



Law Society
of Scotland

The Law Society of Scotland's Response

UK Parliament - Call for Evidence

Brexit: The Proposed UK-EU Security Treaty

25 May 2018



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Summary (This Submission is made on behalf of the Law Society of Scotland)

1. We welcome the opportunity to contribute to the discussions on the proposed UK- EU Security treaty. Post exit, agreement on issues of security is essential given that the UK and EU share common threats to their security from serious organised crime and global terrorism. Given that the first duty of Government is to keep its people safe, we fully support this approach to negotiating the terms of such a treaty between the UK and the EU. There are a number of priorities to be covered in respect of such a treaty including the need to protect fundamental rights, being aware of the global perspective to keep people safe, sharing of data and clarity and certainty as to the resolution of disputes.
2. The Government has committed to work with the Devolved Administrations on the detail of the proposals that affect their interests. Negotiation on any UK- EU Security Treaty needs to take account of the potential impact on Scotland and Northern Ireland. Though security is a matter reserved to the UK Parliament, law and order, criminal law and criminal justice are the responsibility under the Scotland Act 1998 of the Scottish Parliament. These are relevant when considering the UK's security.
3. Scotland has its own legal system relating to both criminal and civil law. It has its own court structure, legal profession, prosecution service and police force. The role of Scottish organisations and institutions need to be factored into such negotiations. These include the Scottish Government Justice Department, Scottish Courts and Tribunal Service, Crown Office and Procurator Fiscal Service, Police Scotland Service and Scottish Prison Service.
4. Post Brexit, the highest levels of security and the protection of the UK and EU citizens need to be secured. The UK must continue to co-operate with the relevant EU law enforcement agencies, networks and systems on a similar basis to the way in which they currently do though it will look different as the UK will not be an EU Member State. Scotland should play its part and fulfil its current level of commitment and responsibility in that respect.
5. Achieving a means of securing the UK position on security matters with the EU is paramount avoiding any period of uncertainty which is not desirable from either a security or in respect of the rights of the UK citizens.

Introduction

1. The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.
2. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.
3. The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the call for written evidence in relation to 'Brexit: the proposed UK- EU security treaty'. The Committee has the following comments to put forward for consideration.

General Comments

1. This call for evidence is in pursuance of the UK Government's proposal to negotiate a treaty between the UK and EU to provide for a legal basis for continued cooperation on security.¹
2. The UK is a multi-jurisdictional state where the UK's exit from the EU will have a specific impact on Scotland given that it has its own legal system with its own criminal and civil law as well as its court structure, legal profession, prosecution service and police force.
3. We recognise that the issue of security is, of course, one reserved to the UK Parliament. However, under the Scotland Act 1998, the Scottish Parliament was given responsibility for a number of devolved matters. Matters relating to law and order, criminal law and criminal justice are directly relevant and require to be considered in relation to issues affecting security². Any proposed UK-EU security treaty affects the scope as well as the delivery of and access to justice. The fight against crime and terrorism is also directly relevant to criminal law. These are issues of great interest and are equally significant for Scotland as for the remainder of the UK (though question 20 is restricted to specific concerns in relation to the Northern Irish/Irish border).

¹ Prime Minister's Speech at the Munich Security Conference on 17 February 2018 (<https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>)

² They were the subject of specific discussion at the roundtable event on 20 February 2018 (<https://www.scottishparliament.tv/meeting/justice-committee-february-20-2018>). Our submission can be seen at <https://www.lawscot.org.uk/media/359755/scottish-parliament-justice-committee-call-for-evidence-draft-eu-implications-2.pdf>

4. We note the recent publication of the UK Government's draft Framework for the UK- EU Security Partnership³. This makes no mention of devolved interests which is important as stressed in the UK Government: *Security, law enforcement and criminal justice: A Future Partnership Paper*⁴ at paragraph 40 that:

'The Government will work with the Devolved Administrations....as negotiations progress on the UK's partnership with the EU. Close working will be especially important where justice and policing are devolved. The UK Government will continue to work closely with these governments on the detail of these proposals as they affect their interests'.

Lord Kerr also expressed his concerns on 16 May 2018 during the Third Reading of the EU Withdrawal Bill where he noted at Column 724 that:⁵

'the Home Office had a huge input into [the Framework], because it is the department responsible for England in relation to the EU in future in these areas. So I asked what consultation there had been with Scotland and was told that the Scots were not consulted at all on this document. That seems to me to be extremely unwise'.

5. The Scottish position as outlined below needs to be considered when deciding how the Framework for the UK-EU Security Partnership will work. That requires acknowledgement of the different legislative context in Scotland. It is not about the legal form of any treaty as international relations lie outside the competence of the Scottish Parliament. It is about the detail as Scotland is actively involved and a contributor to security issues in a number of ways including:
- Scottish Government and the Scottish Law Officers joining UK delegates at the EU Justice Ministers and the EU Prosecutor's meetings
 - Scottish Government being obliged to implement international obligations including those currently existing under EU law
 - Scottish Government providing input into the UK negotiating positions as well as implementing EU legislation where it affects devolved competence
 - Scottish Government also scrutinising legislation from a Scottish perspective

³ <https://www.gov.uk/government/publications/framework-for-the-uk-eu-security-partnership>

⁴ <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>

⁵ [https://hansard.parliament.uk/Lords/2018-05-16/debates/98F7DF3F-ACE5-42E4-9FF6-F2BB1027EFA5/EuropeanUnion\(Withdrawal\)Bill#contribution-E4330678-6666-4899-BCF5-28A19760F963](https://hansard.parliament.uk/Lords/2018-05-16/debates/98F7DF3F-ACE5-42E4-9FF6-F2BB1027EFA5/EuropeanUnion(Withdrawal)Bill#contribution-E4330678-6666-4899-BCF5-28A19760F963)

6. We responded to the UK Government: *Security, law enforcement and criminal justice: A Future Partnership Paper*⁶ on 8 December 2017⁷. That response outlined in detail the various Scottish institutions involved in security matters which include:
- Scottish Government where responsibility mainly falls within the remit of the Scottish Government Justice department
 - Scottish Courts and Tribunal Service who are responsible for the administration of the distinct Scottish court system. That also includes the role of the judiciary under the Judicial Office for Scotland who provide support to the Lord Justice General with responsibility for the training and conduct of judges as well as the disposal of court business. In whatever form any UK-EU Security treaty may be negotiated, will require to consider how decisions are to be made in the event of dispute. This relates to the detailed discussions about the future role, if any, of the European Court of Justice (CJEU) and the position of EU jurisprudence post exit.
 - Crown Office and Procurator Fiscal Service (COPFS) is the Scottish prosecution service. The Lord Advocate has a unique position as its head where he is responsible, among his other roles, for prosecution system as well as acting as the principal legal adviser to the Scottish Government. His decision making as to prosecution where the locus of the crime is Scotland is taken independently of the Scottish Government. In decision-making, he is required to act in the public interest. Crimes which have a security aspect tend to be more serious in nature where indictments (as such cases are prosecuted at solemn level) run in his name. All reports as to crimes to be prosecuted in Scotland (which will include those with cross border implications whether UK, EU or international) all fall to be considered by the COPFS in accordance with Scottish criminal and evidential rules.
 - Police Scotland is involved in dealing with organised crimes and counter terrorism dedicated in keeping people safe. Areas of its work directly align with the need for co-operation with the EU on security matters (These are considered further in relation to the questions below).
 - Scottish Prison Service, funded by the Scottish Government, deals with those persons remanded or sentenced by the courts to custody and rehabilitation. This includes the administration, safety standards of care and organisation of Scottish prisons.

Responses to Questions

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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

⁷ <https://www.lawscot.org.uk/media/359303/the-law-society-of-scotland-response-security-law-enforcement-and-criminal-justice.pdf>

Shape of future arrangements

Question 1: What are the most important aspects of the current security cooperation relationship between the UK and EU, which the Government should seek to maintain?

1. Post Brexit, in order to preserve the highest levels of security and the protection of the UK and EU citizens, there must be the '*closest possible co-operation*' between the EU and UK. We endorse the observations during the evidence session to the Committee by representatives from the Crown Prosecution Service (CPS) that priorities should include the European Arrest Warrant (EAW), European Investigation Orders (EIO) and co-operation on matters relating to proceeds of crime⁸. We do consider that areas of mutual operational benefit must continue that include not only practical operational cooperation but also multilateral cooperation through EU agencies and data driven law. A further area of priority relates to the Victims' Rights Directive⁹ that ensures that victims of crime and their family members have the right to information, support and protection. It sets out procedural rights for victims in criminal proceedings and requires that EU Member States provide appropriate training on victims' needs to professionals who are likely to come into contact with victims¹⁰. In Scotland, the directive has been implemented by the Victims and Witnesses (Scotland) Act 2014.

Why?

2. This is essential when we consider the real and every day shared threat that terrorism and organised crime presents to Scotland, UK and the EU from the global perspective. Organised crime¹¹ is increasing in complexity and scale and has been recently described as the UK's '*biggest national security (our emphasis) threat*'.¹²
3. The geographic dimension of Europe cannot be ignored. Given the proximity of the EU with the UK (and indeed the common border between Northern Ireland and Ireland), Scotland faces the same threats to its security as the rest of the UK and EU. Attacks at Glasgow Airport and the London West End terrorist attack by Doctor Bilal Abdullah¹³ have demonstrated exactly that. The UK's

⁸ <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-subcommittee/inquiries/parliament-2017/brexit-proposed-security-treaty/>

⁹ 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

¹⁰ This Directive is implemented in Scotland in the Victims and Witnesses (Scotland) Act 2014

¹¹ We recognise that this is a general terms but can be seen to include cybercrime trafficking smuggling guns and gang activity and money laundering.

¹² National Crime Agency - <https://www.rt.com/uk/426629-organised-crime-gang-report/>

¹³ <https://www.dailyrecord.co.uk/news/scottish-news/glasgow-airport-bomber-bilal-abdullah-5068762>

ability to handle terrorist incidents has been strengthened since then with the UK Parliament agreeing where terrorism cases arise with cross border that there are benefits for such cases to be tried in one country (given the UK-wide jurisdiction in relation to terrorist offences under the Counter-Terrorism Act 2008)¹⁴.

4. The UK must continue to co-operate with the relevant EU law enforcement agencies, networks and systems on a similar basis to the way in which they currently do. Scotland should play its part and fulfil its current level of commitment and responsibility in that respect. Cognisance of the Scottish specific interests and dimension requires to be taken into account as identified above in the General Comments section.
5. The aspects which we would consider are the most important include:

5.1 Need to protect fundamental rights: That ties in with how such disputes should be resolved which we have touched on above. The Scottish Government has recognised in setting out one of its aims in ‘The strategy for Justice in Scotland’¹⁵ that Scotland should have:

‘a justice system that contributes positively to a flourishing Scotland helping to create an inclusive and respectful society in which all people and communities live in safety and security, individual and collective rights are supported and disputes are resolved fairly and swiftly.’

There must be consistency in how the law is applied in the field of security, law enforcement and criminal justice post exit. That should include the recognition and enforcement of citizen’s rights, equality, respect for human dignity, the rule of law, promotion of the interests of justice and the protection of human rights. These are all create ‘a *common cause to act together in our shared interest*’¹⁶. Indeed, in terms of the negotiation of the UK-EU Security Treaty both the UK and EU are bound by the EU Charter of Fundamental Rights and must act in accordance with the Charter when approaching issues which touch on the rights of its citizens.

Any proposed UK-EU security treaty should deal at the outset with how it is intended that the reciprocal arrangements between the Member States including the rights of citizens will work post exit. (We refer later to the need to undertake contingency planning regarding the arrangements at and after exit day).

What is crucial is to ensure stability in the law for the public. The importance of such rights can be seen in relation to Directives that deal with:

¹⁴ Joint Statement by HM’s A-G and the Lord Advocate handling of terrorist cases where the jurisdiction to prosecute is shared by prosecuting authorities within the UK
http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Handling%20of%20Terrorist%20Cases%20where%20the%20Jurisdiction%20to%20Prosecute%20is%20shared%20by%20Prosecuting%20Authorities%20within%20the%20UK.PDF paragraph 1.4

¹⁵ <http://www.gov.scot/Publications/2012/09/5924/0>

¹⁶ Munich Security Conference: 17 February 2018 the Right Honourable Theresa May

- victims' rights measures¹⁷ that ensure victims of crime receive appropriate information, support and protection and can participate in criminal proceedings and that victims are to be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner
- trafficking¹⁸ (which is a serious crime) where there have been a number of legal measures adopted setting up common rules.

Clarity as to the position on such rights is important as lawyers require to advise their clients on what the applicable law is. If there is uncertainty as to the actual law, there will be an increase in litigated cases. The number of potential appeals may also be expected to increase until major issues of law are able to be resolved. That will all take time while there will be an ongoing lack of certainty for those appearing before their courts and their advisers as to the possible outcome of any of their cases. That is an unsatisfactory position from everyone's perspective. What we have at present are systems that are tried, tested and mature. Future arrangements which are agreed may well be anticipated to be subject to challenge.

The actual forum to resolve such disputes also needs to be agreed as part of any UK- EU Security treaty. The EU Withdrawal Bill sets out at clauses 6 and 7¹⁹ the provisions that apply in relation to EU law at the exit date. The supremacy of EU law ends at exit day as does any referral of any matters for decisions to the CJEU. After exit day, any court or tribunal including those in Scotland will not therefore be bound by or to any principles laid down or any decisions made on or after exit date with regard to EU law.

At present, the law as far as the judiciary are concerned is clear. EU law is supreme and applies to current disputes going through the courts. Post exit, where a dispute arises, the judges have a choice. They can consider whether or not to 'have regard' to the pre-existing EU law of the European Court of Justice or reject it out of hand though subject always to applying the same test as the court applies in deciding whether to depart from its own existing body of case law.

Post exit subject to parliamentary approval of the draft EU (Withdrawal) Bill,²⁰ the EU Charter of Fundamental Rights will continue to apply to protect the rights of individuals. Being part of the EU has provided the UK with opportunities to be involved in work relating to the preservation and protection of such rights. We are aware of initiatives such as those being taken forward by the European Criminal Bar Association²¹ on '*Agenda 2020: a new Roadmap on minimum standards of certain procedural safeguards*'. These include the development of mutual recognition and mutual

¹⁷ 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029>

¹⁸ Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0036>

¹⁹ <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0102/18102.pdf>

²⁰ https://publications.parliament.uk/pa/bills/lbill/2017-2019/0102/lbill_2017-20190102_en_1.htm

²¹ http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf

trust in criminal matters which are important topics that have underpinned earlier successes in co-ordinated UK-EU work in relation to matters such as the EAW and EIO. Exactly what the role the UK, if any, will be able to take in this type of work on enhanced and continued procedural rights post exit remains to be seen. The negotiation of the UK-EU Security treaty should be seen in this context.

We therefore welcome the intention that any UK- EU security should *'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.'*²²

We note that the Framework for the UK-EU Security Partnership is silent as to how any disputes will fall to be resolved.

5.2 Global perspective: The first duty of Government is to keep its people safe²³. The landscape post Brexit will be different but safety must be maintained to protect our people both here and abroad. Globalisation may be seen in relation to the context requiring co-operation internationally as illustrated in the work of:

- Police Scotland: Its International Assistance Unit deals with *'organised crime and terrorism [that does] not respect borders and it is vital thatpolice force can work with counterparts in Europe and across the world to keep Scotland safe.this collaboration is currently working well.'*²⁴

Organisations with whom they work and should continue to work include Eurojust, Europol, Cepol (European Police College), European Agency for Fundamental Rights (FRA) and the European Network and Information Security Agency (ENISA). Access to these organisations will include the need to continue data-sharing that allows, for instance, for the identification of a suspect's location and to facilitate the operation of the EAWs (as below).

- COPFS: It also has an international role as recognised by the Lord Advocate James Wolffe where he indicated:

'successful investigations and prosecutions undertaken by law enforcement in Scotland demonstrate the enormous benefit derived from the excellent international cooperation we have established. ..we are fully committed to building on the strong links we have with countries elsewhere in Europe and around the world'.

²² Munich Security Conference: 17 February 2018 the Right Honourable Theresa May Prime Minister

²³ Paragraph 5 of the HM Government Security law enforcement and criminal justice paper

²⁴ 7 February 2017 Justice Secretary Michael Matheson

Data-sharing is important now and will only be anticipated to increase with the greater use of technology and virtual networks in the future. There will be an ongoing need to access relevant data from the EU. This is also a key area where EU law intersects with devolved matters.²⁵

Scotland needs to be able to work with European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) given its role in supporting the management and promotion of information and communication technology to implement the EU's policies in areas of justice, security and freedom. The eu-LISA has the responsibility for managing new EU information systems and empowering the agency to make EU information systems for security, border and migration management fully interoperable by 2020. Use of sophisticated, flexible and integrated system and solutions must be maintained to enable law enforcement, cooperation and integrated border management. That will continue to help address the challenges of irregular migration, cross border crime and terrorism which will continue to present problems and threats to the UK's security.

Any UK- EU Security treaty will need to deal with the data sharing question and recognise the importance of comprehensive and robust data protection arrangements. That will need to take into account the provisions of the Data Protection Bill which currently is in final stages in Parliament which includes the maintenance of very high standards of data protection. The stability to which we referred earlier is essential for the UK and EU and its people.

The need for participation in eu-LISA has been recognised by the Government as

'[it] believe[s] it is in the national interest to continue participatingas this will maximise our influence over how it operates IT systems that we take part in and for which it is responsible'.

Co-operation however is not just one way. The Schengen Information System II (SIS II) demonstrates how the UK contributes to the sharing of real-time data for the purposes of law enforcement which includes wanted criminals, missing persons and suspected terrorists. The numbers quoted by the Prime Minister indicated that *'about a fifth of all alerts are circulated by the UK, with over 13,000 hits on people and objects of interest to law enforcement across Europe in the last year alone'*²⁶ which demonstrate the scale of the issue.

Any UK-EU Security treaty needs to decide how provisions for these arrangements should be made. A high level agreement could be included in the UK-EU Security treaty but these arrangements need to be workable in relation to other areas of sharing mechanisms such as asset recovery legislation, sexual exploitation of Children and Victims' Rights, and the EIO which are

²⁵ The Cabinet Office Paper identified 11 points of intersection with devolved and EU law. Data-sharing was one where it includes the EU fingerprint database (Eurodac), the European Criminal Records Information System (ECRIS), False and Authentic Documents Online (FADO) EU Directive on Passenger Name, the Prum framework and Schengen Information System (SIS) 11

²⁶ Munich Security Conference: 17 February 2018 the Right Honourable Theresa May

merely provided by way of illustrative examples. What must be avoided are any gaps. Article 168²⁷ of the Draft Withdrawal Agreement provides for transitional arrangements.

We recognise that there need to be bilateral arrangements as the UK contributes data, information and expertise to organisations such as Europol separately. Europol has the role of supporting and strengthening cooperation between national police and prosecuting authorities in relation to serious crime affecting two or more Member States which includes:

- Facilitating requests for mutual legal assistance
- The operation of EAW
- Bringing together national authorities to agree approaches in special cases and
- Proving legal technical and financial support to Joint Investigation Teams

This work has greatly enhanced co-operation between prosecutorial and judicial authorities and should continue.

Specific mention should be made in this context of the EAW where there seems to be a general commitment, as recognised by the Prime Minister in her Munich speech,²⁸ stressing the importance of practical co-operation between the UK-EU including:

'our expedited extradition and mutual legal assistance relationship – [meaning] wanted or convicted serious criminals- and the evidence to support their convictions- mov[ing] seamlessly between the UK and EU Member States'.

Any UK –EU Security treaty would need to facilitate the continuation of the role of the EAW. Extradition under the EAW as the Prime Minister identified ceases post exit.

These changes regarding the operation of the EAW are equally significant for Scotland as for the rest of the UK. Extradition outside the EAW would take much longer and cost more. The internal systems and staff needed to handle such requests in the future cannot yet be predicted and are therefore not currently established. (Resourcing of the relevant prosecution services such as the CPS and COPFS are considerations requiring to be made in time for exit. This formed part of the Committee evidence-taking session on 16 May with the CPS staff.²⁹)

²⁷ https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

²⁸ Munich Security Conference: 17 February 2018

²⁹ <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-subcommittee/inquiries/parliament-2017/brexit-proposed-security-treaty/>

To give an indication of the scale of the issue, the figures in relation to volume of requests from 2016-2017 are set out in Table 1 from the National Crime Agency³⁰. That demonstrates the level of interaction between the EU and UK:

Table 1:

	Requests for Extradition to the UK³¹	Requests for Extradition from the UK
Requests	16598	345
Arrests	1736	196
Surrenders	1390	178

Question 2: In an ideal world, what is your vision of the “closest possible cooperation” on security cooperation between the UK and EU post-Brexit?

1. Chief Brexit negotiator, Michel Barnier has expressed the view that: *‘security is not to be negotiated. Any trade-off between security and trade would lead to a historic failure - and it would be a strategic mistake, benefiting those who seek to weaken us.’*³²

This view is shared by the Prime Minister when she emphasised that:

*‘the UK is just as committed to Europe’s security in the future as we have been in the past. Europe’s security is our security. And that is why I have said- and I say again today- that the [UK] is unconditionally committed to maintaining it.’*³³

Looking to the future arrangements with the EU, we reiterate that we consider agreement on these matters to be of supreme importance.

³⁰ <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/827-eaw-part-3-master-fiscal-year-v1-0-final-2009-2017>

³¹ These figures incorporate Scotland.

³² Chief Brexit negotiator Michel Barnier 15 May 2018 Brexit: EU keen to ensure closest possible cooperation with UK for mutual security and defence

³³ Munich Security Conference: 17 February 2018 the Right Honourable Theresa May

2. The relationship with the EU will be different as various security arrangements in which the UK is currently involved will need to be reassessed. We believe that it is paramount to ensure that there is the maximum possible co-operation as far as security issues affecting the UK are concerned. We would also reflect what was said by George Wilson, EU Law and Policy Specialist to the Home Affairs Sub-Committee as far as '*closest possible cooperation*' is concerned:³⁴

'That co-operation would be based, as it currently is, on respect for the rule of law and fundamental human rights. It would include important safeguards that benefit not only ourselves but EU nationals, when we look at the security and justice tools. In the proposed treaty, if it is agreed, we would like to see fundamental rights prioritised alongside, rightly, the aim of keeping our country and Europe safe from serious organised crime and terrorism.' (The underlining represents our emphasis).

3. There needs to be a clear understanding of how the rule of law and access to justice for both the EU and UK citizens will apply at exit and how those values will be respected. The UK will not be a member of the EU. There needs to be as constructive a focus as possible on how best to achieve the common aims of security between the EU and UK. This will need to address to how the UK may seek to participate in any other international agreement such as Framework Participation Agreements negotiated between the social partners at European level which are contractually binding on the signatory parties. These may well include dealing the development of military capabilities where the EU has indicated that the UK will be welcome to participate in these projects.³⁵ (This is referred to as external security in the Framework for the UK- EU Security Partnership.)
4. How exactly that '*closest possible cooperation*' will be achieved may well require as some have suggested more than one treaty given the number of issues referred to in question one above. These may well need to be considered and agreed within the context of any UK-EU Security treaty. Certainly it is in the interests too of the EU to ensure that a number of the systems continue to operate bilaterally in fields such as data-sharing.
5. We do recognise that we are in '*completely uncharted territory*' where we can fully expect there to be challenges, no matter what and how it is set out. We would suggest that the dispute resolution methods must be clear from the outset since we envisage challenge not only from the EU but from those individuals and organisations affected across Europe.³⁶

³⁴ 25 April 2018

³⁵ 15 May 2018 Brexit: EU keen to ensure closest possible cooperation with UK for mutual security and defence

³⁶ Javier Ruiz Diaz Policy Director, Open Rights Group

6. Whether arrangements are finally reached, the '*closest possible cooperation*' should factor in specific Scottish interest where they need to take account of the different Scottish legal system.

Question 3: 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?

1. We recognise that there may need for several treaties because of the diverse range of issues to be covered. Whether that happens in the future, we stress that if there is any overarching treaty, it requires to ensure the security of and respect for the rights of the UK and EU citizens. Key to that is the role of the CJEU or another mechanism for the resolution of disputes.
2. The Government has identified a number of working streams to implement the EU exit which involves the Home Office and the Ministry of Justice.³⁷ These require to acknowledge the Scottish position as it affects devolved areas of interest.
3. We have at our disposal some of the world's most sophisticated systems in the fight against crime which we need to maintain as cross-border co-operation is absolutely crucial to keep the UK citizens safe and bring criminals to justice. That will allow for countering cross-border threats together.³⁸
4. We therefore consider that all aspects of security where there are arrangements or relationships existing at present should be included within a treaty/treaties arrangement.

Transition or implementation period

Question 4: Can we expect existing security arrangements to be maintained during the transition or implementation period?

1. Negotiations with regard to the EU Withdrawal Agreement are still ongoing and the mantra '*nothing is agreed until everything is agreed*'³⁹ applies. We have stressed as above the need for continued

³⁷ Letter from Philip Rycroft Permanent Secretary Department for exiting the European Union to Meg Hillier Chair of Public Accounts Committee dated 30 April 2018

³⁸ Letter from Philip Rycroft Permanent Secretary Department for exiting the European Union to Meg Hillier Chair of Public Accounts Committee dated 30 April 2018

³⁹ <https://www.telegraph.co.uk/news/2017/12/11/theresa-may-tell-ireland-nothing-agreed-terms-brex-it-row-deal/>

procedures to ensure the security of the UK. There does seem to us to be a fundamental need for agreement. Failing any agreement, we cannot see how the current security measures will continue to operate.

Question 5: Is the UK likely to be permitted to work within existing EU security frameworks during the transition or implementation period, for example Europol?

1. The UK continues to work within existing EU security frameworks during the transition or implementation period. That will end in accordance with Article 7 of the EU Withdrawal Agreement when the UK will cease to be a member of any network, information system or database.⁴⁰
2. The importance of the Europol role to the UK is addressed in the Framework for the UK- EU Security Partnership⁴¹ where it identifies that *'sustaining cooperation on the basis of existing EU measures represents the most efficient and effective means of achieving the objectives [that the UK share with the EU].*
3. Europol along with Eurojust lies at the heart of the efforts to tackle the threats emerging across Europe. It provides a common forum for exchanging information, expertise, sharing resources and developing new methods in which to co-operate. It is in the UK and EU's mutual interest for such co-operation to continue post exit when the transitional arrangements as currently outlined in the draft Withdrawal Agreement will end on 31 December 2020⁴² unless agreement as to any continued partnership or relationship is reached.

Question 6: What, if any, legal provisions will be required in order to achieve a successful transition or implementation period with regard to security cooperation?

1. The Draft EU Withdrawal Agreement⁴³ needs the UK Parliament to agree the draft EU Withdrawal Agreement and then to an Implementation Bill which the Government intends to introduce to Parliament in the autumn.

⁴⁰
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf

⁴¹ Munich Security Conference: 17 February 2018 the Right Honourable Theresa May

⁴² Article 121 of the Withdrawal Agreement

⁴³ Article 121

2. There can therefore be no certainty meanwhile as to achieving a successful transition. What would be desirable is to achieve the same level of security cooperation as at present. Of necessity, it will look different as the UK will not be a member of the EU.

Other modes of cooperation

Question 7: 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?

1. We refer to our answer to Questions 1-3. There will be considerable impact if the UK leaves with no deal in place. That includes:
 - no longer being a member of organisations such as Europol and Eurojust with the benefits that membership brings
 - Extradition in the form that it currently takes place
 - An end to the significant exchange of data and engagement
 - Being unable to secure evidence from the EU 27 quickly through the EIO
2. The Prime Minister indicated that 'this would damage us both and put our citizens at greater risk.'⁴⁴ To avert that risk, the UK and EU both need to have in place measures on security cooperation post exit. That is required for the safety of the people and also for reciprocal preservation of their human rights in the light of the geographic proximity and shared threats.
3. We cannot comment on the likelihood of the UK and EU reaching agreement.

Question 8: Are there any existing models, either within the EU or elsewhere, for a future UK-EU security relationship?

1. There are a range of agreements that exist for countries that lie within the Schengen third countries (Norway, Iceland, Switzerland and Liechtenstein) and non-Schengen third countries. These differ depending whether they relate to participation in various organisations or matters such as extradition. To allow the UK to enjoy such benefits would need all EU Member States' agreement. There is agreement with Norway and Iceland on the application of certain provisions of the 2000 EU

⁴⁴ Munich Security Conference: 17 February 2018

Convention on legal assistance⁴⁵ as well as its 2001 Protocol⁴⁶ which may provide one type of model to follow. There is also the possibility of cooperation following the lines of the bilateral mutual cooperation treaties with Japan⁴⁷ and the United States of America⁴⁸.

2. It will take time to negotiate future arrangements. We would stress that the important factors are the priorities for the UK on which to secure agreement or arrangements. These will include aspects such as the EAW, operational cooperation between law enforcement authorities and judicial cooperation in criminal matters as well as ensuring continued access to justice, respect for fundamental rights and effective enforcement and dispute settlement mechanisms.

Question 9: What fall-back options would be available to the Government should the UK fail to reach an agreement with the EU?

1. The UK has opted out of provisions previously, such as the EAW which was one of the thirty five police and criminal justice measures that the UK re-joined in December 2014, following the exercise of the Protocol 36 block opt-out⁴⁹. Denmark currently holds an opt out from EU policies in relation to security and defence, citizenship, police and justice⁵⁰. There is therefore a model. Failing this being possible, there would need to be bilateral agreements reached with each Member State.
2. However, there needs to be recognition that contingency planning should be undertaken in the event that agreements are not able to be reached. That will require all Scottish based organisations to be aware of that risk at present and develop their responses as required. The priority must be to provide security for all citizens by 29 March 2019.

Structure of future cooperation

⁴⁵ <https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=32>

⁴⁶ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22004A0129%2801%29>

⁴⁷ Agreement between the European Union and Japan on mutual legal assistance in criminal matter
<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8341>

⁴⁸ Agreement on mutual legal assistance between the European Union and the United States of America
<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=5441>

⁴⁹ <https://www.parliament.uk/2014opt-out>

⁵⁰ Secured under the Edinburgh Agreement in 1992 after a referendum for the ratification of the Maastricht Treaty was rejected by Danish voters

Question 10: 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?

1. Continued access to Europol is important to us to maintain UK security at its current level. Europol represents a means which allows both the EU and the UK to participate. There is participation at present which includes both Member and non-Member States. For instance, Denmark is an observer and invited to meetings as far as governance arrangements are concerned but they have no data exchange or access to databases. Third countries are invited to meetings with the heads of Europol National Units but have not further rights. Whether these might provide models to follow would be a possibility. The UK's participation would change but could continue but not in the form as exists at present.

Question 11: 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?

1. The UK's Data Protection Bill should, subject to receiving parliamentary approval, align the UK with the EU framework though we understand that some reservations may have been expressed.
2. We would again stress post exit that there is no obvious substitute for the criminal intelligence and data which the UK currently has with regard to its access to EU databases. Other existing data exchange mechanisms exist that do complement access to EU tools but cannot nor will fully replace them What is best practice is free flow of data on criminal matters including full access to the SIS II and other EU databases.
3. Some existing third countries do have direct access to the databases but these are limited either to EU Member States exclusively or to Member States and non-EU countries within the Schengen Area. Negotiating that type of access to SIS '*will not be easy..... [as] there is no legal basis in the EU treaties for a non-EU, non-Schengen country to participate in Schengen*⁵¹.
4. The EU does have processes allowing such third countries to share data with Member States on criminal and judicial matters providing that a transfer of personal data to a third country or an international organisation may take place where the third country ensures an adequate level of protection ⁵²(an adequacy decision). For adequacy decision to be determined, this will consider the rule of law, respect for human rights, rules for the onward transfer of personal data to another third

⁵¹ Camino Mortera-Martinez from the Centre for European Reform

⁵² 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

country/international organisation and the relevant legislation (concerning public security, defence, national security and criminal law and the access of public authorities to personal data).

5. The Law Enforcement Directive allows for transfers to a third country without an adequacy decision. These are much more cumbersome and require legal procedures to have been agreed. Without these safeguards, transfers can only be where it involves the prevention of an immediate and serious threat to public security of a Member State or a third country. The UK would need an adequacy decision in order to retain the level of data exchange after exit. There is no guarantee that the UK would achieve this without any challenges. Challenges that may be expected would include those over the Government's red line on the role of the CJEU and the level of incorporation of the EU Charter on Fundamental Rights into UK Law. Furthermore, any discussions over an adequacy decision would take time to achieve. Recent EU agreements over much more limited levels of data exchange with the US and Canada have encountered major legal obstacles where the CJEU has taken a strict approach to privacy and data protection rights. Though the EU-US 'Umbrella Agreement' was formally signed in June 2016 establishing a 'framework' for the protection of personal data in the field of law-enforcement cooperation, it is understood to fall short of providing a lawful authority for the transfer of data from the EU to the US⁵³.

Question 12: 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?

1. The Government's red line has implications for negotiation because the EU requires autonomy in the adjudication of EU law issues. Post Brexit, there needs to be clarity about how disputes are to be settled. The Framework for the UK-EU Security Partnership does not include any mechanism as to how disputes are to be resolved. This is vital for the reasons expressed above about clarity of the law for UK in the future.

Question 13: 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?

1. As the position of the UK is not going to be the same post Brexit, there may well be the need for other institutions to be established for the purposes of security cooperation. What needs to be avoided is a cluttered landscape and lack of clarity of what any new organisations' remits will be.

⁵³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/635/63508.htm#footnote-033>

Question 14: Can you see any potential delays to the ratification of a security treaty?

1. A security treaty requires ratification by the UK Parliament. Depending on its terms there may be issues which both Houses and the devolved legislatures will consider controversial. A number of aspects could require extensive scrutiny. Section 20 of the Constitutional Reform and Governance Act 2010 sets out the timeframe for ratification and provides for the legal effect of a resolution of the House of Commons or Lords that a treaty should not be ratified.
2. Furthermore, the EU-27 legislatures may have their own concerns which could delay the treaty's finalisation.

Question 15: Would any such delays pose the risk of a cliff-edge in operational capacity?

1. Yes, they could. We have concerns over lack of clarity on security arrangements at exit and the implications for the UK security. As highlighted above all the organisations in the UK that are involved in security considerations would need to ensure that they have made contingency planning in event that agreements have not concluded.

Question 16: 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?

1. We refer to our answers to Questions 1-3 where we highlight the priorities and concerns about security when the UK is no longer part of the EU.

Question 17: Will the UK lose the influence that it wields in security cooperation, once it is no longer part of the EU?

1. There is a risk that the UK would lose influence after withdrawal so that there is a need to build on the current levels of cooperation and bilateral support networks which currently exist. There is interdependency between the UK and EU which should continue.
2. The UK has been influential and has demonstrated an expertise in various topics on a thematic basis in the past which has included trafficking and modern slavery, terrorism and serious organised crime. There should still be scope for this to continue.
3. Bilateral relationships will need to be developed but cannot replace the current legal frameworks. The UK should be in a much better position now with the contacts which have been developed with

the operation of the EAW and EIAs; these networks should allow for the opportunity for such work to continue, albeit functioning within a different legal framework.

Question 18: 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?

1. We refer to our answer to Question 17.

Question 19: 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?

1. That would tend to depend on the terms of the treaty. It would be important to avoid such an outcome in the negotiations.

Northern Ireland

Question 20: Do you believe that the land border between the UK and Republic of Ireland will pose particular challenges for security cooperation post-Brexit?

1. No comment.

We trust this is helpful for your purpose and would be happy to provide any further information, if required.

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