HOUSE OF COMMONS

Northern Ireland Affairs Committee

Oral evidence: Cross-border co-operation on policing, security and criminal justice after Brexit, HC 766

Wednesday 13 January 2021

Ordered by the House of Commons to be published on 13 January 2021.

Watch the meeting

Members present: Simon Hoare (Chair); Scott Benton; Mr Gregory Campbell; Stephen Farry; Mr Robert Goodwill; Claire Hanna; Fay Jones; Ian Paisley; Stephanie Peacock; Bob Stewart.

Questions 215 - 253

Witnesses

I: Gemma Davies, Associate Professor, Northumbria Law School, Northumbria University; Professor Valsamis Mitsilegas, School of Law, Queen Mary University of London; Colin Murray, Reader in Public Law, Newcastle Law School, Newcastle University; Professor Steve Peers, School of Law, University of Essex.

Examination of Witnesses

Witnesses: Gemma Davies, Professor Valsamis Mitsilegas, Colin Murray and Professor Steve Peers.

Chair: Good morning, everybody, and welcome to our Northern Ireland Affairs Committee for a further evidence session on cross-border co-operation on policing, security and criminal justice post Brexit. This is an incredibly important issue on which further work needs to be done. We are very grateful to our witnesses for joining us this morning to take our questions and hopefully give us their thoughts, suggestions and advice. You are very welcome and thank you for joining us today.

Q215 **Claire Hanna:** Thank you to our witnesses. Does the trade and co-operation agreement represent a good deal for the UK on law enforcement and judicial co-operation on criminal matters?

Chair: To whom are you firing that one?

Claire Hanna: It's an opening salvo.

Chair: It's an opening salvo. Shall we be old-fashioned and do ladies first and go to Gemma Davies?

Gemma Davies: Thank you to the Committee for inviting me to give evidence today. We have spent a long time talking about what we want in terms of police and security co-operation. We are now moving on to looking at what we have to work with and how we are going to live with what we have. There are a number of aspects that are really important to discuss today. First, in answering the question, "Is it a good deal for the UK?", the agreement was never going to be able to replicate the level of co-operation the UK enjoyed in the area of police and judicial co-operation within the EU. In that regard, inevitably the phrase "security downgrade" has been used numerous times and I would agree with that.

However, I do not think that that means that the deal is a bad deal. Without an agreement, co-operation between the UK and the EU would have relied on international co-operation mechanisms like Interpol and the Council of Europe conventions. A no deal would have been very significant in this area. The UK and the EU have secured co-operation that, not in all fields but in some fields, is as close as is conceivable, bearing in mind the UK's red lines, particularly in relation to the role of the CJEU and, on the other side, not undermining the EU's internal legal order. Therefore, it represents a working compromise, but there are some real issues, particularly in relation to loss of real-time data. I am sure we will come on to look at that.

Importantly, there are areas where co-operation can be enhanced in the future, particularly between the UK and Ireland, through the possibilities of bilateral agreements. Perhaps we can come to that as we go through the session.

Colin Murray: To directly follow on from what Professor Davies has said, as a deal, it was never going to replicate exactly what was there when the UK was a member of the European Union. There was a lot of talk bandied around ahead of this deal that it would be unprecedented in breadth and scope in terms of security co-operation. We have a deal here that is entirely in line with precedents for some third countries that already exist with the European Union. In terms of suspect surrender and access to Europol, the UK is in a position that is almost entirely comparable to where Norway is and it aligns with those precedents.

It is not by any means unprecedented. It is what you might call a "keeps the lights on" deal in terms of justice and security. When the Committee had the Chief Constable of the PSNI before it a couple of months ago, he said that his biggest priority was ensuring that immediate information flows north-south would continue after this. As Professor Davies has said, there are protections for information flows and there are workarounds, but there are compromises and trade-offs built into this as well.

In terms of Brexit and our overall look at this, because we are getting into a level of post-legislative review that this Committee is performing this morning rather than looking at this ahead of the enactment of the 2020 Act, we see some of that balancing coming into play here too. This is not an unfettered or unbridled taking back control exercise. The UK has had to make trade-offs to get that policing and judicial co-operation access, in terms of data protection and human rights, which are built into the trade and co-operation agreement.

Professor Mitsilegas: Good morning and thank you for having me. To follow up on the comments of my colleagues, this was always going to be a damage limitation exercise for the United Kingdom and an attempt to replicate to the extent possible the high degree of co-operation of EU member states in a highly integrated area. Of course, we see clearly the limitations of this co-operation, with the UK now being a third country.

Having said that, there are clearly some areas where both parties have demonstrated quite a high degree of ambition for continuing as close co-operation as the UK status as a third country permits. I grouped this agreement, when I was reading it, into three levels of ambition and achievement in terms of the closeness of co-operation. The first, where we really see in the agreement a willingness to continue as closely as possible to what we had, was on extradition. I will come back to that. Second is the exchange of a series of law enforcement operational data. There are detailed provisions on Prüm, passenger name records and criminal records. Third, and perhaps unsung, towards the end of the text, is a willingness for strong co-operation on confiscation and the exchange of confiscation orders.

The medium level where perhaps more could be done is in the field of mutual legal assistance, where the agreement does not replace but merely supplements existing Council of Europe arrangements. There are

limits, as was mentioned, to the UK's participation in the EU agencies, Europol and Eurojust, and in joint investigation teams. Then the lower achievement, which was what we discussed in our last evidence session and which came as no surprise, is that the UK does not have direct access to EU databases. That we have to live with. The big one is the Schengen Information System. The UK does not have access to that, but also does not have direct access to EU databases such as the Europol Information System or the European Criminal Records Information System, although the annexes to the agreement for those, which I have read, call for building upon EU infrastructure and criminal records to ensure information exchange. This always comes with a caveat of data adequacy, protection of human rights and following European advancements, but we will come back to that.

Q216 **Chair:** Sitting behind that answer seems to be the strong indication that this is a dynamic, rather than a static, situation where there is an appetite for joint working and co-operation.

Professor Mitsilegas: There is certainly a dynamic situation. There is a willingness not to lose out, especially in areas that are deemed as a success story and where the UK is also viewed in the eyes of the European Union to be a strong contributor. On extradition and the exchange of DNA data in Prüm, for example, I do not think the EU wanted to lose the capability and willingness of the UK to be part of the system, but we have the limits of a third country. The UK is no longer an EU member state.

It is also dynamic to the extent that the closer the co-operation, the closer we will have to follow. The UK needs to be cognisant of the development of the EU acquis in the future. EU law will develop and any co-operation will be contingent on some sort of common understanding as to the extent to which the UK will be seen to be compliant with the development of future EU legislation in the field.

Professor Peers: Good morning. Thanks for inviting me. As for the question, it is useful to answer it in respect of the UK and EU simultaneously, you could say. They have both preserved a lot of things they would have lost had there been no deal. They have both lost some things, particularly the Schengen Information System and some of the capabilities of other information exchange that they had when the UK was a member. Really, it is a halfway point, maybe even a three-quarters-way point, between those positions. The quarter that is missing is particularly the Schengen Information System, but quite a lot of the UK's relationship has still been preserved. It is certainly much better than we would have had in a no-deal scenario.

Q217 **Claire Hanna:** Do the provisions apply uniformly across Britain and Northern Ireland? Are there specific issues that arise as a result of either the protocol or the reality of the land border on the island of Ireland?

Gemma Davies: The provisions apply uniformly across the whole of the UK. The way in which they might operate could differ because Northern Ireland and Scotland have slightly different processes in relation to certain aspects of this area. There are consequences that will have to be specifically considered for Northern Ireland, but it is not the case that there are certain aspects of part 3 that apply differently per se.

Colin Murray: In terms of provisions like mutual assistance, when it talks about investigatory teams that are already operative, you can apply that quite directly to, say, the joint task force that operates under Fresh Start. You can work out how this applies specifically in the context of Northern Ireland but, as Professor Davies has said, the deal applies on a UK level.

Q218 **Chair:** With our mind to the geography of the only shared land border between the two single markets, and the history, we have heard Ministers say that, effectively, the deal makes people as safe post 31 December as they were before. With a specific slant to Northern Ireland, do you think that that is a fair and justifiable assessment? Is the deal as it stands today adequate to meet the needs of policing and security in Northern Ireland and then, in the wider context, the island of Ireland? If not, how urgently should the gaps and lacunas be filled?

Gemma Davies: Dr Murray talked about keeping the lights on, and that is a phrase that we have heard several times. The agreement as it stands certainly does that. It stops the immediate problems that would have occurred in a no-deal scenario. However, particularly in relation to mutual legal assistance, there are definite areas—and perhaps it would be best if, as we go through, we could highlight those—where it would be possible for bilateral co-operation to either extend the provisions that are in the TCA or clarify the position in some regards.

Data protection is very complex. The agreement contains lots of data protection safeguards, mutual legal assistance being one of them, for example. The way in which the PSNI and the AGS might want to work together would be better facilitated through a specific agreement. That would not necessarily go beyond the TCA but would rather explain it.

Q219 **Mr Campbell:** Dr Murray made reference to the Norwegian model—that it was broadly similar to that. People will claim that our deal will do x or y, but if our deal is similar to Norway, what has been the Norwegian experience? Has that been about par for the course, slightly better or worse?

Colin Murray: The Norwegian model is relatively new in terms of how it has come together. The Committee has heard before about Norway and Iceland and how there was quite a tortured process of trying to get a suspect surrender arrangement, which was put in place well over a decade ago in terms of the outline, to move into being enforceable, but it is up and operative now. It works well and works comparably to the European arrest warrant. In terms of access to Europol, now participating

as a third country and being able to feed into Europol by association, that is very like the relationship that Norway and Switzerland currently maintain with that EU agency. That is all workable.

In the context of Chair's broader question, there are two issues that might arise on current security. The first of those is getting used to new ways of doing things. How do the police notify that they would like to put out to their partner forces across Europe that they are seeking the surrender of a specific suspect who might be within those forces' territory? All of that has to be worked up and new processes have to be put in place, which the police service in Northern Ireland and the other police services in the UK have to get used to. Beyond that, European partners have to get used to that too. It is very easy to be part of the system of 26 countries and to forget that another country, which is in a slightly analogous system, might not be affected by a notice, and the notice that an arrest is being sought might not be raised. That is operational and it will get easier to fix over time.

The TCA is a ferociously complex document. All of the numbering of articles within it is non-sequential. It is all subject to tweaking and change at the moment. In terms of policing and security co-operation, there are specific break clauses in it that allow for suspensions or termination. Going down the line, we can hope that there will be a scenario where this relationship will be enriched. If there is friction as a result of this deal as a whole, there are areas in which this could all still break apart. It could collapse as an arrangement quite quickly, in terms of suspension or termination by one of the parties of the police and justice measures with a limited period of notice.

Q220 **Chair:** While it could, let us be frank: it is highly unlikely given the complex and intertwined nature of security and intelligence across the continent of Europe, and given that the major democracies are committed to principles of security, Five Eyes and the like. In real terms, nobody is going to pick up their ball and run home crying, are they?

Colin Murray: I do not foresee this as a short-term option. All parties are very happy to have concluded this deal and to have the benefits coming out of this deal. I do not want to over-egg this particular pudding. I just want to put it out that, in terms of the comparison to what has gone before, there are friction points there that did not previously exist.

Q221 **Chair:** I am not entirely sure whether criminals or potential criminals listen to NIAC but, if they do, the clear message to any criminals listening to our proceedings has to be that there is not a great, wide Serengeti plain for them to exploit while officials and politicians try to tie up bits of string.

Colin Murray: That is correct.

Q222 **Fay Jones:** I just had a small follow-up question for Professor Mitsilegas. You mentioned that the UK does not have access to European databases

such as Europol. Is it fair to say that there are equivalent databases or proprietary assets that the UK owns that the European Union now does not have access to either?

Professor Mitsilegas: The UK has been a major contributor to the Europol database, and it remains to be seen how this will be worked out in the future. If you look at the agreement, there are provisions to enable information exchange between Europol and the United Kingdom, including the agreement allowing for direct information exchange between UK authorities and Europol without necessarily going via the designated national contact points. There is an awareness and a willingness for information exchange to continue. As for whether the UK will benefit from the more general intelligence products of Europol that come from pulling together the analysis in the Europol database, that will remain more limited.

Europol may also be concerned about losing intelligence and information to analyse that comes from the UK. The UK, together with Germany, was the highest user of Europol and the Europol system. Some say that Europol is an example of the UK successfully exporting its model of intelligence-led policing. Operationally, it is not only a loss for the United Kingdom, but we have constitutional and legal constraints that render the United Kingdom a third country. I read the agreement as trying to achieve as much as possible within these constraints.

This will have to be ironed out in the future by bodies such as the specialised committee envisaged by the agreement, where it brings experts from both the EU and the UK to work out the functioning, monitoring and implementation of the agreement. Any complex questions in the future will come to this committee to examine.

Bob Stewart: I am probably the only accused criminal, having been arrested on an Interpol red warrant in 2005. I was totally innocent, of course.

Chair: They all say that, Bob. The prisons are full of innocent people.

Q223 **Bob Stewart:** I am totally innocent. I just want the professors and these academics to understand that I am totally innocent of anything that they may pick up on the internet.

I want to talk about extradition and the speed of extradition. That is what I am particularly interested in. I will combine the two questions because we are a bit behind on time. First, I am interested in speed of extradition between the United Kingdom and the European Union and, of course, speed of extradition between a member of the European Union, such as the Republic of Ireland, and Northern Ireland or the rest of the United Kingdom. Has the speed of extradition been slowed down by what has happened or is it much the same? Professor Peers, perhaps a view from the University of Essex might help.

Professor Peers: It is possible in some cases that the speed will slow down. Even though the starting point is that it is a very similar to the

European arrest warrant, there are a few exceptions that did not exist. One of them is the bar to extraditing own citizens that some member states or the UK may wish to apply. It only applies to probably a small number of cases and, in a way, it simply stops the proceedings at the beginning, so they will not even get anywhere.

That leaves us with other cases where we seek a British citizen from, for instance, Ireland or Germany, or the other way around. In those cases, there are at least one or two potential new roadblocks that could slow things down. One of them is that the dual criminality rule is not always waived for the same list of 32 cases as it is under the European arrest warrant. It is possible for member states or the UK to say, "We are not going to waive it."

Another one is that the political offences exception might come back in a limited form, and another one is that there is a possible form of human rights safeguard specific to extradition. A court can ask the other court for guarantees relating to human rights before it would proceed with the extradition. All of these are things that defence lawyers may wish to bring up in individual cases if they think there is some basis that it might help their client.

I suspect that in some cases there might be more general human rights arguments based on EU law or on national constitution. The history is with Ireland in particular being reluctant to co-operate with UK extradition on national constitutional grounds. That was, in a way, quashed as part of the European arrest warrant, although it kept popping up. I suspect it may pop up more now that the UK is a third country.

The argument for mutual trust was limited anyway, with some exceptions, but the starting point for mutual trust that you have between member states, and the specific process of saying you could only refuse the European arrest warrant if a member state was facing sanctions under the EU's own system for serious breaches of human rights, does not apply to the UK. At least, it would apply in a different way under the trade and co-operation agreement. We do not necessarily have the same conclusion if there is an argument that there are human rights problems in individual cases.

All of those are things that defence lawyers are going to try to explore. I guess we will see how successful they are in the months and years to come.

Q224 **Bob Stewart:** Thank you very much. Your answer in summary is that it is slightly more complicated. It could give lawyers a bit more of a field day. Is that correct?

Professor Peers: Yes, that is fair to say. We cannot yet be sure how successful they will be, but there are possibilities for them to give it a go.

Gemma Davies: When we are looking at the speed of extradition, there are a number of stages to that speed. There is the speed from when a warrant is issued to when a suspect is arrested in a different country, and then there is the speed from when they are arrested to the point at which a decision is made on their extradition. Finally, there is the speed at which they are returned to the country that requested them after a decision is made.

As Steve has mentioned, from the point of arrest the TCA sets out the same time limits that the European arrest warrant did. In theory, there should not be a delay, but I agree that there are three main differences between surrender under the TCA and the EAW. The one that would be most problematic for the UK and Ireland is probably dual criminality. That is where offences have to exist in both countries, and it is possible that that can be waived. Ireland has not waived that requirement in relation to the Iceland-Norway agreement. It is not a given, but I take from that that they would therefore be likely not to waive it, or may not waive it, in relation to this agreement. My understanding is that the UK will not waive it either, which means that in every case dual criminality will have to be established. As both the UK and Ireland are common law countries, there is, generally speaking, quite a large degree of alignment in their criminal law. Having said that, that will still likely slow things down.

Where we need to be careful is from the issuing of a warrant to the point at which arrest takes place. For the UK, in terms of other EU countries, that would traditionally have been facilitated through SIS II. The question is whether the workarounds for not having access to SIS II will ensure that arrest occurs as quickly as it would otherwise have done. Ireland has only just joined SIS II and therefore there is some benefit to that, to the extent that the UK and Ireland were already sharing European arrest warrants in a different format. Nonetheless, moving forward, the UK and Ireland will have to be very clear about how they are going to be exchanging arrest warrants, to ensure that they are dealt with as expeditiously as possible.

Professor Mitsilegas: First, it is important to note that the agreement itself retains the time limits of the European arrest warrant. The political will is there for speedy execution. Secondly, as was mentioned, the key question is what will happen now that the Schengen Information System is no longer part of the equation and how the parties will find a way to co-operate outside this.

Thirdly, there is also a more practical question, which is the extent to which UK extradition requests will continue to be prioritised in the same way as requests from other EU member states vis-à-vis Ireland. Presumably they will be, because most of the business in Ireland will probably concern requests from the United Kingdom, but we need to think about the obligations of EU member states to give not legal but at least de facto priority to requests from their EU partners because they

also have to comply with the strict time limits of the European arrest warrant.

This is something on which a lot of discussion and lobbying needs to happen within the justice systems of the two states, to have the awareness to continue prioritising these requests now that the UK is no longer an EU member state.

Colin Murray: In that regard, when it comes to Ireland, over the last decade two thirds of PSNI requests under the European arrest warrant system have ultimately dealt with Ireland. There is already a relationship there. I am certain there will be prioritisation between An Garda Siochana and the PSNI to make that work again.

In terms of the idea of political offence exception, to follow up on what Professor Peers was saying, these roadblocks, as he put it, will present an issue in a small number of cases. The political offence exception, as it was such a serious impediment to traditional diplomatic processes of extradition in the 1970s and 1980s, was a function of how the constitution of Ireland was being interpreted at that time by the Irish courts and the Irish Supreme Court. There was a change in position by the Supreme Court in the late 1980s and, in a nutshell, much more of a focus on ideas of political bias within a prosecution rather than the nature of an offence.

To put it simply, the ecosystem exists where that should not be a particular problem with the new suspect surrender arrangements. In that respect, it is not about good relations between law enforcement agencies. It is about how the jurisprudence developed from the late 1980s onwards.

Chair: Dr Murray, the final point that you made is enormously important and should give us all some significant comfort.

Q225 **Stephanie Peacock:** Good morning. Is there a risk of delay in extradition arrangements where the location of the suspect is unknown, as a result of transmitting warrant notices through Interpol instead of through Schengen II?

Professor Peers: I do not have the statistics to hand in terms of exactly how Interpol works. It is well known that, reportedly, simply signing up to the Schengen Information System enables more effective transition of requests than any alternative measure. Whether it can be fully replaced by the Interpol system remains to be seen. I do not know how many police forces in other countries are signed up to Interpol in the same way they might be signed up, as the British police were, to the Schengen Information System. Would they do the same sorts of checks when they are talking to a suspect in a police station to find out whether they are wanted via the Interpol system, in the way they might do for the Schengen Information System? That would be an important amount of

comparative information to have. I do not know if anyone has actually compiled it.

We could try to encourage Ireland and other countries with which we do a lot of extradition business to develop the software, the capabilities and the practice of police making those judicial checks where they do not do so already. You would be picking up on the suspects where it would not be obvious, for instance, that they are wanted by the UK, if it is not a notorious case. That is the sort of thing I would suggest we look into operationally, to see whether those sorts of checks could be made more frequent and systematic.

Colin Murray: I am not sure if members have seen it, but the National Crime Agency shared a very useful piece of written evidence with the Home Affairs Select Committee at the start of the year, looking at the deal. It did not foresee any major operational capabilities gap at its end but, as Professor Peers has said, its concern, the fly in the ointment, was how this would be picked up by partner law enforcement agencies in other countries.

Q226 **Mr Campbell:** Further to the earlier questions at the start of the session, on the proportionality clauses in the surrender arrangements, how do the witnesses make a comparison with the European arrest warrant itself? Are they comparable? If they are different, in what way—in a negative or positive way?

Professor Mitsilegas: The difference with the European arrest warrant is that proportionality features much more strongly in the agreement, as an element that underpins the very operation of extradition. Presumably, the UK Government sees this as a small victory, because the United Kingdom raised proportionality concerns during the operation of the European arrest warrant system, where proportionality was not a ground to refuse the execution of the warrant under EU law.

I read the agreement as now allowing the parties to refuse to execute the European arrest warrant on proportionality grounds, which was actually in UK law. The UK has changed its domestic law, even as an EU member, to allow for refusing to execute the European arrest warrant on proportionality grounds. This has been mirrored in the agreement, which means that proportionality plays a stronger role.

If you compare it, it is also quite interesting that there is a stronger proportionality safeguard within the agreement between the EU and a third party than currently we have within the EU law and the European arrest warrant framework decision. The safeguard of proportionality is stronger and it will enable the courts in the United Kingdom to very carefully scrutinise extradition requests from other EU member states and to have the leeway not to execute a warrant if they find that it is disproportionate.

Colin Murray: It is great to see the proportionality element explicitly within this arrangement, but following on from Professor Mitsilegas, it was already operating on a UK level from July 2014, in sections 21A and B of the Extradition Act 2003. The Commission's advice on how the European arrest warrant is used as it developed was very clear that it wanted to see it used proportionately. There were cases in the early days of the European arrest warrant of it being used to try to track down people who had defaulted on hire purchase agreements, and various causes célèbres about it, which the Commission itself has been very keen to avoid.

The European arrest warrant is, let us face it, a very robust law enforcement tool. It is good to see explicit safeguards built in, in terms of individual protections, but this has already been operating in this way for the UK for several years and it has not been questioned by the Commission in that time. Indeed, it reflects the Commission guidance on how the European arrest warrant operates. Will it be a big practical change? I do not think it will necessarily make that much of a difference to how suspect surrender operates.

Professor Peers: Perhaps you could say that it insulates the UK from any argument that its proportionality bar to extradition is a problem, which might have been the argument under the European arrest warrant even though the Commission was not raising it. As Professor Murray said, some other member state might have raised it, or there might have been some other way it got to the EU court and been challenged. Now it is written into this agreement, so there is no doubt that it is compatible with the agreement. It might provide some grounds for defence lawyers to argue that the particular proceeding is disproportionate but, as Professor Murray said, it was there in the law already. It is not a new ground for defence lawyers to argue.

Q227 **Mr Goodwill:** We have already heard some evidence on political offence exceptions and, indeed, back in November, Naomi Long, the Northern Ireland Minister of Justice, said that the definition had been tightened both in case law and in legislation, but it would still be a challenge. Associate Professor Davies has already given us some good evidence on this. What are the circumstances where this could be a problem? I am particularly thinking of where a person may have carried out a criminal offence but argued that there was a political motivation or, indeed, membership of a proscribed organisation that may not be proscribed in both jurisdictions.

Gemma Davies: As you have set out, the TCA allows for states to refuse to execute a warrant for a political offence, but that is quite narrowly defined. We have to remember that section 13 of the Extradition Act already contains a prohibition, which is not identical but is very similar. I do not foresee this having a significant impact on requests received by the UK, but it might have an impact on requests received by other EU countries. However, I expect that Ireland would not make a declaration

that would curtail its surrender for a wider range of political offences. Therefore, while it is something that we have to be mindful of, I do not anticipate that this will be a significant problem, as it could have been in a no deal if we had fallen back on the 1959 agreement.

Q228 **Mr Goodwill:** I guess things like Holocaust denial and the laws in Germany would be an example where it could be a problem with other jurisdictions. That is quite clearly a political opinion that somebody might state. In terms of the UK, Northern Ireland and Ireland, you do not foresee any problems specifically.

Gemma Davies: I do not. The other witnesses may feel differently.

Mr Goodwill: Do the other witnesses concur?

Professor Peers: I do not think it is an issue with Ireland. It may be an issue with a Catalan politician, let us say. I am thinking of a particular case in Scotland. That is the sort of thing where you might be able to argue political offence now, depending on what the declarations are on the two sides, whereas you would not have been able to do so under the European arrest warrant.

Q229 **Mr Goodwill:** There would be no security implications to this political offence exception, as far as you can see, within the common travel area.

Professor Peers: Within the common travel area, no. There is also a terrorism carve-out, so you could not use a political offence exception in terrorist-related cases anyway. It would be for what you might call less serious cases where there is a political argument involved, not the areas where there was always the biggest concern with a political offence exception being arguably misused.

Mr Goodwill: I can see Dr Murray nodding.

Chair: I do not want to put words into colleagues' mouths, but given the seriousness of this issue and the interest the Committee has had in it, what we are hearing from our witnesses this morning is encouraging in terms of security and policing.

Q230 **Fay Jones:** Earlier on, when talking about information assets, we learned that there are workarounds to share information where some formal mechanisms might have been lost. On a similar theme, what scope do you see for the UK and Ireland to agree further bilateral agreements on extradition, building on the surrender arrangements that are contained within the new relationship agreement?

Professor Peers: In the case law of the EU, it is not established one way or the other whether, and to what extent, there is an exclusive competence when it comes to issues like extradition. In principle, it is a shared competence between the EU and its member states, so they are free to negotiate as long as they do not contradict EU law. Now we have an EU arrangement, so the question would be whether there is some sort of contradiction. The European arrest warrant itself allows for simplified

proceedings between member states. You could argue it is at least implied that the same thing is possible here in the TCA. As long as there is no contradiction with the TCA, what would be wrong with us having a simplified arrangement with Ireland? I do not know whether Ireland or the Commission would necessarily see it the same way, or whether they might be uncomfortable with that or challenge it in some way.

Colin Murray: In terms of these arrangements, for the UK and Ireland to build an alternate bilateral measure of suspect surrender, there would be a risk of duplicating something that all four of us would say looks on paper like it will be a fairly effective substitution for the European arrest warrant. That is not to say that there is not scope for bilateral co-operation. It is probable that it will be in areas like reinforcing the joint taskforce and how it operates, securing information exchange and how that might work.

Even if we look at these European measures that we have talked about, like the Schengen Information System, those developed as the Schengen free movement area came about to enforce common external boundaries and movement within the area. If you think about the common travel area as analogous to Schengen, there could be scope for bilateral arrangements. Indeed, even in the Northern Ireland protocol it is made clear that the common travel area can continue to function, but any new bilateral arrangements, as Professor Peers says and as the protocol makes clear, would have to respect Ireland's EU law obligations.

Yes, there perhaps is facility to build up that information exchange and formalise some elements that are in there at the moment. On the other hand, we are moving out of an era of hyper-intense negotiation, and any move in this regard is likely to be in the medium term rather than the short term. In the middle of 2019, we saw the UK and Ireland agree a memorandum of understanding on the common travel area, and I suppose the key thing there is that it was not a formalised treaty. It remained simply a memorandum of understanding. For some of that idea of building up formal architecture, there clearly is a sticking point on the way to doing that. That is something that might be explored, but I just do not see the bandwidth for it happening in the short term.

Professor Mitsilegas: There is a very strong legal argument now that, with areas that are covered within this agreement, the UK has an exclusive external competence. It is very difficult for me to see how member states will be allowed to have bilateral agreements, for example on extradition, where we have a text that is very detailed. You look at the provisions. It is almost a replica of the European arrest warrant. In the annexes, the pro forma, which is very similar to the European arrest warrant, is also included. The agreement itself gives you a very detailed framework of co-operation. I would be quite surprised if there was more than that.

I know that bilateral co-operation is important to the deliberations of the Committee. There is one provision in the agreement, the provision on operational co-operation, which has to do more with police data, where the agreement explicitly allows for bilateral agreements between EU member states and the UK. That means that, if I read it a contrario, for the rest of the areas, the EU and the UK treat this as an exclusive competence, which means that the agreement covers the other areas.

As Professor Murray mentioned, even in the area of operational co-operation, the treaty is clear that EU member states must comply with EU law. That is something that we should remember when we look at how the practical co-operation between the UK and the EU member states will develop in the future. EU member states and their courts are bound by EU law when co-operating with the United Kingdom.

Q231 **Chair:** Professor Mitsilegas, we are on the cusp, as a Committee, of looking at citizenship and the right of people born in Northern Ireland to assert both Irish and British citizenship, or just one or the other, if they so wish. Should we have anything on our radar to be worried about in relation to the bilateral dynamic between the UK and the Republic vis-à-vis extradition in circumstances where a citizen born in Northern Ireland asserts their Irish citizenship, commits a crime, crosses a border into the Republic and needs to be extradited to stand trial? Is there anything there that we should be worried or anxious about, in terms of the Republic's approach to extradition of its citizens to the UK jurisdiction?

Professor Mitsilegas: I take it that this is relevant to the extradition of own nationals. I think the agreement talks about the fact that, in principle, extradition of own nationals should be allowed, but member states can limit it if they raise their own internal constitutional concerns. Some member states, even during the transitional period in 2020—Germany among others—have declared that they will stop extraditing their own nationals.

If this is the case, the agreement itself calls for the state that refuses to extradite its own nationals to do its best to provide justice within its own legal order. The question is now whether Ireland will make use of this and decide not to extradite its own nationals to the United Kingdom. This is a political choice, and I am not sure whether it is a real possibility. I will defer to others on that.

Colin Murray: Even at the height of the Northern Ireland conflict, it was never used in that way. There is not a nationality bar on extradition within the Irish constitution. It simply is not an analogous position to Germany, Slovenia and Austria, the countries Professor Mitsilegas is mentioning.

Chair: That is helpful. Thank you very much indeed.

Q232 **Stephen Farry:** Good morning to all our witnesses. I want to move on to ask a range of questions about access to a range of information

programmes of the European Union and issues around data sharing. First, I will ask a general question about how the trade and co-operation agreement allows or does not allow, as the case may be, for the efficient exchange of information between law enforcement agencies in Northern Ireland and Ireland. Under this, we can talk about things like the loss of access to the Schengen Information System II, the situation around Prüm and PNR.

Gemma Davies: The agreement includes arrangements for the timely and efficient exchange of passenger name records. There are outlines for the protection of data that is shared in that way. There are also provisions for the sharing of DNA and fingerprints, in a way that is very similar to the Prüm decisions. There seem to be quite adequate provisions in relation to passenger name records, DNA and fingerprints.

Another important aspect, which I think the Committee looked at last time, was the European Criminal Records Information System. Obviously the sharing of criminal records is particularly important between Northern Ireland and Ireland. The UK does not have access to ECRIS per se, but there are significant improvements on the 1959 convention. The TCA states that states continue to have an obligation to inform each other of the criminal convictions that are handed down in their territory. That is really important to ensure that at least one state has a complete record of all convictions, no matter where they were handed down in the EU. That will continue.

ECRIS is not real-time. ECRIS is still a system where you have to make a request, but it is an expedited system for making those requests. The TCA allows the UK to be part of that system, but there are some changes. The provisions do not cover exchange of information on the convictions of third-country nationals, and the time limits are longer. A conviction that is handed down in one state is communicated to the state of the convicted person's nationality, it says, once a month, whereas currently it has to be done as soon as is possible. Requests for looking at somebody's previous convictions have to be replied to within 20 days instead of 10.

There is an annexe to the TCA that sets out the technical provisions. It would appear to me that, although the UK is technically losing access to ECRIS, member states will continue to use ECRIS in the way in which they co-operate with the UK, and the UK can continue to use the same software that it has currently been using. I believe that means the UK can continue to use the software in the same way. Moving to 20 days instead of 10 might not seem a huge difference, but in operational matters that can be a big difference. Therefore, that is one area where potentially the UK and Ireland can try to work together to ensure there is a faster working limit in practice.

Q233 **Stephen Farry:** That is all very useful. If I may dig down a little further into the granular detail, my understanding is that, prior to Brexit, in some of the various programmes, the UK had real-time access to databases. Literally, somebody could type into a terminal in the UK and get the

information immediately. In other situations, as you say, there were requests made that were turned around fairly quickly. I would say that we are moving along a spectrum of more clunky access across that range of programmes. Is there any real-time access that we still preserve, or are we now entirely in the sphere of having to make a data request and a human being somewhere else having to make a decision to pass that information to the relevant UK authority?

Gemma Davies: My understanding is that that is the big difference between before the UK left the European Union and now. While we have access to criminal records and DNA, those are decentralised. Direct, live or real-time access to data, would have been through the Schengen Information System and the Europol Information System. The UK has lost access to those EU databases providing for real-time information.

That has been clear to the UK for some time. The EU made it very clear from an early stage that that would not be possible for a third country. Most importantly, that means loss of our access to SIS II. The size of the data gap currently seems to be unknown. I think Dr Murray made reference there to some evidence that has been submitted to other Committees in relation to that. There will need to be careful monitoring of what the capability gap is.

Q234 **Stephen Farry:** I cannot recall precisely where I heard this, but I gather that, on the number of times that various personnel and different agencies would have accessed some of those databases, we are talking in the millions of accesses across a calendar year. Is that your understanding of what the previous situation was?

Gemma Davies: That is right. In 2019, that was over 600 million times. The reason for that is that the PNC is automatically linked to SIS II. That would be a big difference with Interpol. The information has to be manually uploaded to Interpol, so there has to be some sort of decision as to whether a piece of information should be circulated via Interpol, whereas that automatically occurred with SIS II.

Q235 **Stephen Farry:** This is all very useful. How dependent are those new arrangements on the current interim data adequacy arrangements and, therefore, in terms of a longer-term data adequacy recognition being achieved over the coming months? As a follow-up to that, what would be the consequences in the event that the UK did not achieve that data adequacy? What type of steps does the UK need to take over the next number of months, or indeed weeks, to ensure it achieves that data adequacy recognition?

Gemma Davies: Do you want me to answer that?

Stephen Farry: Absolutely, yes. You are doing very well. Please proceed.

Chair: That is high praise from Mr Farry.

Gemma Davies: Data protection is a complicated issue, and I am sure my colleagues will be able to add more. In terms of your very last point—what the UK can do—there is very little at this stage. Data adequacy is a unilateral decision by the Commission that has been going on now for some 10 months. It is an intensive process. Because we now have this short transition period for data protection, in theory the outcome of that investigation will be known in four or possibly six months if there is an extension.

It is clear that data protection is very important to criminal justice co-operation. It is very important to part 3 of the agreement. The agreement says that co-operation is based on the parties' long-standing commitment to ensuring a high level of protection of personal data. Within the actual agreement itself, it spells out a lot of data protection principles—perhaps more than I would have first thought. Originally, the EU wanted the agreement to be subject to an adequacy agreement. In my reading, it seems to have pulled back on this.

Inevitably, a data adequacy decision would be the easiest way forward. However, without a data adequacy decision, it seems to me that parts of part 3 may be able to continue because there is, built into the agreement, this requirement to engage in this high level of data protection. The agreement itself states that, in the event that a data protection adequacy decision ceases to apply—so assuming that the UK had one and that at some point it ceased to apply—or in the event of serious or systemic deficiencies within one party as regards the protection of personal data, it is possible for some or all of the criminal law part of the TCA to be suspended.

Finally, the TCA does not appear to include any express provision dealing with what happens if the Commission does not adopt an adequacy decision within the data protection transition period. Without an adequacy decision, it might be possible for parts of the agreement to continue, but it would be much more cumbersome, because it would mean the UK law enforcement agencies needed to satisfy EU partners that there are adequate data protection safeguards.

Prior to the agreement, when there was a threat of a no deal, UK law enforcement agencies were being advised that, in the event of a no deal, EU senders of data would require a contract, binding legal instrument or some other way of assessing that appropriate safeguards are in place. In short, the situation is not as perilous as we had once thought it would be. However, a data adequacy decision would certainly be the best way forward. Even without it, a really high degree of alliance with EU data protection will inevitably be required to grease the wheels of part 3.

Stephen Farry: That is all very comprehensive.

Colin Murray: I do not want to depart at all from anything that the Committee has just heard, which is a fantastic summary of some really complex elements of this agreement. We talk about a spectrum of

approaches. I would just emphasise that, with each of these different databases and modes of information sharing, there is not necessarily the same move back along a spectrum. If you look at title 2 of part 3, Prüm still talks about automated data transfer for biometric data or number plates. The picture is complex and varies based on which one of these EU systems is in play, in terms of the level of access in.

The other thing to follow on data adequacy is that, yes, the transitional window, where it is accepted by the EU that data adequacy is in place, is extended by the TCA for at least four and probably six months, to let the Commission work to its determination. There are some hiccups or potential roadblocks with regard to that data adequacy ruling. Perhaps the most significant of those is the Court of Justice of the European Union's recent ruling on the Investigatory Powers Act 2016 and the breaches of EU law that it found with regard to that before the end of the transition window.

For now, the UK is committed to retaining the GDPR as UK retained law. If the Commission was not to accept data adequacy on the basis of that operating as it should, it would be setting a dizzyingly high bar for any third country to achieve a data adequacy ruling.

Q236 **Chair:** Dr Murray, do you have any concerns, given the issues you have just talked about, of, effectively, this providing a bit of a field day for defence counsel during a trial?

Colin Murray: There are particular windows in terms of how evidence is used. As the Committee has heard in previous sessions, evidence transfer and how material is moved from one jurisdiction to another, in terms of trial, is an entirely separate matter again from data transfer as part of operational policing or in the movement of policing resources and the focus of it. I do not see that any of these issues with databases and how they are going to operate are going to come up on a trial level.

Q237 **Chair:** There is nothing about admissibility.

Colin Murray: In terms of European Union law, there are separate European Union measures on movement of evidence. Ireland has not always participated to the same level in those as the UK has done. In terms of how this is going to work on a Northern Ireland basis, in that particular relationship, I do not see any major changes. I suspect that Professor Peers might want to come in on that point.

Professor Peers: Where litigation tends to happen on data protection is not usually in criminal trials as such. The data would often be used by the police to identify someone and then you gather something else. If you think someone might have committed a bank robbery, you use it to identify your guy, then you get the CCTV, or perhaps his associates to rat on him or something like that. That is the basis of your trial.

Where it does get litigated is by privacy rights NGOs, or individuals, like Mr Schrems, who keeps going back to the EU court and raising privacy

arguments. There are a load of different NGOs that have been litigating over the years. Some of them are British; some are French, Belgian and so on. There are already cases pending about passenger name records within the EU—whether that law is even valid on human rights grounds. Of course, if there is a problem with the internal law, there might be a problem with the TCA provisions on passenger name records potentially as well, or they might have their separate problem, given that they are with a non-EU country.

I imagine there will be litigation, but of a different nature than from criminal trials. It will be by privacy NGOs raising some argument or another, whatever the relationship ends up as after this transition period between the UK and the EU.

Q238 **Mr Campbell:** I wanted to get a query answered by Professor Davies, given her answer to Stephen Farry. When she talked about the number of real-time requests in 2019, what was the figure again—an extraordinarily high figure?

Gemma Davies: It was just over 600 million. That gets queried quite often. The reason for that is the interconnectedness between the PNC and SIS II, so most of those are happening automatically.

Q239 **Mr Campbell:** Just imagine the scale of those numbers of requests. That is over 10 million a week. That must cover a huge multitude of reasons for requests. There must be perfectly straightforward, mundane reasons. Is there any way of establishing, out of all those 600 million, how many actually resulted in cases going to court and convictions?

Gemma Davies: I certainly would not have that data, but I am sure there would be somebody within policing who would be better placed to answer that. One of the things is the amount of times that SIS II is accessed. On the other hand, there are the figures for how many times we have uploaded information to SIS II, so how much UK information is circulating. Again, I do not have those figures in front of me. I want to say that it was 40,000, but perhaps I can confirm. There were 40,000 pieces of information that the UK was circulating on objects and persons of interest, but perhaps I could confirm those figures after the meeting, in case I am incorrect.

Mr Campbell: That is fine, thanks.

Q240 **Chair:** Just to clarify on that figure, because, as Mr Campbell said, it is a very big number indeed, is the differential like that between important emails and spam emails? The data just gets uploaded, which drives the numbers, but 95% of the information is literally so bog standard and irrelevant that nobody ever looks at it. The germane, important stuff will still be able to be uploaded, shared and looked at. In essence, we are closing down the spam folder.

Gemma Davies: It could be seen as an element of that, yes. Now there has to be a decision made about what is uploaded to Interpol. I am

assuming, and there would probably be those who could give evidence on that from an operational perspective. There would have to be some sort of reason. There would have to be some information that would make you think it was worth while circulating on the I-24/7 database. There is a manual process.

The downside of that is that, if it is automatic, there could be cases that have a cross-border element, where an officer is unaware. A good example is stolen vehicles. In a regular, run-of-the-mill situation where a vehicle is stolen, that might remain in the UK, or it could have been taken to a different country. Will every stolen vehicle be uploaded to I-24/7, or will just some of them be? Will that create a gap? That is unknown. There are questions still.

Q241 **Chair:** In essence, there are risks, but one should not become too exercised about a big gap in the quantum of data.

Gemma Davies: It would be true that not all those times would result in information that came from SIS II. It is not 600 million times that UK police officers have used information that came from other countries via SIS II. That is inaccurate. It is how many times the system was accessed.

Q242 **Mr Goodwill:** It is slightly ironic that, on 1 January this year, the Republic of Ireland signed up and connected to SIS II, the day after the UK lost real-time access to it. Despite that, are there any benefits from that happening that we will still receive? I am tempted to ask Gemma Davies, but you have been doing a lot of the heavy lifting, so Dr Murray might want to come in on that first.

Colin Murray: The European Scrutiny Committee picked up on this in December, with a report flagging the significance of Ireland joining. That significance matters in terms of operational policing co-operation through the joint task force set up under Fresh Start in 2015. The work that the Committee heard of can be done by a joint team of PSNI and An Garda Siochana. That operational sharing is still going to exist and is going to become an important hub, where those police forces do not have to rely purely upon, say, Europol liaison or the association the UK has through that agency. That is going to matter an awful lot on the island of Ireland.

Beyond that, the European Scrutiny Committee raised the issue as to whether this is going to be a way of general information flowing into law enforcement agencies across the UK. That is maybe a little excitable, in terms of the potential for this. I do not think there is necessarily an opportunity for every single police force in the UK to send liaison officers to the PSNI, and all be crowding around the water cooler and waiting to hear titbits from what comes through SIS II into the PSNI.

The fact of the matter is, in terms of the joint task force, that Ireland is going to take the lead in extracting information and getting information that it finds useful. Then it will do the process of sifting that and thinking what needs to be shared to the operational policing teams that happen

through the joint task force. It is a workaround. It is going to be significant in the context of police co-operation on the island of Ireland. I do not think it is a workaround at an Ireland-UK overarching level. The liaison that is going on through Europol will still be the main conduit. I do not think this is an appropriate conduit to do more than what institutions on the island of Ireland have already been set up to do.

Q243 **Mr Goodwill:** You are saying, in effect, that this would only apply if it was a genuinely joint operation. It could not just be that a detective in Belfast has a mate down in Dublin, gives him a call and asks, "Can you have a quick look on the system and check this out for me?" Would it be legal to do that?

Colin Murray: Ireland, as you have said, has joined the system since 1 January, but—and it is certainly not a legal term in the context—it is in for a probationary period. How it uses this information, particularly with regard to data protection elements, is one of the things that is overseen by the EU, as to whether that membership of SIS II is firmed up and Ireland continues to get this access. After Brexit, this shift towards joining SIS II is very significant for Ireland. I do not think that any member of the Gardaí is going to be encouraged to share off-the-cuff information outside those formal channels at this point.

Q244 **Chair:** There would be no merit, would there, in doing it off the cuff, if that meant it was not admissible?

Colin Murray: This is the difference between a trial and a police investigation. I think that is what Professor Davies was talking about in terms of the number of alerts that are generated with this system. The actual directing of police resources and trying to find intelligence is a very separate issue from evidence within a trial.

No, there would be no point in off-the-cuff materials being used as evidence, but, in terms of where you direct police resources, sometimes those relationships are very important. It is how policing has been able to function, and indeed how, as we have heard, the UK has taken a lead and disseminated through Europol a tradition of intelligence-led policing. It is not about what is happening at a trial. It is about what is happening in co-operation with police agencies to try to get on top of criminal activity, ahead of starting those investigations.

Q245 **Fay Jones:** We have touched on this a little already this morning, but to what extent do you feel that the arrangements agreed between the EU and the UK on the exchange of criminal records and information are an adequate replacement for losing access to the European Criminal Records Information System? Professor Davies, you touched on this at the very beginning. How much do you think what is agreed in the deal makes up for the loss of access to the European Criminal Records Information System?

Gemma Davies: I dealt with some of that before, so other witnesses may have something to add or say differently on that. There are a

number of areas where the TCA means that there is a loss of connection, if that might be the word. First, it is about how quickly a conviction is communicated to the state of the convicted person's nationality. If we had fallen back on the convention, the states would only be obliged to notify a state once a year. So once a year you would have to contact the UK; France would have to contact the UK once a year and tell it how many of its nationals had been convicted during that year.

There is a really significant improvement to that, in that I think the time limits are now that convictions handed down in a state have to be communicated once per month. However, under ECRIS it was as soon as possible. As I said before, I think requests have to be replied to within 20 days, instead of 10 days. It waits to be seen exactly how the UK will be able to access criminal records information. If it is able to use the same technical platform that it has been previously using, it means that, although the legal basis upon which we are accessing criminal records has changed, the way in which we have done it remains the same. That should minimise disruption, but there are still some aspects where we are not quite as well off as we were before.

As we said, 20 days might not seem a great difference from 10 days, but in many operational cases it would be. It means that police officers can try to speed up that process in cases that are fast moving or very important. That is an area where the UK and Ireland would be able to work together to agree closer time limits to ensure that criminal records are shared as quickly as possible, bearing in mind the border.

Q246 **Chair:** I want to ask Professor Mitsilegas something that almost takes us to the top of the questioning that we had. The Government have referred to the agreement for co-operation, particularly with relation to Europol, as ambitious. I think we heard at the start of the meeting that it is pretty run of the mill as per any third country. Is that a fair assessment? Have the Government slightly over-egged the pudding?

Professor Mitsilegas: On Europol, we have the constraint of the UK now being a third country. That means that, in the development of the strategy and vision for Europol in the future, the UK will be less influential. It may be an observer, but it will no longer be on the management board. There is an effort to maintain data exchange, again with no direct access to the Europol databases, but with data exchange between the UK and Europol, including direct data exchange. We will see how this works in the future.

The truth lies somewhere in the middle of the two views that you expressed in your question. We have to play with the limitations and constraints of third-country participation in Europol. I suspect that in the future, in practice, the UK will be the most closely connected third country to Europol compared to other third countries, but that does not replicate what the UK had as an EU member state, one that influenced quite substantially the vision and functions of Europol, and exported the model of UK intelligence-led policing, arguably, at the EU level.

Q247 **Chair:** I want to ask each of you in turn for a very short answer to this. On the presumption that it will be desirable to deepen the UK's co-operation in Europol and Eurojust over the coming months and years, what one thing—you may find that the four of you share the one thing—would you like to see movement on in that area?

Colin Murray: Before we can even start to make assumptions, we need to see the detail of how the UK is going to operate its association with Europol, information on numbers of officers, how they are going to operate and where they are going to be deployed. As Professor Mitsilegas says, the UK is going to be the most important third-country partner for Europol simply by virtue of size and proximity. It is going to matter more than Switzerland or Norway, which have similar arrangements. It is a bigger country and has a tradition of leadership within Europol. Law enforcement agencies within the UK are going to want to see the detail of how the UK intends to operationalise this.

Professor Peers: We will have to see in practice where the information gaps are. There might of course be workarounds bilaterally, via Interpol and so on. Something like more direct access and input into the Europol Information System would be a good thing to have.

Gemma Davies: The extent of the relationship between the UK and Europol is not yet fully known. I think article 59 specifically states that working arrangements complementing or implementing this title can be made. As far as I can see, in the Europol part, there is no specific mention of the UK's participation in joint investigation teams. There is an oblique reference in relation to mutual legal assistance, but it would appear to me that there is no express legal basis in the agreement to set up such a team. A separate agreement is needed that would outline UK participation in JITs. I would like to see that as quickly as possible.

Professor Mitsilegas: To add to what colleagues have said, the UK needs to show a clear vision and commitment to what it wants to do. This applies to both Europol and individual member states, for example Ireland. For the UK now, the key task is to keep the operational co-operation as prioritised, to the extent possible, as it was before. There is a lot of work within the working groups and the specialised committee on law enforcement to be done. I would urge the UK to be fully committed, to send its experts and to try to get some concrete solutions to the most pressing problems as soon as possible.

Chair: Thank you. That is very helpful.

Q248 **Stephanie Peacock:** Will Northern Ireland law enforcement agencies be able to be involved in joint investigation teams with Irish law enforcement agencies, when they are supported by Europol and Eurojust, under the agreement?

Chair: That is a very good, specific question.

Professor Mitsilegas: I can start on that.

Chair: Give us a good, specific answer.

Professor Mitsilegas: There is a legal basis in the agreement on joint investigation teams. It is possible for these to be instituted. The agreement makes clear that their work is governed by EU law. There are many questions. To go to the other half of your question, as Gemma mentioned, whether this can be within Europol or Eurojust is unclear in the agreement. We can read it either way. I would personally support a more expansive reading. I see it as a general legal basis in favour of joint investigation teams, so I do not see why not.

There is a very big debate about the extent to which the UK can initiate a joint investigation team, as a third country. This remains to be seen. This is also something to be ironed out now, at this stage. There are many examples of joint investigation teams involving third countries, within the framework of Eurojust as well, not only on Europol. These are details that need to be ironed out. I read the text of the agreement as sufficiently flexible to allow for co-operation in the field.

Colin Murray: To back up that point, certainly in title 8 of part 3 there is that provision on joint investigation teams within mutual assistance. The difficulty is that it is not particularly fleshed out. It is only a few lines long in thousands of pages' worth of document. It is the boundaries of this arrangement. Can the UK initiate one of these teams? There is nothing to suggest that can be done within this. How does co-operation work within it? The provision is specific that it operates on the basis of EU law. That would then be the dominant legal framework overarching how any joint investigation team works, even if the initiation point is resolved.

Q249 **Ian Paisley:** I was reading that the Home Secretary takes a very strong view on all this. She says that the UK is going to be a much safer place. She has outlined five tools that she intends to use. She is going to give the police more tools to keep the public safe, with stronger powers to police and other agencies in the UK. She is going to ban foreign criminals from entering the UK who have served more than 12 months in jail. She is going to refuse to accept inaccurate identity cards that are often used for travel within the EU. She is going to crack down on illegal imports of goods with a pre-arrival data process that she is setting up. Have you examined any of those mechanisms, in your work, to see if they match with the words that the UK will be a safer place?

Professor Peers: I could answer perhaps on two of those. With identity cards, there is legislation from two or three years ago that aims to make them more secure and to deal with any particular concerns about that. Whether that is fully applied by now or how it will work out in practice is unknown perhaps, but the intention is there to tighten up abuses and misuses of ID cards.

Q250 **Ian Paisley:** That is a very helpful answer. The reason for the crackdown, I suppose, is because identity cards have been abused in the past. It appears that the Home Secretary has taken the view that she is

not going to accept them, because they are so inaccurate, and she is going to stick to passports instead. Is that your understanding also?

Professor Peers: Yes. There has to be an exception for those covered by the withdrawal agreement for several years, but the Government take account of that. It is everybody else who is not covered by the withdrawal agreement, French people living in France and so on. I do not know, however, to what extent the people using identity documents are fraudulent. To whatever extent it exists, the intention is there and the legislation is there to try to reduce it. It is very hard to quantify what level of criminality is being solved by not recognising those cards.

On banning criminals, that certainly is tighter than what EU free movement law allows for. EU free movement law says you have to make a case-by-case decision to expel or refuse entry to EU citizens. To make it automatic is a tighter rule. However, you have to have the criminal record data to hand. As we have already heard, you will not have it to hand—some sort of easily searchable database—at the borders to know if the guy in front of you has a one-year sentence or not. You may very well have UK records. If you have them available, you can use them to see if there is a UK record, or you may have got the data before on this Latvian guy in front of you and you know for sure they have a sentence. In general, we are not easily going to know whether that person has a criminal sentence or not.

Ian Paisley: I am wondering if any other work has actually been done on those five issues that the Home Secretary says she is concentrating on to make the UK safer. Certainly, from what the professor has told us, it indicates that there is a tightening of the rules to make the UK safer. That obviously has to be welcomed. There are issues to do with sharing data, but I am wondering if any work has been done to explore these avenues, in particular the additional tools that the police and other agencies will be given.

Mr Goodwill: Could I interject, as a former Immigration Minister?

Chair: Yes, of course.

Mr Goodwill: We had a big problem with countries like Italy and Greece, where you could get an ID card at your local town hall, which did not include any biometric information. They were often abused by, for example, Albanians, either by forging them or by getting hold of them. By only allowing a biometric travel document, that will certainly close that particular loophole. Sorry, I turned into a witness there for a second. I apologise.

Chair: It is nice to see you wearing two hats, Robert, and very fitting they are.

Q251 **Claire Hanna:** I wanted to look at the European convention on human rights and the extent to which the commitments to that are underpinned

by the agreement. I am not sure exactly who would be most relevant.

Professor Peers: There is a potential fast-track route to terminating or suspending part 3 if either the UK or a member state decides to denounce the ECHR or its protocols—the three that the UK has signed up to, that is. It is not automatic, but it would be fairly likely in practice, if the UK were to denounce the ECHR or one of those three protocols, that the EU would seriously consider some kind of suspension.

There is no clear reference to national implementation, so it may be that changes to the Human Rights Act, or repealing it without replacement, would not necessarily trigger this fast track. I still think they would trigger some doubts and concerns if it is a very serious weakening of the Human Rights Act from the EU's point of view. In either case, I think you would also have litigation. You would have people arguing in court that they should not be extradited to the UK, for instance, because of the circumstances of having denounced the ECHR. You would have that going on as well as a political response, which would be fairly likely.

Q252 **Claire Hanna:** You have probably anticipated where I was going with those questions there. Looking ahead to Peter Gross's upcoming review, if the UK Government follow on with hints that have been given that they will withdraw from this, effectively this agreement would have to be revisited. Is that what you are saying?

Professor Peers: I am saying it is not automatically ending if the UK leaves the ECHR. The EU would still have to make a decision how to respond. If it decides to respond, the termination of part 3 is very quick. It ends as soon as the denunciation of the ECHR becomes effective. We cannot be absolutely certain that it would terminate it, but there would be a lot of political pressure. Even if the politicians dither, there would be case law in national courts being sent to the Court of Justice—extradition cases are often fast-tracked—asking questions about whether co-operation should still continue on the ground. Could you, under a national constitution, or as a decision of a national court, start to suspend extraditions on that ground? You would have a lot of pressure happening on that level as well.

Professor Mitsilegas: There are two levels to address your question. One is what happens if the UK decides to repeal the Human Rights Act. The second is if it decides to withdraw from the European convention on human rights. I was relieved to see that, in the agreement, the EU managed to include some reference to the issue of giving effect domestically to the ECHR. It does not mention the Human Rights Act as such, but it is clear that any decision from the UK to repeal the Human Rights Act will affect the functioning of the agreement.

As Professor Peers said, I personally find it untenable, in the scenario that the UK withdraws from the European convention on human rights, that you can expect the level of close co-operation in these fields that has been achieved with this agreement. These fields all have implications for

human rights, not only in extradition but in data exchange and law enforcement operations. The UK is very close now to the European Union in a number of areas. It is very difficult for this close co-operation to survive if a third country withdraws from the European convention on human rights, which forms a very important benchmark for the European Union in terms of close relations with third countries.

Colin Murray: This level of co-operation comes with alignment. In a lot of regards, that is something the UK Government are very happy with. Even if you look at the Bill that was put through Parliament on 30 December, you have to go 350 pages into the trade and co-operation agreement before you get to provisions on police and justice co-operation. It is there front and centre at part 1 of the Bill, now the Act, that this co-operation has been retained.

When we talk about the European arrest warrant, we are talking about something that is profoundly different from traditional diplomatic extradition processes. We are looking at a system that relies on mutual trust between justice systems and that is founded upon those human rights protections being embedded within those systems. If you take this brick out, this co-operation win that has come as part of the agreement will simply fall away.

Generally in the document, if you look at the overarching legal provisions you can find in title 2 of part 6, there is loose mention of the UK's international and human rights commitments. When it comes to part 3 and specifically with regard to the suspect surrender arrangement replacing the European arrest warrant, there is very specific mention of the European convention and its operation within UK domestic law. I can sign up to everything that Professors Mitsilegas and Peers have said. The European Union would not allow this system to continue to function if the UK was not fully implementing the European convention on human rights within domestic law, or at least as fully as it is now.

Q253 **Claire Hanna:** That is very helpful. To follow up, Colin Murray, I know you specifically worked on the issue of that stand-off on prisoners' voting rights. Are there other specific issues that you anticipate might cause tensions between the UK and the EU, in terms of differential approaches that are allowed within the operation of this?

Colin Murray: The idea of mutual confidence in a justice system almost ends up functioning as a bit of a black box. Once you have accepted that a justice system within another part of Europe—and under this agreement that means the UK and the European Union countries—is comparable, courts do not tend to go behind that ruling of comparability. That determination is made at an executive level. When the UK labels the remaining EU member states as tier 1 countries, when extradition cases have come up in the past and tier 1 has been mentioned by the UK courts, the courts have been very clear: "We are not going to go behind the determination. We are not interested in the nitty-gritty of particular

disputes over how certain human rights apply. We are looking at a general application of standards".

If you look at the Court of Justice of the European Union's case law, in cases like Melloni it has really not looked to go behind the general idea of mutual trust and confidence in other criminal justice systems. Once the architecture of human rights compliance is in play and has been accepted at a general level, as long as nothing big is done to knock huge chunks out of that, the system continues to function through it. It is not necessarily as granular as looking into controversies over particular rights and how they are applied.

Chair: I thank our witnesses for what have been some very reassuring answers on what is clearly an important question across the piece, particularly with regards to the security and safety of people in Northern Ireland. It is not a done thing yet, but I think everybody is now saying this is a dynamic process, capable of evolution, tweak and reform as experience shapes and dictates. That is very encouraging. Thank you very much indeed for joining us and giving us your contributions this morning.