

74. The EU has concluded agreements with the so-called 'Schengen Associated States'[111] that cover a range of internal security measures. Examples include the Schengen Association Agreements which, for instance, facilitate the use of SIS II, and the agreement between the EU, Norway and Iceland on the application of Prüm. It is important, however, to note both that the UK is not fully part of Schengen (though it does participate in the criminal law and policing aspects of the Schengen system), and that the EU has not reached any such agreements with non-Schengen third countries.

75. Camino Mortera-Martinez, of the Centre for European Reform, has argued that there is "no legal base in the EU treaties for a non-EU, non-Schengen country to access Schengen data", concluding that the UK is unlikely to retain direct access to SIS II—though accepting that it might be easier for the UK to stay "plugged into" non-Schengen databases (such as the Prüm databases or Passenger Name Record).[112] However, Article 7 of the draft Withdrawal Agreement states that at the end of the transition period, the UK shall no longer be entitled to "access any network, any information system, and any database established on the basis of Union law".[113]

Precedent for EU-third country agreement (significant capability gap)

76. Some precedents for EU-third country agreements, in the Government's words, "deliver a significantly reduced capability". For instance, existing EU agreements with third countries on extradition "do not provide the same level of capability as the European Arrest Warrant". The Norway and Iceland extradition agreement with the EU—concluded in 2006 and not yet in force—will leave "a significant capability gap relative to the EAW once implemented. That gap includes, for example, additional grounds for refusal to surrender including for own nationals."[114]

77. The Government's technical note also discusses the use of PNR data. Existing EU-third country PNR agreements provide for the transmission of PNR by air carriers, to the relevant competent authorities of the third countries. But they do not provide for the reciprocal exchange of PNR between the authorities of the relevant states and the EU for the purposes of police and judicial cooperation. So, for example, they do not enable relevant third countries to work with EU Member States' Passenger Information Units (PIUs) to identify travel patterns in the way that Member States are able to do under the PNR Directive.

78. In addition, the technical note addresses third country agreements with Europol, enabling those countries to "contribute to the work of the agency". Such agreements do not provide third countries with direct access to

111 The Schengen Area is currently made up of 26 States, 22 EU Member States and four Associated, non-EU, States: Iceland, Norway, Liechtenstein and Switzerland.

112 Camino Mortera-Martinez, 'Plugging in the British: EU justice and home affairs', (May 2018): http://www.cer.eu/sites/default/files/pbrief_plugin_jha_31.5.18.pdf [accessed 22 June 2018]

113 European Commission, *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, Article 7: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en [accessed 18 June 2018]

114 HM Government, 'Technical Note: Security, Law Enforcement, and Criminal Justice', p 4: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710802/FINAL_INTERNAL_SECURITY_COMBINED.pdf [accessed 18 June 2018]

Europol's databases (notably the Europol Information System), generally do not permit them to post Seconded National Experts to work with Europol, and do not enable them to initiate activity—especially bilateral activity, such as EMPACT (European multidisciplinary platform against criminal threat) projects, which develop operational action plans to combat crime in priority areas.[115] Europol reviews and quality-assures data exchanged with third countries more than data shared with Member States, and certain intelligence cannot be shared without clearance.

Precedent for EU-third country agreements (smaller capability gap)

79. In some cases, the Government identifies smaller capability gaps. For example, certain third countries (for instance Norway, Switzerland, the USA, and Montenegro) have agreements with Eurojust that allow them to contribute to the work of the agency, although even in this instance third countries are not able to initiate coordination meetings, cannot nominate a member of the Eurojust College, and do not have full access to the Eurojust Case Management System.

80. Furthermore, while third countries can participate in Eurojust Joint Investigation Teams (JITs), which facilitate the coordination of investigations and prosecutions across multiple jurisdictions, they are unable to establish new JITs (which requires the involvement of two or more Member States) or access funding.

The Government's view

81. Thus the Government's own analysis suggests that the precedents for third country security agreements with the EU are in varying degrees inadequate. In response, the Rt Hon David Davis MP, writing in *The Sunday Times* on 10 June, sought to place the onus on the EU to find a better model: "The EU now faces a choice. There are some who wish to use 'third country precedents' as a ceiling on cooperation, and who say that if the EU does not already allow for certain types of joint working with non-Member States, it never can." He continued: "I disagree with these attempts to put conditions on our offer. It would be to put legal technicalities ahead of the practical realities of protecting lives. And weakening British security would necessarily weaken that of the rest of Europe."[116]

Access to Europol

82. We received a large amount of evidence on precedents for third country security agreements, particularly in respect of Europol and the European Arrest Warrant.

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115 In 2010, the EU set up a four-year policy cycle to encourage coherence in tackling serious international and organised crime. The policy calls for effective cooperation among law enforcement agencies, other EU agencies, EU institutions, and relevant third parties. Projects under EMPACT set out operational action plans (OAPs) to combat crime in the areas that have been assigned a priority under this cycle. An OAP is designated for each objective, and Member States and EU organisations work in a coordinated fashion to implement each OAP. Europol, 'EU Policy Cycle: EMPACT': https://www.europol.europa.eu/crime-areas-and-trends/eu-policy-cycle-empact [accessed 3 July 2018]

116 David Davis, 'Look beyond the bluster and the noise—our deal-making with the EU is bearing fruit', *The Times*, 10 June 2018: https://www.thetimes.co.uk/article/david-davis-look-beyond-the-bluster-and-the-noise-our-deal-making-with-the-eu-is-bearing-fruit-v3sln8vz6 [accessed 20 June 2018]

83. Several non-EU countries have operational agreements with Europol, including the USA, Canada and Serbia.[117] Under these agreements, third countries may send liaison officers to Europol and participate in analysis projects, but only with the agreement of relevant Member States.[118] 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 cannot attend Europol Management Board and Management Board working group meetings.

84. A new EU Regulation updating Europol's governance structure and objectives, which the UK opted into, came into force in May 2017. Under the new Regulation, there are two possibilities for UK cooperation with Europol post-Brexit.[119] The first would be an international agreement between the EU and the UK, which the EU would conclude under Article 218 TFEU. The second would be for Europol to conclude an operational agreement with the UK, stating that the UK had obtained an adequacy decision for the purposes of police cooperation.

85. Rob Wainwright suggested that Denmark's agreement with Europol might offer a model for the UK.[120] Denmark originally secured an opt-out from all JHA measures in 1992, after Danish voters had rejected the Maastricht Treaty in a referendum. This opt-out was maintained in successive protocols to the treaties, and in 2012 Protocol No. 22 granted Denmark a permanent opt-out from almost all EU justice and home affairs legislation adopted after the Lisbon Treaty entered into force in 2009—unlike the UK, Denmark cannot opt into measures on a case-by-case basis. The realisation that this would exclude Denmark from continuing membership of Europol led the Danish Government to call a referendum on ending the opt-out in December 2015—but the Danish public voted to retain the opt-out. As a result, in February 2017, Denmark was designated a third country with respect to Europol. This in turn enabled Europol and Denmark to conclude a bespoke operational agreement.

86. The agreement means that Denmark interacts with Europol on broadly the same footing as third countries.[121] It differs in several ways, however, from typical third country agreements:

- Europol has set up a specific interface comprising up to eight Danish-speaking Europol staff, who will manage Danish requests to input, receive, retrieve and cross-check data on Europol systems, and will exchange information with Danish competent authorities;
- Denmark is invited to the meetings of the Heads of the European National Units and may be invited, as an observer, to the Europol Management Board and its sub-groups;

117 This section draws in part on the House of Lords Library Briefing, 'Proposed UK-EU Security Treaty', LLN-2018–0058, May 2018.
118 Q 3; written evidence from Law Society of England and Wales (PST0006)
119 Article 25(b) and/or (c) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135/53, 24 May 2016)
120 Q 2
121 Q 6

- Denmark contributes to Europol's budget.[122] Rob Wainwright said that this part of the agreement meant that "Denmark essentially pays to play … It has to make a specific financial contribution to the Europol budget, which no other EU Member State does directly at least."[123]

87. Nevertheless, as 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, emphasised in December 2016, the Denmark agreement does "not … 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".[124]

88. The hierarchy in status between Denmark and other EU Member States on the one hand, and third countries on the other, may be illustrated by reference to the Joint Parliamentary Scrutiny Group, established under the Europol Regulation, of which the UK Parliament is currently a full member.[125] Under the JPSG's rules of procedure, adopted in March 2018, "each national Parliament of a Member State applying the Europol Regulation" is represented by up to four members to the JPSG. The JPSG is required to invite observers "from the list of EU Member States that have concluded an Agreement on Operational and Strategic Cooperation with Europol" (in other words, Denmark), and "may also decide to invite, on an *ad hoc* basis and for specific points on the agenda, observers from … third countries with which Europol has concluded agreements" (which would include the UK). Observers from either category "shall not have the right to take part in the decision-making".[126]

89. Denmark has been a reluctant participant in the EU's JHA legislation. But unlike the UK after Brexit, Denmark is an EU Member State, subject to the Treaty's institutional checks and balances. Indeed, its agreement with Europol is predicated upon Denmark's continued membership of the EU and Schengen, and its full implementation of the relevant EU Directive on data protection in police matters.[127] Denmark also accepts the jurisdiction of the CJEU, the competence of the European Data Protection Supervisor,

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122 Europol, *Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office*, 29 April 2017. https://www.europol.europa.eu/sites/default/files/documents/operational_agreement_europol_denmark.pdf [accessed 3 July 2018]

123 Q 6

124 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: http://www.consilium.europa.eu/en/press/press-releases/2016/12/15/tusk-joint-statement-denmark-europol/ [accessed 25 June 2018]

125 Established under Article 51 of Regulation 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135/53, 24 May 2016)

126 Rules of procedure of the Joint Parliamentary Scrutiny Group on Europol, adopted 19 March 2018, Articles 2.1 and 2.2: https://www.senato.it/application/xmanager/projects/leg18/file/RoP%20adopted%20Sofia%20JPSG_19032018.pdf [accessed 1 July 2018]

127 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119/89, 4 May 2016)

and the Charter of Fundamental Rights.[128] In all these respects, the position of Denmark contrasts with the Government's preferred model for the UK post-Brexit, and the Commission slides published on 18 June explicitly discount the Danish precedent: "The Danish arrangement is not a precedent for the relations with the UK, as Denmark is an EU MS [Member State], Schengen member, accepts full ECJ jurisdiction and the EU data protection legislation."[129]

90. Despite these differences, we asked the Minister, Mr Hurd, whether the Danish agreement might be a model for the UK. He did not regard the comparison as valid, given the UK's previous significant contribution to Europol:

> "We would not automatically look to Denmark as an example, not least because our situation is different from Denmark's. Again, this comes back to the central point about our existing weight in the system. The latest data I have seen … is that we are in the top three Member States that contribute intelligence every day to the different databases within Europol. In relation to serious and organised crime, we are the highest contributor of data. Denmark is in a different situation."[130]

91. Mr Hurd described the Government's position as follows: "Our proposition is, 'look, together we've made Europol work. The UK is pretty fundamental to that. Can we negotiate a new relationship that allows the UK to maintain its weight in this system and, as far as possible, to influence it?'" He did not go into detail, but clearly wished the UK to retain as much influence as possible. In addition, Mr Hurd felt that the UK should have direct access to Europol databases, arguing that "there would be very significant resource burdens and implications for Europol if it were asked to act in effect as a gateway for indirect access for the UK to Europol databases".[131]

92. There is likely, however, to be resistance from the EU side to realising the Government's ambition. Camino Mortera-Martinez told us that she had "been defending the idea of having a bespoke deal on Europol for the UK, including voting rights on the management board. That has been snubbed by most of the people I have talked to in Brussels and welcomed in London."[132]

Conclusions

93. **In our 2016 report on *Brexit: future UK-EU security and police cooperation*, we argued for an arrangement with Europol that went further than existing operational agreements between Europol and third countries, which would represent a significant diminution in the UK's security capacity. We therefore support the Government's aim to secure a future relationship with Europol that as far as possible maintains the operational status quo.**

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128 Europol, *Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office*, 29 April 2017: https://www.europol.europa.eu/sites/default/files/documents/operational_agreement_europol_denmark.pdf [accessed 3 July 2018]

129 European Commission, 'Police and judicial cooperation in criminal matters', 18 June 2018: https://ec.europa.eu/commission/sites/beta-political/files/slides_on_police_and_judicial_cooperation_in_criminal_matters.pdf [accessed 22 June 2018]

130 Q 83

131 *Ibid.*

132 Q 24

94. **Such a relationship would be in the EU's interest, as well as the UK's. As Rob Wainwright, the then Director of Europol, told us, the UK has been "the lead Member State" in coordinating "highly complex, large-scale multinational operations"—the EU can ill afford to lose access to UK expertise. The volume of data exchanged between the UK and Europol is such that it is imperative for both sides that early agreement is reached, to support continuing cooperation in the fight against trans-national crimes such as people trafficking, drug smuggling, fraud and terrorism.**

95. **We are concerned, however, by the Minister's transactional approach to negotiations on Europol: the UK is indeed a major contributor of data, but the Government should not for that reason underestimate the impact that UK withdrawal will have upon its role and influence in Europol, as in other EU institutions.**

96. **This impact is illustrated by the fact that the House of Commons and House of Lords will lose the right to membership of Europol's Joint Parliamentary Scrutiny Group. We call on the Government, in its negotiations with the EU on ongoing security cooperation, to have regard to the ongoing role of the UK Parliament in ensuring democratic oversight and accountability. In the meantime, this Committee looks forward to continuing, as far as possible, to work with other national parliaments and the European Parliament in the JPSG and other interparliamentary fora.**

97. **The closer the integration that the UK seeks with Europol, the more compromises the Government will have to make. As we acknowledged in our 2016 report, Europol is accountable to the CJEU, and any operational agreement will have to take this into account. Moreover, any agreement is likely to require the UK to remain aligned with EU data protection legislation, and—depending on the level of access to Europol that the UK achieves—to pay into the Europol budget.**

Extradition

98. When the UK leaves the EU it will remain party to the 1957 Council of Europe Convention on Extradition, which provides for the extradition between countries of persons wanted for criminal proceedings or for the carrying out of a sentence. There are three main differences between the EAW and the 1957 Convention.[133]

99. Firstly, the EAW is a "transaction" between judicial authorities that removes the role of the executive. By contrast, applications under the 1957 Convention were made through diplomatic channels, with Secretary of State approval required at a number of points in the process. As we noted in our July 2017 report on *Brexit: judicial oversight of the European Arrest Warrant*, "Falling back on the 1957 Council of Europe Convention on Extradition would significantly slow down extradition proceedings, since it would mean going back to making routine extradition requests—as well as resolving disputes about extradition requests—through diplomatic channels."[134]

133 House of Lords Library Briefing, 'Proposed UK-EU Security Treaty', LLN-2018–0058, May 2018, pp 10–11

134 European Union Committee, *Brexit: judicial oversight of the European Arrest Warrant* (6th Report, Session 2017–19, HL Paper 16), para 73

100. Secondly, the EAW framework imposes strict time limits at each stage of the process, whereas the 1957 Convention does not. Under the Convention, it used to take an average of eighteen months to extradite an individual, partly because there were no time limits. With the introduction of the EAW, average extradition times dropped to 48 days. The cost of extradition has also decreased, by as much as four times.[135]

101. Thirdly, Article 6 of the 1957 Convention provides that states can refuse an extradition request for one of their nationals, but, as we saw above, the EAW framework abolished the own-nationals exception.

102. There are other tools that enable extradition between EU Member States and third countries. The EU has concluded an agreement with Norway and Iceland, countries which are not in the EU but are members of the Schengen area and of the European Economic Area. Negotiations began in 2001 and the agreement was concluded in 2014, but is not yet in force. The provisions of this agreement are largely the same as the EAW, but it includes the option for parties to refuse to extradite their own nationals. The interpretation of the agreement is entrusted to the CJEU (on behalf of the EU) and the competent courts of Norway and Iceland. Article 37 of the agreement, however, seeks to align developing case law, requiring the Contracting Parties to keep it "under constant review". To this end, "a mechanism shall be set up to ensure regular mutual transmission of such case law".[136]

103. The Defence Extradition Lawyers Forum warned against falling back on the cumbersome and time-consuming agreements that underpinned extradition arrangements before the EAW was adopted.[137] Nick Vamos also reported that "operationally, the people who deal with extradition requests around Europe will have completely forgotten how the 1957 [Council of Europe extradition] convention is supposed to work". Indeed, he said that there were "probably only one or two people left in the CPS extradition unit who even remember using the 1957 convention".[138]

104. The Law Society of England and Wales noted that the 1957 Convention does not include all 27 EU countries,[139] and the Defence Extradition Lawyers Forum said that some Member States had repealed domestic legislation underpinning the Convention.[140] The Law Society suggested that falling back on the Convention would also create problems with Ireland, which before the introduction of the EAW did not apply the Convention between Ireland and the UK, and Spain, "from where traditionally extradition has been difficult".[141]

105. Mr Hurd argued that a security treaty would include extradition arrangements to replicate the "effective arrangements" currently provided by the EAW.[142]

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135 Written evidence from BrexitLawNI (PST0007)
136 European Union Committee, *Brexit: judicial oversight of the European Arrest Warrant* (6th Report, Session 2017–19, HL Paper 16), paras 49–54
137 Written evidence from the Defence Extradition Lawyers Forum (PST0003)
138 Q 20
139 Written evidence from Law Society of England and Wales (PST0006)
140 Written evidence from the Defence Extradition Lawyers Forum (PST0003)
141 Written evidence from Law Society of England and Wales (PST0006)
142 Q 91

Conclusions

106. **In respect of extradition, the Government has been clear only that it wishes to retain all the benefits of the European Arrest Warrant. There is, however, no precedent for a non-EU Member State securing extradition arrangements equivalent to the EAW. Even the EU's agreement with Norway and Iceland (which has yet to be brought into force) allows for an 'own-national' exemption, analogous to that proposed for the UK during the transition period. It also provides an indirect but influential role for the CJEU.**

107. **But to fall back on cumbersome pre-EAW extradition arrangements such as the 1957 Council of Europe Convention would lead to delay, higher cost, and potential political interference. This would be a bad outcome for both the UK and the EU.**

108. **As recently as April 2014 the Prime Minister, then Home Secretary, made a considered case that it was in the UK's national interest to maintain participation in the European Arrest Warrant. The underlying national interest remains, and by the Government's own admission, the UK is seeking an unprecedented level of cooperation with the EU. However, there is little sign yet of the realism that needs to go alongside this ambition. The Government needs urgently to commission a full impact assessment of the various possible outcomes of the negotiations, to build up a credible evidence-base for taking what will be difficult, but unavoidable, decisions.**

Brexit opportunities

109. We asked some of our witnesses whether the UK's new status as a third country might bring any opportunities for future security cooperation. Most saw a positive result from Brexit arising only to the extent that the status quo in security cooperation was continued, though Richard Martin pointed to the possibility of a more stringent application of immigration law for criminals from the EU27, once the UK had abandoned freedom of movement: "Post Brexit, not knowing what configuration we get, there is an opportunity to have stronger borders and to have more intervention at borders if we are not in the EU."[143] The ability to detect such criminals would, however, be partly dependent on the ability to access EU criminal records databases such as ECRIS.

110. Rob Wainwright suggested that after Brexit the UK might act as a bridge between the EU and 'Five Eyes' security communities (the USA, the UK, Canada, Australia, and New Zealand):

> "There is one opportunity for a future model in which I can see the possibility of a strategic alliance between two very formidable security communities: the European Union and the Five Eyes community. That is quite interesting. Those two have not engaged much directly until now".[144]

143 Q 70
144 Q 9

Progress of negotiations

111. As we said above (paragraph 24), time is short: the UK and the EU have just three months in which to reach agreement on the outlines of the future relationship, to inform the 'political declaration' that will accompany the final text of the Withdrawal Agreement. But, as we noted in our recent report *UK-EU relations after Brexit*, "negotiations appear to have stalled".[145] On 15 May we asked Rob Jones, Director of Future European Policy at the Home Office, to update us on the progress of the negotiations up to that point. It was disquieting to learn that "internal security" had "involved little more than an hour's discussion with Task Force 50", the team leading the negotiations on behalf of the Commission.[146]

Conclusion

112. **We are concerned that, by mid-May, the UK and EU negotiators had spent little more than an hour discussing the future internal security relationship, despite the obvious mutual interest in making rapid progress. The safety of UK and EU citizens demands that the negotiators turn urgently to this vital task. We call on the Government, with immediate effect, to report regularly to Parliament on progress towards securing agreement on this fundamental aspect of the future relationship.**

145 European Union Committee, *UK-EU relations after Brexit* (17th Report, Session 2017–19, HL Paper 149), para 108

146 Q 82

CHAPTER 6: A SECURITY TREATY?

Why a treaty?

113. As we have seen, the Government believes that a future security relationship between the UK and EU should be underpinned by a comprehensive security treaty. Elements that might feature in such a treaty are summarised in Box 3.

Box 3: Outline of a possible UK-EU security treaty

A UK-EU security treaty that retained the current operational relationship and took account of future developments, but which did not require the UK to apply CJEU jurisdiction, could be based upon the precedent of the EU's Schengen Association Agreements with Norway, Iceland, Switzerland and Liechtenstein.

An Annex to this treaty could list the EU legislation in this field that the UK was still committed to apply. Certain limited amendments could be agreed to that legislation.

When discussing new EU legislation, the UK could be consulted at ministerial level as well as at the level of senior civil servants and representatives, although as a non-EU country it would not have a vote. If the UK and EU agreed that the UK should participate in a new law, a Joint Committee would have power to amend the Annex, to add that new or revised legislation to it, without the need to conclude a new treaty.

There could be an inter-parliamentary committee consisting of legislators from the UK Parliament, the European Parliament and national EU Parliaments.

If the UK did not accept a new EU law amending an existing EU law, or if case law in the UK and EU courts diverged, then there could be discussion between EU and UK officials with attempts to reach a political agreement to settle the dispute. If no agreement could be reached to settle it, then the two sides could agree to stop cooperating on one issue, but still cooperate on all the others dealt with by the agreement.

It would not be necessary for the CJEU to have a direct role in settling disputes (it has no such role in other EU agreements with third countries in this field). But a reciprocal commitment by both the UK and EU to take account of each other's case-law could be included.

114. The EU has yet to show any willingness to contemplate a single over-arching security treaty. In his speech at the Fundamental Rights Agency on 19 June, Michel Barnier envisaged a "future internal security partnership" based on "four pillars":

- effective exchange of information (but not UK access to EU-only or Schengen-only databases);
- operational cooperation between law enforcement authorities;
- judicial cooperation in criminal matters (but not UK participation in the EAW); and
- cooperation in taking measures against money laundering and terrorist financing.

Mr Barnier also highlighted the cross-cutting issues of fundamental rights, data protection and mechanisms for enforcement and dispute resolution (which are considered later in this chapter).[147]

115. The Government's enthusiasm for a security treaty remains undimmed. Mr Hurd said that the Government was "being very bold and ambitious with this, but I do not think that we are wrong in that … Our hope and belief is that, particularly at this time, the mutual interests and the need to maintain and to build the integrity and capability of these collective security mechanisms will outweigh other considerations."[148]

116. The Government considers that while existing precedents for *ad hoc* EU cooperation with third countries on security "provide context, they are not the right starting point for our future partnership".[149] The Government argues that current arrangements merely "provide a limited patchwork of cooperation", and could result in a "serious shortfall in capability affecting not only the UK but also the EU and its Member States … The security of our citizens must be our overriding priority and that will not be achieved by a marked—and avoidable—reduction in our ability to combat serious crime and terrorism."[150]

117. According to the Government's analysis, a security treaty would provide more coherence of approach than a series of *ad hoc* arrangements. In a recent statement on future security cooperation, the Government also said that it was "clear from consultation with law enforcement partners" that a treaty "was operationally necessary".[151] The Government concluded:

> "A future relationship that protects critical operational capabilities and keeps our citizens safe … would be delivered most effectively by a new, comprehensive Internal Security Treaty that draws on legal precedents for strategic relationships between the EU and third countries in other areas of the *acquis* and enables cooperation to be sustained on the basis of existing EU measures where this delivers mutual operational benefits."[152]

118. Some witnesses, on the other hand, believed that a treaty was neither practicable nor desirable. Javier Ruiz Dias of the Open Rights Group was concerned that encapsulating the future security relationship in a treaty would both be unworkable and would damage transparency:

> "For us, the fundamental question is that we are not sure that a single treaty covering what is currently spread over possibly around a dozen legal instruments, from regulations to directives to opinions, will work, or that it will be feasible to build it in under two years … our experience

147 Michel Barnier, 'Speech at the European Union Agency for Fundamental Rights', 19 June 2018: http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm [accessed 22 June 2018]

148 Q 92

149 HM Government, 'Technical Note: Security, Law Enforcement, and Criminal Justice', p 5: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710802/FINAL_INTERNAL_SECURITY_COMBINED.pdf [accessed 18 June]

150 *Ibid.*, p 6

151 HM Government, *Framework for the UK-EU Security Partnership* (May 2018), p 15: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides__SI__FINAL.pdf [accessed 18 June 2018]

152 HM Government, 'Technical Note: Security, Law Enforcement, and Criminal Justice', p 8: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710802/FINAL_INTERNAL_SECURITY_COMBINED.pdf [accessed 18 June]

with [such] agreements is that they generally have a very low level of public accountability."[153]

119. Tim Devlin challenged the Government's assertion that "a treaty would be the most efficient way to ensure our relationship can evolve over time as threats and technology change".[154] Wondering whether a treaty could "adequately replace the existing instruments", he suggested that "it could but it probably will not, because it is unlikely that European law will stand still. It is highly probable that European law on criminal justice and other Home Office-related matters … will move forward and converge more, and we will need successive treaties to keep up."[155]

120. Other witnesses believed that a treaty would be the best way to secure an effective future security relationship between the UK and the EU.[156] Dr Helena Farrand-Carrapico, for instance, argued that a comprehensive treaty would "show political commitment to the relationship between the UK and the EU". She also noted that "the EU has already said that it is not open to the model of the bilateral agreements that Switzerland has".[157]

What should the treaty prioritise?

121. While the Government hopes that a security treaty will reflect as far as possible the status quo, the inherent difficulties facing third countries that wish to participate in existing EU security frameworks may require the Government to prioritise certain aspects of the current relationship. Indeed, such prioritisation is to some extent a natural extension of the JHA opt-in, which allows the UK to choose to participate in those measures that it believes to be most valuable. It continues to opt into EU measures (such as the proposed Regulation on interoperability), in the knowledge that, as long as the withdrawal agreement is agreed and ratified, the UK's participation will at least extend into the transition period.

122. When asked which areas they would prioritise, some witnesses understandably pushed for the retention of tools specific to their sector. Tim Devlin of the Bar Council called for UK participation in Eurojust Joint Investigation Teams, and for "equivalent mechanisms for the European Investigation Order", an instrument that speeds up mutual assistance in criminal investigations.[158] Jim Brisbane of the CPS agreed that the "European Investigation Order [is] extremely important to us", while his colleague Debbie Price told us that since July 2017 the UK had "issued about 129 EIOs", and received "in the region of 400 to 500".[159] Dr Anna Bradshaw highlighted mutual recognition instruments that facilitated "the recognition of confiscation orders made in other Member States. Those are incredibly useful tools."[160]

123. Dr Marco Stefan thought that the "ideal agreement" would cover "at least three aspects": first, continued cooperation between UK and EU

153 Q 47
154 HM Government, 'Technical Note: Security, Law Enforcement, and Criminal Justice', p 1: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710802/FINAL_INTERNAL_SECURITY_COMBINED.pdf [accessed 18 June]
155 Q 77
156 Q 16; Q 96; Q 103; written evidence from Fair Trials international (PST0010); written evidence from the Law Society of Scotland (PST0009)
157 Q 16
158 Q 71; cf. Q 57
159 Q 103, Q 104
160 Q 72

agencies; secondly, UK access to JHA databases; and thirdly, continued UK participation in mutual recognition instruments, in particular the EAW.[161] Camino Mortera-Martinez agreed, pointing out that these were also the priorities that the Prime Minister laid out in her Munich Speech.[162]

Conclusions

124. **We support the Government in prioritising three areas for future UK-EU security cooperation:**

- **extradition;**
- **access to law enforcement databases; and**
- **partnerships with EU agencies such as Europol.**

125. **Witnesses to this inquiry presented arguments both for and against the Government's preferred option of negotiating a single, comprehensive treaty to cover all these areas. On balance, however, we consider that the Government's objective is unlikely to be achievable, given the time that has been taken to negotiate EU agreements with third countries in the past, and the range and complexity of the available models and precedents. We also note that the principle that 'nothing is agreed until everything is agreed' increases the risk inherent in seeking to negotiate a single security treaty. In effect, all the eggs would be in one basket.**

126. **In addition, there would be a strong temptation, within a security treaty, to prioritise a few achievable and significant goals, and some of the synergies between the various instruments in the EU toolkit could be lost.**

127. **The Government therefore needs to adopt an evidence-based approach. It should analyse on a case-by-case basis the value of maintaining access to each of the tools that it has already opted into, making its findings public wherever possible.**

128. **The Government also needs to be realistic about what it can achieve, not least because the EU has given little indication that it will be prepared to negotiate a bespoke treaty instead of a series of agreements on security. Whatever the approach adopted, any UK-EU agreement will be judged less on its form than on its success in protecting the security of the UK and EU27.**

129. **The best should not be the enemy of the good: if a comprehensive treaty cannot be agreed, the safety of the people of the UK and EU27 means that a series of *ad hoc* security arrangements could help to mitigate reduced operational capacity. Time is short, and both sides urgently need to show pragmatism and flexibility if they are to reach agreement.**

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161 Q 21

162 Q 21; cf. Rt Hon Theresa May MP, Speech at Munich Security Conference, 17 February 2018: https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018 [accessed 3 July 2018]

Cross-cutting issues

Ratification of mixed agreements

130. Although a comprehensive security treaty may be desirable in principle, even the transition phase allows little time in which to draw up such a far-reaching treaty. In particular, while the CJEU has not yet clarified the EU's external competence in the security field, there is a possibility that a security treaty could be deemed a 'mixed agreement', resulting in a complex and potentially time-consuming ratification process. This is outlined in Box 4.

Box 4: Mixed agreements: ratification

Both the EU and its Member States may adopt legally binding acts in areas of shared competence—though Member States may do so only where the EU has not exercised its competence or has explicitly ceased to do so. An agreement between the EU and a third country in an area of shared competence is therefore known as a "mixed agreement". It is concluded both by the EU and by the Member States of the EU, which must give their consent according to their own constitutional arrangements.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) illustrated the difficulties of ratifying mixed agreements. As Camino Mortera-Martinez explained, "If you need every parliament of every country ratifying it, and in some countries you have several parliaments, as we know from the Belgian CETA case, it will take much longer than if you have an exclusive EU agreement."[163]

In the UK, the Constitutional Reform and Governance Act 2010 requires that the Government place a copy of any treaty subject to ratification 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 it. Treaties do not have direct effect in UK domestic law, but where necessary the Government can introduce further legislation to implement a treaty.

Data protection and the need for adequacy

131. Many EU justice and home affairs tools involve the transfer of data. At present this is enabled by the UK's membership of the EU and its compliance with its data protection legislation, including the General Data Protection Regulation (GDPR). The data protection provisions of JHA frameworks such as the PNR are shaped by this broader EU data protection law. Under the new Europol Regulation, the Commission, rather than Europol, is the body that carries out adequacy assessments for sharing Europol data.[164]

132. Article 7 of the draft Withdrawal Agreement states that at the end of the transition period, the UK shall no longer be entitled to "access any network, any information system, and any database established on the basis of Union

163 Q 24

164 Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135/53, 24 May 2016)

law".[165] According to Marco Stefan, this provision would include EU justice and home affairs databases: "This means that in order to ensure continuity of access to these databases the UK will need, first, to obtain an adequacy decision within the transitional period and, secondly, to conclude an operational agreement with the agencies, in a very short amount of time."[166]

133. As we noted in our report, *Brexit: the EU data protection package*, the need for an 'adequacy decision'—a determination that the UK's data protection laws were essentially equivalent to the EU's—means that the UK would need to comply with standards that it had not had a role in setting.[167] This principle was reasserted by Michel Barnier on 28 May 2018: "We cannot, and will not, share … decision-making autonomy [on data protection] with a third country."[168]

134. Securing an adequacy decision, in accordance with Article 45 of the GDPR, might also be difficult and potentially time-consuming.[169] The process could only begin after the UK becomes a third country in March 2019, and assessments typically take two years. Failure to secure an adequacy decision could thus jeopardise conclusion of a security treaty by the end of the transition period.

135. Moreover, in order to achieve an adequacy decision, the UK's legal framework for data processing for national security purposes would be assessed. For as long as the UK is an EU Member State, its data processing for national security purposes is outside the scope of EU law. This will change once the UK is a third country, and in the case of the USA the CJEU "invalidated the European Commission's adequacy decision on the ground 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".[170]

136. The Government has proposed a separate agreement on data protection, as a "cross-cutting issue".[171]. It has not stated directly that it will seek an adequacy decision, but has instead 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".[172] The Minister, Mr Hurd, also told us that the Government wished to "build on" this model.[173]

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165 European Commission, *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: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en [accessed 18 June 2018]

166 Q 23; cf. Q 16; written evidence from Law Society of Scotland (PST0009)

167 European Union Committee, *Brexit: the EU data protection package* (3rd Report, Session 2017–19, HL Paper 7), para 163

168 Michel Barnier, Speech at the 28th Congress of the International Federation for European Law, 26 May 2018: http://europa.eu/rapid/press-release_SPEECH-18-3962_en.htm [accessed 22 June 2018]

169 Q 96

170 European Parliament, Study for the LIBE Committee, *The Implications of the United Kingdom's Withdrawal from the European Union for the Area of Freedom, Security and Justice*, December 2017, p 63: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596824/IPOL_STU(2017)596824_EN.pdf [accessed 3 July 2018]

171 HM Government, *Framework for the UK-EU Security Partnership* (May 2018), p 4: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides__SI__FINAL.pdf [accessed 18 June 2018]

172 HM Government, *The Exchange and Protection of Personal Data: A Future Partnership Paper* (August 2017), p 2: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf [accessed 25 June 2018]

173 Q 89

137. The Government has also stressed the alignment of the UK's existing data protection legislation with EU standards. It has emphasised 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", arguing that more extensive cooperation than currently exists with third countries should be possible.[174] Mr Hurd told us:

> "What we are trying to do, not least through our domestic legislation programme, is make sure that, at the time we exit the EU, our data standards are 100% aligned with those of our European partners, because that will facilitate the bespoke UK-EU model for exchanging protected personal data that we have undertaken to negotiate with them."[175]

138. EU negotiators do not appear to share the Government's optimism. Michel Barnier has expressed scepticism about the UK's ability to keep its data protection regime in line with EU Regulations,[176] while the UK has been accused of having "illegally copied" personal information from the Schengen Information System.[177] A slide published by the European Commission on 15 May suggests that the EU might accept a "security of information agreement" for police and judicial cooperation matters, which would appear to fall short of a treaty on data protection.[178] In our report, *Brexit: the EU data protection package*, we warned that in the absence of an agreement between the UK and EU, "The lack of tried and tested fall-back options for data-sharing in the area of law enforcement would raise concerns about the UK's ability to maintain deep police and security cooperation with the EU and its Member States in the immediate aftermath of Brexit".[179]

139. We also noted that the EU-US Privacy Shield and the EU-US Umbrella Agreement—both of which cover data protection—would cease to apply to the UK post-Brexit. Because of EU rules for onward transfers, securing unhindered flows of data with the EU might require the UK also to demonstrate that it had put arrangements in place with the US affording the same level of protection as the Privacy Shield and the Umbrella Agreement.[180]

140. Of most urgent concern is the possibility that failure to reach agreement on data protection could lead to a "cliff-edge", an operational gap in security cooperation. As Dr Stefan explained:

> "That cliff-edge scenario would happen, especially when it comes to access to EU databases, if there was no adequacy decision before the end of the transitional period and no agreement in place between the UK

174 HM Government, *Security, Law Enforcement and Criminal Justice: A Future Partnership Paper* (September 2017), pp 6–7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF [accessed 25 June 2018]

175 Q 89

176 Michel Barnier, Speech at the 28th Congress of the International Federation for European Law, 26 May 2018: http://europa.eu/rapid/press-release_SPEECH-18-3962_en.htm [accessed 25 June 2018]

177 Nikolaj Nielsen, *EU Observer*, '*UK unlawfully copying data from EU police system*', 28 May 2018: https://euobserver.com/justice/141919 [accessed 26 June 2018]

178 European Commission, 'Slide on the EU/UK Possible Framework for the Future Partnership Discussions', 15 May 2018: https://ec.europa.eu/commission/sites/beta-political/files/eu-uk_possible_framework_for_the_future_relationship.pdf [accessed 25 June 2018]

179 European Union Committee, *Brexit: the EU data protection package* (3rd Report, Session 2017–19, HL Paper 7), para 114

180 *Ibid.*, para 116

> and the agencies allowing for this exchange of information … We need to discuss whether it is possible to prolong the transition period, if that is an option."[181]

Helena Farrand-Carrapico made a similar point:

> "There is clearly a risk of operational disruption. It is very clear from the [Withdrawal] Agreement. More worryingly, the Agreement does not foresee a mechanism for extending the transition, so if there is no Agreement within those 21 months we could fall off a cliff edge. I was much more optimistic before I saw the draft Agreement. Now, I am seriously more pessimistic."[182]

141. Some witnesses told us that they had begun to make contingency plans to ensure operational continuity, should the negotiations fail. Richard Martin reported that the Metropolitan Police's planning involved mapping how they might fall back on the I-24/7 database (see above paragraph 36). Steve Smart told us that the NCA was "identifying the highest priority tools … and then looking at, where there are fallbacks, what those fallbacks are". He admitted that such a scenario would "make us less dynamic and less effective. We will not be able to work at the speed we work now, assuming all things remain the same … in order to do what we need to do, we would have to look at doing things in a different way."[183] Jim Brisbane confirmed that the CPS had also undertaken internal contingency planning, in particular to ensure "that we have the depth of expertise to deal with extradition in a different setting".[184]

Human rights

142. The campaigning organisation Liberty, in a position paper published in March 2018, argued that "the potential content of [the proposed security treaty] raises serious concerns for fundamental rights. Taking justice and security as an example, the UK opted out of a raft of rights protections relating to cross-border extraditions and investigations." Liberty suggested that such "gaps in protection were tolerated while the UK remained a member of the EU—arguably because laws like the Charter of Fundamental Rights provided a backstop—but with the Charter's future in the UK uncertain, it's vital that any future treaty explicitly protects rights we've opted out of in the past".[185]

143. George Wilson, EU Law and Policy Specialist at Liberty, expanded on these concerns in evidence, telling us that any reversion to older security cooperation frameworks—which might occur in the event of there being no deal on security—could have human rights ramifications:

> "The current arrangements benefit from strong fundamental rights protections. Although we did not opt into … rights protections in a similar way to other states … we benefit from the application of the Charter, which has provided strong and robust protections for human rights in this area in comparison with other external measures, such as the Council of Europe's European Convention on Extradition. Although

181 Q 24
182 Q 16
183 Q 62
184 Q 106
185 Liberty, 'Brexit: the final countdown', 29 March 2018: https://www.libertyhumanrights.org.uk/news/blog/brexit-final-countdown [accessed 25 June 2018]

> the convention is strong, it is not as strong in rights protection terms as the current arrangements that we have through our justice and home affairs opt ins."[186]

144. The Government has, however, made it clear that the European Charter of Fundamental Rights ('the Charter') will not apply in the UK post-Brexit, and has sought to exclude it from the body of retained EU law that will be created under the terms of the European Union (Withdrawal) Act 2018.

145. This decision will have operational consequences. Liberty has argued that "if we want to keep cooperating with our neighbours on security, human rights must form the bedrock of any future agreement".[187] The rights afforded by the Charter apply to any exercise of EU law provisions, including, for instance, the European Arrest Warrant. Without the Charter, it will be more difficult for the UK to make human rights guarantees to EU27 countries. Another example is the European Investigation Order (see above, paragraph 122), which includes a provision allowing a national court to refuse to grant an order if the court believes that the order has been issued in breach of the Charter.[188] We also noted in our December 2016 report that "high levels of data protection" are among the rights enshrined in the Charter.[189]

146. Finally we note, but have not had the opportunity to consider in detail, the European Commission's slides on police and judicial cooperation in criminal matters, published on 18 June 2018. In analysing the UK's position on fundamental rights, the slides refer to the Government's position of "no Charter", and identify a "potential risk of lowering the standards of protection for individuals". They identify the UK remaining "a party to the European Convention of [*sic*] Human Rights" as a key safeguard, and propose that any agreement should include a "'Guillotine clause', if the UK leaves the Convention or is condemned by the European Court of Human Rights (ECHR) for non-execution of an ECHR judgment in the area concerned".[190]

Court of Justice of the European Union

147. The Government has acknowledged that the proposed security treaty would need to be supported by a dispute resolution mechanism;[191] it has also indicated that one of its 'red lines' is that the UK should no longer be subject to the jurisdiction of the CJEU.

148. This could create problems for future security cooperation. Nick Vamos, formerly of the CPS, told us that the Government's aims were threefold. The first was to achieve cooperation "that looks like what we have now,

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186 Q 46

187 Liberty, 'Theresa May can't have EU security cooperation unless she brings home our rights protections too', 15 February 2018: https://www.libertyhumanrights.org.uk/news/blog/theresa-may-cant-have-eu-security-cooperation-unless-she-brings-home-our-rights [accessed 25 June 2018]

188 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, recital 12, (OJ L 130/1, 1 May 2014)

189 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 63

190 European Commission, 'Police and judicial cooperation in criminal matters', 18 June 2018: https://ec.europa.eu/commission/sites/beta-political/files/slides_on_police_and_judicial_cooperation_in_criminal_matters.pdf [accessed 22 June 2018]

191 HM Government, *Security, law enforcement and criminal justice—a future partnership paper* (September 2017), p 2: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF [accessed 18 June 2018]

not just for the European arrest warrant but across the piece, including the European investigation order, Europol, Eurojust, transfer of prisoners". The second was "something that allows us the level of divergence that we have and is specially bespoke for the UK", and the third was being "outside the jurisdiction of the CJEU". He concluded that while the three objectives were "not impossible in principle," in practice they were "very, very difficult".[192]

149. In our report *Brexit: judicial oversight of the European Arrest Warrant*, we noted that the Government's insistence that the UK not be subject to the jurisdiction of the CJEU post-Brexit might prove to be one of the thornier aspects to the negotiations on security.[193] More recently the Prime Minister has indicated a willingness to move to a more flexible position on the CJEU, and accept its remit, when, for example, the UK participates in EU agencies under the proposed treaty. In her 17 February Munich Speech, she laid out how the proposed security treaty "must preserve our operational capabilities. But it must also … be respectful of the sovereignty of both the UK and the EU's legal orders. So, for example, when participating in EU agencies the UK will respect the remit of the European Court of Justice".[194]

New institutions

150. Finally, we note that, alongside dispute resolution mechanisms, new institutions might be needed to support the operation of any security treaty or agreements. While witnesses made few concrete proposals, they were clear that relationships between ministers, civil servants, parliaments, law enforcement professionals, and judges would be vital. Nick Vamos, for example, called for "a framework that allows for those relationships to grow, flourish and really become effective".[195] Richard Martin told us that relationships were "absolutely fundamental",[196] and Camino Mortera-Martinez advocated having resources in place to "nurture" such relationships: "The more you keep those relationships in place, the more you keep people in the room, the easier it will be for you to get a good deal."[197]

Conclusions

151. **We note that a comprehensive security treaty could be deemed to be a 'mixed agreement'. While this would not have important consequences domestically, it would result in a more complex, time-consuming and risky process of ratification by the EU and its Member States. We call on the Government to explain what consideration it has given to this issue in bringing forward its proposals for a comprehensive security treaty.**

152. **Continued data-sharing is critical for future UK-EU security cooperation. Were the UK to lose access to the EU's security databases, information that today can be retrieved almost instantaneously could take days or weeks to access, creating not only a significant hurdle to effective policing but a threat to public safety.**

192 Q 36
193 European Union Committee, *Brexit: judicial oversight of the European Arrest Warrant* (6th Report, Session 2017–19, HL Paper 16)
194 Rt Hon Theresa May MP, 'Speech at Munich Security Conference', 17 February 2018: https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018 [accessed 23 June 2018]
195 Q 43
196 Q 68; cf. Q 70
197 Q 25, Q 28

153. **We support in principle the Government's objective of securing a cross-cutting agreement on data protection. But this means that the sequencing of the negotiations will be vital: if future security cooperation is to be effective, the Government must reach an agreement on data before agreeing a security treaty.**

154. **We note also that negotiations on data-sharing are notoriously complex. So while we acknowledge the advantages of a cross-cutting agreement on data protection, we stress that this should not come at the expense of an agreement on security.**

155. **Given the hurdles ahead, we are concerned that there is no mechanism in the draft Withdrawal Agreement for extending it, either in whole or in part, beyond the end date of 31 December 2020. We call on the Government and the EU to consider options for allowing such an extension, at least in respect of key security measures, where any interruption to ongoing operational cooperation could cost lives.**

156. **In the meantime, internal security practitioners should prepare for the possibility of an operational cliff-edge. We commend the contingency planning undertaken by the Crown Prosecution Service, the Metropolitan Police and the National Crime Agency, in case the UK loses access to databases and other frameworks for security cooperation at the end of the transition period.**

157. **Setting aside the arguments for and against retaining the European Charter of Fundamental Rights in UK law, any perceived reduction in the rights enjoyed by criminal suspects in the UK could have a significant operational impact on those working to protect the country's security. This is underlined by the European Commission's latest slides on police and judicial cooperation, which identify continuing UK adherence to the European Convention on Human Rights (and compliance with relevant judgments of the European Court of Human Rights) as key safeguards for any UK-EU agreements in this area.**

158. **The Government needs urgently to explain how fundamental rights will be protected after Brexit, and how these protections will cohere with the proposed security treaty. Otherwise it risks delaying an agreement on internal security, leading to an operational cliff-edge.**

159. **We welcome the Prime Minister's statement that the UK will "respect the remit" of the Court of Justice with regard to EU agencies, including those in the field of internal security. Time is now short, and the security of the UK and EU demands flexibility. A security treaty that required the UK courts to take account of decisions of the CJEU (and vice versa) might be more acceptable to the EU—and might therefore be negotiated more quickly—than an entirely bespoke solution.**

160. **We note also that continuing dialogue, at all levels, will be needed to support the future UK-EU security relationship. This will require an increased emphasis on cultivating relationships, both formal and informal, to compensate for the UK's absence from decision-making bodies. We call on the Government to explain the means by which it intends to support such dialogue and embed it in the UK-EU security relationship.**

CHAPTER 7: NORTHERN IRELAND AND THE PROPOSED SECURITY TREATY

Introduction

161. Northern Ireland and the Republic of Ireland straddle the UK's only land border with another EU Member State, and across a range of policy areas, the issues arising more broadly in the negotiations between the UK and the EU affect them with particular acuteness.

162. Security forces in the two jurisdictions have a decades-long history of cooperation in counterterrorism and the fight against cross-border crime such as smuggling. The Police Service of Northern Ireland (PSNI) described "continued close co-operation with An Garda Síochána" as "essential to deal with the myriad of issues presented by the land border". They qualified this, however, by warning that "successful cooperation takes more than good working relationships … we need a clear legal framework within which to cooperate".[198] These factors mean that Brexit, as we have noted before, will have "profound implications for the current high levels of cross-border police and security cooperation between the UK and Irish authorities".[199] The preservation of security cooperation between the UK and the Republic of Ireland will thus be an important element in negotiations on any security treaty between the UK and EU.

163. BrexitLawNI, a research project, told us that "the land border poses significant challenges for security cooperation post-Brexit". They described Northern Ireland as "a post-conflict society", with a unique security context, which faced "unique challenges posed by Brexit".[200] This was confirmed by the PSNI, which described policing the border as "a policing challenge unlike anywhere else in the UK".[201] In addition to "traditional" crimes, such as organised crime, paramilitary activity, and smuggling, there were "cyber-related forms of crime", unbound by national borders, investigation of which often required more resources and cross-border police cooperation between the PSNI and An Garda Síochána. BrexitLawNI said that it was "essential that the UK mitigates the additional security concerns arising from its exit from the EU and does not inhibit this long-standing and hard-won cooperation".[202]

164. A Joint Agency Task Force (JATF) was created in 2015, which tackles organised and cross-jurisdictional crime. As well as the two police forces, it involves the Republic of Ireland Revenue Commissioners, HM Revenue and Customs, and other key agencies. A strategic assessment prepared for the JATF identified six cross-border priorities: "Drugs, excise fraud, human trafficking, child sexual exploitation, rural/agricultural crime and criminal finances/money laundering."[203] PSNI told us that the JATF would be "critical as we respond to the challenges ahead of us post-Brexit".[204]

198 Written evidence from Police Service of Northern Ireland (PST0014)
199 European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76), para 152
200 Written evidence from BrexitLawNI (PST0007)
201 Written evidence from Police Service of Northern Ireland (PST0014)
202 Written evidence from BrexitLawNI (PST0007)
203 *Ibid.*
204 Written evidence from Police Service of Northern Ireland (PST0014)

The European Arrest Warrant

165. BrexitLawNI identified "the potential loss of the EAW" as "one of the most serious security-related issues arising from Brexit", describing it as "a vital tool for the PSNI". PSNI listed the EAW first among their list of "key tools",[205] confirming the evidence given to the EU Select Committee on 31 January 2018 by George Hamilton QPM, Chief Constable of the PSNI, who called loss of the EAW "the biggest practical vulnerability" arising from Brexit.[206] The Prime Minister has also recognised that the EAW has "enabled police cooperation between the Republic of Ireland and Northern Ireland".[207]

166. To illustrate this point, BrexitLawNI told us that between 2007 and 2017 the PSNI sought 154 EAWs; of these, 71 warrants were granted, leading to the extradition of 47 suspects to Northern Ireland. The majority of these PSNI EAW applications, 113, requested the extradition of suspects believed to be in the Republic of Ireland.[208]

Alternative models of extradition

167. Falling back on the 1957 Council of Europe Convention on Extradition could present specific difficulties in the context of Ireland/Northern Ireland. In particular, it contains a "political exception" clause, which BrexitLawNI said had allowed Member States to grant "safe haven" to those who had committed crimes that were political in nature. This had "served as a barrier to the extradition of Irish Republican terrorism suspects to the UK". They also argued that a post-Brexit extradition deal modelled on the Norway/Iceland agreement could "prove problematic for NI", as it both includes an option for parties to refuse to extradite their own nationals, and reintroduces the political exception clause: "Thus, NI (as well as the rest of the UK) could again be faced with a barrier to the extradition of members of Dissident Irish Republican groups suspected of committing terrorist activities."[209] It is worth noting in this context that, under the terms of the Belfast/Good Friday Agreement, those born in Northern Ireland are entitled to claim Irish citizenship, British citizenship, or both.

Data-sharing

168. BrexitLawNI also highlighted the importance of "information-sharing between the PSNI and An Garda Síochána … Leaving the EU risks losing the level of data-sharing that currently takes place between the two jurisdictions, thus potentially threatening security on the island." They explained that the two police forces currently access data such as watchlists through European databases, rather than sharing it directly with each other: "What it ensures is that they are both receiving the same information, they are not relying on each other." If the UK no longer had access to these databases, the police forces would need to "revert" to a situation where they relied on "goodwill".[210]

Conclusions

169. **Security forces in Northern Ireland and the Republic of Ireland have a decades-long history of cooperation in combating terrorism and**

205 *Ibid.*
206 Oral evidence taken on 31 January 2018 (Session 2017–19), Q 62
207 Written evidence from BrexitLawNI (PST0007)
208 *Ibid.*
209 *Ibid.*
210 *Ibid.*

cross-border crime, and over recent years in particular the Police Service of Northern Ireland and An Garda Síochána have developed ever greater mutual confidence and respect. While we are confident that this informal cooperation will continue, we also note the evidence of the Police Service of Northern Ireland that EU instruments, databases and agencies have become increasingly important in providing formal mechanisms for cooperation.

170. **It is thus vital for both sides that any UK-EU treaty or agreements should support ongoing security cooperation, including (particularly in light of the ongoing case before the CJEU) effective extradition arrangements between the UK and Ireland. Here, perhaps more than in any other aspect of security cooperation, the negotiations should not be treated as a 'zero sum game', but as an opportunity to develop a partnership that will benefit both sides.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Internal security: a shared aim

1. Both the UK Government and the European Commission have publicly confirmed that there is a deep shared interest in maintaining the closest possible security cooperation between the UK and the EU after Brexit. Protecting the safety of millions of UK and EU citizens must be the over-riding objective. (Paragraph 21)

2. Security is thus not a 'zero sum game': we all stand to gain from agreement, and we all stand to lose if negotiations fail. We therefore agree wholeheartedly with the EU Commissioner for Security Union, Sir Julian King, that security cooperation should be "unconditional". (Paragraph 22)

3. Neither side, however, has yet approached the negotiations in this spirit. The UK Government's 'red lines', and the EU's response, appear to have narrowed the scope for agreement. While we do not underestimate the difficulty of the issues facing both sides, the current mindset urgently needs to change. (Paragraph 23)

4. Time is now short: the UK and EU need to agree within the next three months on a political declaration, which will be annexed to the Withdrawal Agreement, and which will determine the shape of future negotiations on security. But the distance between the UK and EU positions is considerable. Negotiators on both sides need to focus now on finding common ground and making pragmatic compromises, in order to achieve the over-riding objective of protecting the safety of UK and EU citizens in years to come. (Paragraph 24)

Current UK-EU security cooperation

5. In our December 2016 report, *Brexit: future UK-EU security and police cooperation*, we concluded that the arrangements currently in place to facilitate police and security cooperation between the UK and EU Member States were "mission-critical" for the UK's law enforcement agencies. That conclusion remains valid today. (Paragraph 40)

6. Police and security cooperation are also mission-critical for the EU and its 27 remaining Member States. As the Director of GCHQ, Jeremy Fleming, said in a statement released on 19 June, intelligence provided by UK agencies saves European lives. (Paragraph 41)

7. Given the UK's significant operational dependence on EU systems and databases, we welcome the Government's decision to opt into the proposed Regulation on interoperability between EU information systems. (Paragraph 42)

Security cooperation during the transition period

8. Operational continuity and the security of both the UK and the EU would be seriously undermined were there to be an abrupt end to cooperation in March 2019. We therefore welcome the agreement of both the UK Government and the EU that UK participation in those JHA measures in which the UK currently participates should be extended during the transition period. We note, however, that the draft Withdrawal Agreement would prevent the UK

from opting into new JHA proposals, unless these build on or amend existing measures. (Paragraph 52)

9. The transitional arrangements contained in the draft Withdrawal Agreement would also disbar the UK from retaining a governance role in Europol, Eurojust and on the boards of JHA data-sharing frameworks. From this diminished position, the UK will be unable to influence policy and decision-making, and this in turn could make it more difficult to secure long-term access. (Paragraph 53)

10. In our July 2017 report, *Brexit: judicial oversight of the European Arrest Warrant*, we expressed concern over how the issue of own-nationals would be addressed in any transition period. That concern has now materialised, and the inclusion of Article 168 of the draft Withdrawal Agreement, which would allow EU27 States to refuse to extradite their nationals to the UK during the transition period, in accordance with domestic constitutional requirements, is significant, illustrating the disengagement in police and judicial cooperation between the UK and EU27 that will begin on the day that the UK leaves the EU. (Paragraph 62)

11. At the same time, the practical impact of Article 168 upon the UK's extradition requests is unclear. We therefore urge the Government to ascertain the precise effect of Article 168 of the Withdrawal Agreement on the UK's extradition arrangements, including on cases pending on the date of the UK's withdrawal. We shall look again at this issue in coming months, and in the meantime recommend that the Government publish a contingency plan, addressing the effect of any disruption to the UK's extradition arrangements. (Paragraph 63)

12. We agree with our witnesses that it would be counterproductive for the Government to retaliate against any EU Member State that decided not to extradite own-nationals to the UK by refusing to extradite British citizens to that country, as provided for by Article 168 of the draft Agreement. Such a course of action might appear politically opportune in the short term, but could be detrimental to the UK's security. It could also jeopardise the good will that will be needed if a successful outcome is to be achieved in negotiations on the long-term security relationship. (Paragraph 64)

The UK as a third country—consequences for security cooperation

13. In our 2016 report on *Brexit: future UK-EU security and police cooperation*, we argued for an arrangement with Europol that went further than existing operational agreements between Europol and third countries, which would represent a significant diminution in the UK's security capacity. We therefore support the Government's aim to secure a future relationship with Europol that as far as possible maintains the operational status quo. (Paragraph 93)

14. Such a relationship would be in the EU's interest, as well as the UK's. As Rob Wainwright, the then Director of Europol, told us, the UK has been "the lead Member State" in coordinating "highly complex, large-scale multinational operations"—the EU can ill afford to lose access to UK expertise. The volume of data exchanged between the UK and Europol is such that it is imperative for both sides that early agreement is reached, to support continuing cooperation in the fight against trans-national crimes such as people trafficking, drug smuggling, fraud and terrorism. (Paragraph 94)

15. We are concerned, however, by the Minister's transactional approach to negotiations on Europol: the UK is indeed a major contributor of data, but the Government should not for that reason underestimate the impact that UK withdrawal will have upon its role and influence in Europol, as in other EU institutions. (Paragraph 95)

16. This impact is illustrated by the fact that the House of Commons and House of Lords will lose the right to membership of Europol's Joint Parliamentary Scrutiny Group. We call on the Government, in its negotiations with the EU on ongoing security cooperation, to have regard to the ongoing role of the UK Parliament in ensuring democratic oversight and accountability. In the meantime, this Committee looks forward to continuing, as far as possible, to work with other national parliaments and the European Parliament in the JPSG and other interparliamentary fora. (Paragraph 96)

17. The closer the integration that the UK seeks with Europol, the more compromises the Government will have to make. As we acknowledged in our 2016 report, Europol is accountable to the CJEU, and any operational agreement will have to take this into account. Moreover, any agreement is likely to require the UK to remain aligned with EU data protection legislation, and—depending on the level of access to Europol that the UK achieves—to pay into the Europol budget. (Paragraph 97)

18. In respect of extradition, the Government has been clear only that it wishes to retain all the benefits of the European Arrest Warrant. There is, however, no precedent for a non-EU Member State securing extradition arrangements equivalent to the EAW. Even the EU's agreement with Norway and Iceland (which has yet to be brought into force) allows for an 'own-national' exemption, analogous to that proposed for the UK during the transition period. It also provides an indirect but influential role for the CJEU. (Paragraph 106)

19. But to fall back on cumbersome pre-EAW extradition arrangements such as the 1957 Council of Europe Convention would lead to delay, higher cost, and potential political interference. This would be a bad outcome for both the UK and the EU. (Paragraph 107)

20. As recently as April 2014 the Prime Minister, then Home Secretary, made a considered case that it was in the UK's national interest to maintain participation in the European Arrest Warrant. The underlying national interest remains, and by the Government's own admission, the UK is seeking an unprecedented level of cooperation with the EU. However, there is little sign yet of the realism that needs to go alongside this ambition. The Government needs urgently to commission a full impact assessment of the various possible outcomes of the negotiations, to build up a credible evidence-base for taking what will be difficult, but unavoidable, decisions. (Paragraph 108)

21. We are concerned that, by mid-May, the UK and EU negotiators had spent little more than an hour discussing the future internal security relationship, despite the obvious mutual interest in making rapid progress. The safety of UK and EU citizens demands that the negotiators turn urgently to this vital task. We call on the Government, with immediate effect, to report regularly to Parliament on progress towards securing agreement on this fundamental aspect of the future relationship. (Paragraph 112)

A security treaty?

22. We support the Government in prioritising three areas for future UK-EU security cooperation:

    - extradition;
    - access to law enforcement databases; and
    - partnerships with EU agencies such as Europol. (Paragraph 124)

23. Witnesses to this inquiry presented arguments both for and against the Government's preferred option of negotiating a single, comprehensive treaty to cover all these areas. On balance, however, we consider that the Government's objective is unlikely to be achievable, given the time that has been taken to negotiate EU agreements with third countries in the past, and the range and complexity of the available models and precedents. We also note that the principle that 'nothing is agreed until everything is agreed' increases the risk inherent in seeking to negotiate a single security treaty. In effect, all the eggs would be in one basket. (Paragraph 125)

24. In addition, there would be a strong temptation, within a security treaty, to prioritise a few achievable and significant goals, and some of the synergies between the various instruments in the EU toolkit could be lost. (Paragraph 126)

25. The Government therefore needs to adopt an evidence-based approach. It should analyse on a case-by-case basis the value of maintaining access to each of the tools that it has already opted into, making its findings public wherever possible. (Paragraph 127)

26. The Government also needs to be realistic about what it can achieve, not least because the EU has given little indication that it will be prepared to negotiate a bespoke treaty instead of a series of agreements on security. Whatever the approach adopted, any UK-EU agreement will be judged less on its form than on its success in protecting the security of the UK and EU27. (Paragraph 128)

27. The best should not be the enemy of the good: if a comprehensive treaty cannot be agreed, the safety of the people of the UK and EU27 means that a series of *ad hoc* security arrangements could help to mitigate reduced operational capacity. Time is short, and both sides urgently need to show pragmatism and flexibility if they are to reach agreement. (Paragraph 129)

28. We note that a comprehensive security treaty could be deemed to be a 'mixed agreement'. While this would not have important consequences domestically, it would result in a more complex, time-consuming and risky process of ratification by the EU and its Member States. We call on the Government to explain what consideration it has given to this issue in bringing forward its proposals for a comprehensive security treaty. (Paragraph 151)

29. Continued data-sharing is critical for future UK-EU security cooperation. Were the UK to lose access to the EU's security databases, information that today can be retrieved almost instantaneously could take days or weeks to access, creating not only a significant hurdle to effective policing but a threat to public safety. (Paragraph 152)

30. We support in principle the Government's objective of securing a cross-cutting agreement on data protection. But this means that the sequencing of the negotiations will be vital: if future security cooperation is to be effective, the Government must reach an agreement on data before agreeing a security treaty. (Paragraph 153)

31. We note also that negotiations on data-sharing are notoriously complex. So while we acknowledge the advantages of a cross-cutting agreement on data protection, we stress that this should not come at the expense of an agreement on security. (Paragraph 154)

32. Given the hurdles ahead, we are concerned that there is no mechanism in the draft Withdrawal Agreement for extending it, either in whole or in part, beyond the end date of 31 December 2020. We call on the Government and the EU to consider options for allowing such an extension, at least in respect of key security measures, where any interruption to ongoing operational cooperation could cost lives. (Paragraph 155)

33. In the meantime, internal security practitioners should prepare for the possibility of an operational cliff-edge. We commend the contingency planning undertaken by the Crown Prosecution Service, the Metropolitan Police and the National Crime Agency, in case the UK loses access to databases and other frameworks for security cooperation at the end of the transition period. (Paragraph 156)

34. Setting aside the arguments for and against retaining the European Charter of Fundamental Rights in UK law, any perceived reduction in the rights enjoyed by criminal suspects in the UK could have a significant operational impact on those working to protect the country's security. This is underlined by the European Commission's latest slides on police and judicial cooperation, which identify continuing UK adherence to the European Convention on Human Rights (and compliance with relevant judgments of the European Court of Human Rights) as key safeguards for any UK-EU agreements in this area. (Paragraph 157)

35. The Government needs urgently to explain how fundamental rights will be protected after Brexit, and how these protections will cohere with the proposed security treaty. Otherwise it risks delaying an agreement on internal security, leading to an operational cliff-edge. (Paragraph 158)

36. We welcome the Prime Minister's statement that the UK will "respect the remit" of the Court of Justice with regard to EU agencies, including those in the field of internal security. Time is now short, and the security of the UK and EU demands flexibility. A security treaty that required the UK courts to take account of decisions of the CJEU (and vice versa) might be more acceptable to the EU—and might therefore be negotiated more quickly—than an entirely bespoke solution. (Paragraph 159)

37. We note also that continuing dialogue, at all levels, will be needed to support the future UK-EU security relationship. This will require an increased emphasis on cultivating relationships, both formal and informal, to compensate for the UK's absence from decision-making bodies. We call on the Government to explain the means by which it intends to support such dialogue and embed it in the UK-EU security relationship. (Paragraph 160)

Northern Ireland and the proposed security treaty

38. Security forces in Northern Ireland and the Republic of Ireland have a decades-long history of cooperation in combating terrorism and cross-border crime, and over recent years in particular the Police Service of Northern Ireland and An Garda Síochána have developed ever greater mutual confidence and respect. While we are confident that this informal cooperation will continue, we also note the evidence of the Police Service of Northern Ireland that EU instruments, databases and agencies have become increasingly important in providing formal mechanisms for cooperation. (Paragraph 169)

39. It is thus vital for both sides that any UK-EU treaty or agreements should support ongoing security cooperation, including (particularly in light of the ongoing case before the CJEU) effective extradition arrangements between the UK and Ireland. Here, perhaps more than in any other aspect of security cooperation, the negotiations should not be treated as a 'zero sum game', but as an opportunity to develop a partnership that will benefit both sides. (Paragraph 170)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Browning
Lord Crisp
Baroness Janke
Lord Jay of Ewelme (Chairman)
Lord Kirkhope of Harrogate
Baroness Massey of Darwen
Lord O'Neill of Clackmannan
Baroness Pinnock
Lord Ribeiro
Lord Ricketts
Lord Soley
Lord Watts

Declarations of interest

Baroness Browning

Chair of the Advisory Committee on Business Appointments

Lord Crisp

No relevant interests declared

Baroness Janke

No relevant interests declared

Lord Jay of Ewelme

Member, Advisory Council, European Policy Forum

Member, Senior European Experts Group

Trustee (non-executive director), Thomson Reuters Foundation Share Company

Trustee, Magdalen College, Oxford Development Trust

Patron, Fair Trials International

Lord Kirkhope of Harrogate

Former Member of the European Parliament, 1999 - 2016

Former Conservative spokesman in the European Parliament on Home Affairs and Justice Matters (LIBE Committee)

In receipt of European Parliament pension

Lord O'Neill of Clackmannan

No relevant interests declared

Baroness Pinnock

No relevant interests declared

Lord Ribeiro

No relevant interests declared

Lord Ricketts

No relevant interests declared

Lord Soley

No relevant interests declared

Lord Watts

No relevant interests declared

The Specialist Adviser for the inquiry declared the following interests:

Professor Steve Peers

ESRC Priority Grant on UK Immigration Policy and Brexit

Independent sub-consultant to Optimity Consultants for a study on Brexit and Justice and Home Affairs cooperation

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Brown of Cambridge
Baroness Browning
Lord Boswell of Aynho (Chairman)
Lord Cromwell
Baroness Falkner
Lord Jay of Ewelme
Earl of Kinnoull
Lord Liddle
Baroness Neville-Rolfe
Baroness Noakes
Lord Risby
Baroness Suttie
Baroness Verma
Lord Whitty

During consideration of the report, no interests relevant to the to the subject matter of the report were declared by Members of the Committee.

A full list of Members' interests can be found in the Register of Lords' Interests:

https://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at https://www.parliament.uk/uk-eu-proposed-secrurity-treaty/ and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listen below in chronological order of oral evidence session and alphabetical order. Those witnesses marked with ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

*	Rob Wainwright, Director, Europol	QQ 1–9
*	Professor Anthony Glees, Director, Centre for Security and Intelligence Studies (BUCSIS), the University of Buckingham	QQ 10–19
*	Dr Helena Farrand-Carrapico, Senior Lecturer in Politics and International Relations, Aston University	
*	Professor Tim Wilson FCSFS, Professor of Criminal Justice Policy, Northumbria University Centre for Evidence and Criminal Justice Studies	
*	Camino Mortera-Martinez, Research Fellow and Brussels Representative, Centre for European Reform	QQ 20–29
*	Dr Marco Stefan, Research Fellow, Justice and Home Affairs Section, Centre for European Policy Studies	
*	Nick Vamos, Partner, Peters and Peters Solicitors LLP	QQ 30–44
*	Professor John Spencer CBE, Professor Emeritus of Law, University of Cambridge	
*	Javier Ruiz Diaz, Policy Director, Open Rights Group	QQ 45–56
*	George Wilson, EU Law and Policy Specialist, Liberty	
*	Richard Martin, Deputy Assistant Commissioner, Metropolitan Police and National Police Chiefs' Council lead for International Criminality Portfolio	QQ 57–70
*	Steve Smart, Director of Intelligence, National Crime Agency	
*	Tim Devlin, Criminal Bar Association Executive Member, Criminal Bar Association / Bar Council	QQ 71–81
*	Dr Anna Bradshaw, Member of the Law Society's EU Committee and Partner, Peter and Peters Solicitors LLP	
**	Rt Hon Nick Hurd MP, Minister of State, Home Office	QQ 82–92
**	Rob Jones, Director of Future European Policy, Home Office	
*	Lord Jonathan Evans of Weardale	QQ 93–101

*	Robert Hannigan CMG, Former Director, GCHQ	
*	Jim Brisbane CBE, Internal Assurance Officer and SRO for EU Exit, Crown Prosecution Service	QQ 102–109
*	Debbie Price, Head of International Justice, Crown Prosecution Service	
*	Sir Julian King KCVO CMG, Commissioner for Security Union, European Commission	QQ 110–116

Alphabetical list of all witnesses

	ADS Group	PST0004
*	Dr Anna Bradshaw, Member of the Law Society's EU Committee and Partner, Peter and Peters Solicitors LLP	
	BrexitLawNI	PST0007
*	Jim Brisbane CBE, Internal Assurance Officer and SRO for EU Exit, Crown Prosecution Service	
	Centre for European Studies, Canterbury Christ Church University	PST0005
	Defence Extradition Lawyers Forum	PST0003
*	Tim Devlin, Criminal Bar Association Executive Member, Criminal Bar Association / Bar Council	
*	Javier Ruiz Diaz, Policy Director, Open Rights Group	
*	Lord Jonathan Evans of Weardale	
	Fair Trials International	PST0010
*	Dr Helena Farrand-Carrapico, Senior Lecturer in Politics and International Relations, Aston University	PST0013
*	Professor Anthony Glees, Director, Centre for Security and Intelligence Studies (BUCSIS), the University of Buckingham	
*	Robert Hannigan CMG, Former Director, GCHQ	
**	Home Office	PST0011 PST0012
**	Rt Hon Nick Hurd MP, Minister of State, Home Office	
*	Information Commissioner's Office	PST0002
**	Rob Jones, Director of Future European Policy, Home Office	
*	Sir Julian King KCVO CMG, Commissioner for Security Union, European Commission	
	Law Society of Scotland	PST0009
	Law Society of England and Wales	PST0006

*	Richard Martin, Deputy Assistant Commissioner, Metropolitan Police and National Police Chiefs' Council lead for International Criminality Portfolio	
*	Camino Mortera-Martinez, Research Fellow and Brussels Representative, Centre for European Reform	
	Open Rights Group	PST0008
	Police Service of Northern Ireland (PSNI)	PST0014
*	Debbie Price, Head of International Justice, Crown Prosecution Service	
*	Steve Smart, Director of Intelligence, National Crime Agency	PST0015
*	Professor John Spencer CBE, Professor Emeritus of Law, University of Cambridge	
*	Dr Marco Stefan, Research Fellow, Justice and Home Affairs Section, Centre for European Policy Studies	
*	Nick Vamos, Partner, Peters and Peters Solicitors LLP	
*	Rob Wainwright, Director, Europol	
	Aled Williams	PST0001
*	George Wilson, EU Law and Policy Specialist, Liberty	
*	Professor Tim Wilson FCSFS, Professor of Criminal Justice Policy, Northumbria University Centre for Evidence and Criminal Justice Studies	PST0013

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords EU Home Affairs Sub-Committee, chaired by Lord Jay of Ewelme, has launched an inquiry into Brexit and the proposed UK-EU security treaty.

The House of Lords EU Committee and its six Sub-Committees are conducting a coordinated series of short inquiries looking at the key issues that will arise in the negotiations on Brexit. This inquiry will examine the practical and legal challenges for negotiating a security treaty with the EU, and what such a treaty might cover. The Sub-Committee is looking at internal police and security cooperation rather than external defence and foreign policy cooperation.

This is a public call for written evidence to be submitted to the Sub-Committee. The deadline is Friday 25 May. The Sub-Committee values diversity and seeks to ensure this wherever possible. How to submit evidence is set out later in this document, but if you have any questions or require adjustments to enable you to respond, please contact the staff of the Sub-Committee. We look forward to hearing from a range of interested individuals and organisations.

Inquiry focus

The Sub-Committee is examining the Government's proposal to negotiate a treaty between the UK and the EU that would provide a legal basis for continued cooperation on security. In its future partnership paper on future security, law enforcement and criminal justice cooperation, the Government stated 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", and called for a partnership between the UK and EU "that goes beyond the existing, often ad hoc arrangement for EU third country relationships". In her speech to the Munich Security Conference on 17 February 2018, Prime Minister Theresa May said that "the UK has been at the forefront of shaping the practical and legal arrangements that underpin [the UK and the EU's] internal security co-operation". EU Member States currently enjoy levels of cooperation and mutual recognition that go deeper than any comparable international collaborations; the Government has supported the idea that a UK-EU treaty would provide "a legal basis" for continued cooperation.

The European Commission's paper on police and judicial cooperation in criminal matters identifies the following principles for a future 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 Member States (there must be a balance of rights and obligations); and the EU must continue to have autonomy in making decisions. 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. An agreement between the EU and a third country in an area of shared competence is known as a "mixed agreement". This means that it is concluded both by the EU and by the Member States of the EU, which must give their consent.

The Committee is seeking evidence on the following questions in particular:

Shape of future arrangements

- What are the most important aspects of the current security cooperation relationship between the UK and EU, which the Government should seek to maintain?
- In an ideal world, what is your vision of the "closest possible cooperation" on security cooperation between the UK and EU post-Brexit?
- What should be the scope of the proposed UK-EU security treaty? Are there any issues that might not be best covered by this type of arrangement?

Transition or implementation period

- Can we expect existing security arrangements to be maintained during the transition or implementation period?
- Is the UK likely to be permitted to work within existing EU security frameworks during the transition or implementation period, for example Europol?
- What, if any, legal provisions will be required in order to achieve a successful transition or implementation period with regard to security cooperation?

Other modes of cooperation

- In the event that the UK leaves the EU without any deal in place on security cooperation, what does the UK stand to lose? How likely do you believe this outcome to be?
- Are there any existing models, either within the EU or elsewhere, for a future UK-EU security relationship?
- What fall-back options would be available to the Government should the UK fail to reach an agreement with the EU?

Structure of future cooperation

- Do you think that it will be possible for the UK to continue to have access in some way to the EU's structures for security cooperation, for example Europol?
- Are there any instances in which the EU can share data with a third country that does not have an adequacy decision? What is the legal basis for that to happen?
- To what extent do you think the Government's 'red line' on CJEU jurisdiction limits the post-Brexit options available to the UK for security cooperation?
- Do you see a need for new institutions to be established to facilitate security cooperation between the UK and EU and vice versa, once the UK leaves the EU?

Ratification

- Can you see any potential delays to the ratification of a security treaty?
- Would any such delays pose the risk of a cliff-edge in operational capacity?

Post-Brexit influence

- Do you have any concerns about how the UK and EU will be able to cooperate on identifying, agreeing, and tackling commonly shared security risks when the UK is no longer part of the EU?
- Will the UK lose the influence that it wields in security cooperation, once it is no longer part of the EU?
- Do you expect the UK's level of influence on security cooperation in Europe to change post-Brexit? Do you see any opportunities to improve upon the security relationship between the EU and the UK following Brexit?
- Would involvement with EU structures for security cooperation post-Brexit mean that the UK would find it more difficult to cooperate with third countries–for example, the USA?

Northern Ireland

- Do you believe that the land border between the UK and Republic of Ireland will pose particular challenges for security cooperation post-Brexit?

Submissions need not address all questions.