

Committee on Exiting the European Union

Oral evidence: the UK's negotiating objectives for its withdrawal from the EU, HC 1072

Tuesday 28 February 2017

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Members present: Hilary Benn (Chair); Alistair Burt; Mr Alistair Carmichael; Joanna Cherry; Jonathan Edwards; Michael Gove; Mr Peter Lilley; Karl McCartney; Mr Pat McFadden; Craig Mackinlay; Dominic Raab; Stephen Timms.

Questions 1136 - 1232

Witnesses

I: David Anderson QC, Independent Reviewer of Terrorism Legislation; David Armond, Deputy Director General, National Crime Agency; Professor Steve Peers, University of Essex.

Examination of witnesses

Witnesses: David Anderson QC, David Armond and Professor Steve Peers.

Q1136 **Chair:** Can I begin by welcoming our witnesses, Professor Steve Peers from the University of Essex, David Anderson QC and David Armond, the Deputy Director General of the National Crime Agency? Mr Anderson, you have a range of titles and responsibilities, which we are very aware of. We are very grateful to all of you for giving up your valuable time to come to appear before the Committee today. We have a lot of ground to cover and a lot of members who will want to ask questions, so if you could keep your answers as succinct, but I am sure they will be informative, as possible, that would be helpful.

I would like to begin by asking this to each of you in turn. The Secretary of State for Exiting the European Union said that the Government's aim is to "keep our justice and security arrangements at least as strong as they are". Clearly, whether that happens or not is going to depend on the outcome of the negotiations we are about to embark upon. I would just



like to ask you to begin by giving us an indication of what the consequence would be if we were not able, in the negotiations, to keep our arrangements as strong as they are. Do you have a view on the likelihood of us being able to achieve that or not?

David Anderson: Plainly, if we cannot replicate things as good as we have, then the fight against crime of all kinds is going to be more difficult. I am not one of those who put it all on terrorism. Terrorism is an important part of the picture, but by no means the biggest one. As a consequence, we will be less safe, partly because we will not have access to the information that we currently have access to, and partly because there will be greater delays built into the system, whether you are looking at extradition or other forms of co-operation.

David Armond: Quite often, when we talk about the arrangements we have through JHA measures and our membership of Europol, the focus is on serious crime and terrorism, but, of course, they actually impact on policing and safety on our streets. As an example, we are not a member of Schengen but have access to the Schengen information system. That is linked to the police national computer, so a policeman on the streets in Birmingham can stop a car, do a check on it, find it is stolen in France and that the occupants are wanted for serious offences. That in itself is an amazing additional protection for the UK.

In terms of the access we have obtained through Europol and the influence we exert through having a British director, who has implemented since 2008 a whole load of what are really British intelligence management systems, we would have a quite steep hill to climb if we were to lose access to all of them. The final point I would make is on the European arrest warrant. In the event that we lose that, which is likely, we would need to go through a process of re-engaging with all the member states to negotiate treaties on extradition, because many countries have repealed the legislation.

Professor Steve Peers: The likelihood is that we retain access to some of what we are currently part of. It is always possible that we retain access to all of it, but that seems a less likely scenario. Depending on what we give up and what the terms are, that will have some impact on the effectiveness of crime-fighting in this particular field, where we are usually talking about crimes with an international dimension involving the European Union states. Purely domestic crimes and crimes involving only the United States or other non-EU countries are not affected. In that specific field, whatever we end up losing is going to have some form of impact. It is hard to quantify in detail without knowing what the outcome is.

Q1137 **Chair:** You said you thought it would be easier to carry on with some as opposed to others. Which are the ones that you think are going to be trickier?



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Professor Steve Peers: It is hard to see at this point what the UK is going to ask for and what the other side is going to ask for. Anything that the UK asks for, if it is willing to go along with the texts as they are, is going to be a lot easier. As long as the UK says, "We will continue to apply the law exactly as it is", that should in principle be a much easier negotiation. Then the only issue that might possibly come up is the jurisdiction of the Court of Justice. As I said, there is a future question of whether to continue to apply those judgments, as well as a question over what happens if those laws are amended. Does the UK go along with the amendments? Those questions will inevitably come up, but at least if our starting point is that we are happy to continue applying the law as it is, that ought to be an easy negotiation, to the extent that we are willing to say that.

Q1138 **Chair:** My second question relates to the time it is going to take to replace what we have at the moment with an agreement, covering the period from the moment we leave, as to what we would like to carry on with. As you will be aware, the chief negotiator for the EU, Michel Barnier, has said he would hope to conclude the negotiations by October, the autumn of 2018, to give time for the results to be scrutinised. Assuming Article 50 is triggered by the end of March, then that is going to leave about 18 months.

Given your knowledge of the issues that we are examining today, how likely do you think it is that the work that would be needed to come up with new arrangements, bearing in mind the fact that we start from the same place, could be concluded in that period? Secondly, if it could not be concluded, how important would it be for us to have some kind of transitional arrangements that would cover the period between us leaving in two and a bit years' time and finally concluding those new arrangements covering the area of justice, security and home affairs?

David Anderson: The time it takes to negotiate something depends on what you want and where you start from. We start at the moment from a place that is aligned, but there is a huge variety. If you look at the EU agencies, for example Europol, then there are a number of countries with operational agreements with Europol, which I am sure is the least we would want: the US, Australia, Canada, Colombia, Norway and Switzerland. Those took between five and 12 years to negotiate.

Chair: Five to 12 years?

David Anderson: Yes, I believe that is right. On the other hand, if you look at Eurojust, which is the prosecutorial co-ordination body, I believe the US was admitted to some sort of status within Eurojust within about a year of 9/11. I very much echo what Steve says. It is going to depend on what we want. Plainly, the others will not anticipate that we, as a third country, have a place on the management board or the steering group. They may also not anticipate that we would have access in real time to all the data. For example, if you are Norway in Europol then you



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have to ask the agency to do the search for you. You cannot do it yourself. If we were happy with that, there would not be an issue.

There are also two bigger issues. One is the question of dispute resolution. How theological are we going to be about resisting the judgments of the European Court? Regarding data protection, which I am sure you will come on to, in light of the Investigatory Powers Act and the Davis-Watson ruling, which is extremely significant, in December of last year, what will we have to do to demonstrate that, not only now but in the future, we are on board with European standards?

David Armond: Just to echo my colleague, I am aware of the arrangements and negotiations that have been in hand around Norway and Iceland's membership of the European arrest warrant process. They have taken 15 years. Although negotiations started back in 2001 and an agreement was reached in 2006, the agreement still has not been ratified. To this day, they still do not have access to the EAW.

I agree with my colleague that the minimum we should be seeking to achieve is an operational agreement with Europol. That should be eminently possible to do. I would add two things. First, there has never been a precedent for a member state to leave, so precedents are not necessarily helpful. We are fully embedded in the architecture and I firmly believe, as do my senior colleagues in Europe's police forces, that the UK is a safer place because of our intelligence exchange and co-operation with the Europeans. Similarly, Europe is a safer place because of our contribution to intelligence.

Provided we focus on safety and protection of our citizens as an issue, and do not use these tools and measures as a bargaining chip or other leverage, we can achieve what we need, but it is going to be tight and I think there will need to be transitional arrangements for some.

Chair: You do.

David Armond: Yes.

Chair: That is helpful.

Q1139 **Dominic Raab:** Thank you all for coming to give evidence. The EU and Europol have data-sharing arrangements, for example passenger name records, with the US and Australia. Given that we will be, as you rightly pointed out, a departing member with existing co-operation, is there any reason why that should not be possible in the future, subject to all the technical hammering out of the details that you have already alluded to? There is no in-principle reason why that should not be eminently possible. Does anyone disagree with that?

David Anderson: For myself, I would be least concerned about Europol. I am not saying we can get everything that the members of Europol get, because currently nobody with an operational relationship gets that real time access to data, but there are good precedents for countries outside



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the EU making operational agreements that probably give them most of what they want. What we would undoubtedly lose, it seems to me, is the leadership role that we currently play, not only in Europol, but certainly in counterterrorism right across the piece and in Europe.

Q1140 Dominic Raab: Sorry, I should have been clearer. My specific question was on data sharing and I gave PNR as an example. That is something that is done with non-EU countries. There is no reason the UK cannot do it. There is every reason that, as a former member, mutual self-interest would drive us towards agreement, subject, I accept, to the time it takes to conclude that.

David Anderson: Yes, but be careful. Just look at what is happening at the moment with the EU-Canada PNR agreement, which similarly was forged for completely pragmatic reasons, but which appears to be running into quite serious problems in the European Court. Put that together with the Davis-Watson case, which is very hostile to this whole idea of the blanket collection and retention of data, and you find quite a neuralgic issue that could arise between the UK and Europe.

It is going to arise whether we are in the EU or outside the EU, but the perception, which I think is accurate, is that we have been the ones in Europe pushing for greater operational efficiency, and the Germans and the east Europeans have been pushing for more data protection. Because we have been involved we got the PNR directive through, just as we got the data retention directive through in 2006. That was largely because of British influence, not only in the Council but in the Parliament.

In our absence, it seems to me, the relative fondness of the remaining 27 for data protection is only going to increase. The issue that we are too nosy is not going to go away. Everything you say is right, and it is true that we produce a lot of intelligence and everybody likes that, but it would be quite wrong to deduce from that that the world is simply going to fall at our feet if we snap our fingers and say, "We want a unique relationship with these bodies", because we also have some special demands.

We may be saying, for example on arrest warrants, "We want more in the way of proportionality". I do not know. We may be saying on Europol, "We are not entirely happy about some of your case law on data retention". It will be a negotiation. We bring great strengths to the negotiation, but to the extent that we are asking for special treatment we may find it difficult.

Q1141 Dominic Raab: In relation to Europol, my understanding is that there are 12 non-EU countries with liaison officers at Europol. The US has been mentioned in relation to Eurojust. My understanding is that they have more liaison officers at Europol than most EU countries. Again, subject to dotting the Is and crossing the Ts on the technical questions of firming up protocols, MOUs or whatever it may be, there is no reason in principle, given the mutual interest, why that should not be possible for the UK on



departure.

David Armond: It is eminently possible. At the moment, in terms of the liaison bureaux, the UK and the US have the same size team present—18 people. The issue is this, and my colleague referred to it earlier on. At the moment, we have direct access to European intelligence systems. Although we could still have a seat as a liaison bureau, first, the size of the team that is present might be culled to an extent because of available office space, and, secondly, we would have to make all our inquiries through a liaison structure rather than by direct access to the systems. It is certainly possible and we would expect that a similar arrangement could take place for us.

Q1142 **Dominic Raab:** Can I ask David Anderson about the EAW? As David Armond referred to, there are clearly significant law enforcement benefits from the European arrest warrant. I also recall during the independent review of extradition our current Lord Chief Justice pointing out the widespread civil liberties concerns and the problems with it. We have had domestic cases, from Andrew Symeou to Michael Turner—I have a current case of Colin Dines—where the EAW frankly does not fit up to the billing of British standards of due process, particularly at the point of the issuing of the warrant and the way it is approved.

We are now leaving the EU. I know you said before the vote, David, that there was no reason why we could not continue extradition arrangements. I wondered what scope you thought there was for continuing the extradition relationship we have, avoiding going back to the Council of Europe conventions, which are cumbersome and slow, but also making sure that we do not hang innocent citizens out to dry in the way that, frankly, I have seen happen in the past. Do you think there is scope for even tweaking the safeguards that apply when a UK court considers an EAW request? Ought that to be possible?

David Anderson: I entirely understand where you are coming from, but your question, if I may say so, demonstrates exactly why extradition could be really difficult. There is no question but that we use the European arrest warrant far more than we used to use old extradition proceedings. We used to extradite about 60 people a year, before 2004. The number is now 600; 95% of those are foreign nationals accused or convicted of criminal offences.

Common sense says, "Let us continue with the arrest warrant and see if we can improve it". As regards improvement, I would say two things. First, there have been some recent developments in the European Court jurisprudence that allow member states, for example, not so readily to extradite people fearing human rights abuses. I will leave Steve to comment in more detail on that, because he knows the case law better than I do.

Also, there will be great resistance to us trying to carve out a special position for ourselves. You only have to look at Norway and Iceland,



which have an EAW agreement, as David said, but it is still not in force. If we want more proportionality injected into the system, the Germans are going to say, "Hang on, we do not want to send you our nationals any more", because that is what they have negotiated with Norway and Iceland. Others will want an exception for political offences.

Q1143 Dominic Raab: I understand the dilemma. I am interested in what the alternatives are. Is it your view that we continue a system that has been demonstrably proven to be challenging when it comes to due process and presumption of innocence; or are you saying that within the existing framework, if we were to continue it, we have more room for manoeuvre to beef up the national level checks? I am interested to know whether there is any scope for improving the due process without encountering the kind of pushback that you have understandably highlighted.

David Anderson: We can certainly try. We are leaving now, so one takes that as the baseline. There is going to be a trade-off between getting an early deal on extradition and getting a bespoke deal on extradition. I would be very surprised if we could manage both.

Q1144 Dominic Raab: Can I ask one final question to David Armond? As a non-Schengen EU member, the UK bars EU nationals only when there is a serious, present and genuine threat. The test for barring non-EU nationals is that their presence is not conducive to the public good. Do you think that, as a security measure—I am thinking of terrorism, but it could apply more broadly—as we leave the EU we should apply the existing EU threshold or the UK test that we apply to non-EU nationals across the board, given that there is clearly a security dividend, in terms of preventative checks, in the non-EU rules that we currently apply?

David Armond: It feels like a question that I can only agree with you on.

Dominic Raab: Feel free to indulge your best instincts.

David Armond: If we are no longer members of the EU, the position we take in relation to the checks and due diligence will be the one that applies to the rest of the world. If you do not mind, I want to come back to the EAW point.

Q1145 Dominic Raab: I am conscious of time and I want to nail this particular question, because it is important for a sense of balance. My understanding is that, since 2006, on the Home Office's data we have barred 11,000 from the EU on the grounds that I highlighted and over 200,000 from non-EU countries. That is not entirely reflective, because it depends on the flows, the number of people coming and, indeed, the threat. Can you see a very significant security advantage in being able to revert to the non-EU rules that we currently have in place, or have you not considered that?

David Armond: I do not know the detail of those figures. They seem very large. I take your word for it that those are the numbers. Remember that, by being members of the EU and having the EAW, there



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are significant numbers of people who are removed from our country because they are wanted on arrest warrants.

Q1146 Dominic Raab: I want to be really clear on this point, because I appreciate there are pros and cons in all this, and I am trying to focus on one of the opportunities. It is very clear, and I just wonder what your assessment of the advantage is. The numbers for EAW are different, because that is not a preventative check. This is about a preventative check at the border. It has been highlighted in relation to the recent Brussels-Birmingham case that has been going through the High Court. I just wondered whether you had any assessment—you may not have—as to the advantage to the UK in applying the current non-EU threshold in relation to EU nationals as a matter of preventative checks. If you have not done the assessment, I totally understand, but I just wonder whether you could put an assessment on it.

David Armond: I have a very strong view. Anything that we can do to prevent the entry into this country or remainder in this country of people who represent a threat to our national security is advantageous, so I agree with your position.

Q1147 Karl McCartney: Mr Anderson, you slipped in a statistic there that I want to drill down and get some detail on, if I could. You mentioned roughly 600 extraditions per year; 95% of those are EU citizens being extradited. That would not be for parking tickets and things like that. Can you give us an explanation of how serious the crimes that they have committed are? As for the people we have brought back to our country who have gone to European states, is it roughly the same number and the same sort of crimes?

David Anderson: On the first question, I do not have the figures to hand. Steve Peers may well know more about that. In relation to extraditions to the United Kingdom under the European arrest warrant, they are less numerous. They run at about 15% of the rate of our use of the EAW to other EU countries.

Professor Steve Peers: I know it is significantly less than the other way round. The people we are removing from this country are people we probably do not want here, if they have been convicted or at least have been accused of offences. It is necessary to wait until that has been resolved before we decide if we want them here. That is a factor to consider when you talk about the numbers who are being removed.

Q1148 Karl McCartney: What crimes are we talking about? It is not parking tickets, is it?

Professor Steve Peers: I have never seen a breakdown by crime, but there is a threshold of six months or one year potential or actual sentence before you can send a European arrest warrant in respect of somebody. That can be, however, and has been in certain cases, used for some ridiculously minor crimes. The most ridiculous I have seen are theft of a beer can at a house party, theft of a piglet and theft of a



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wardrobe door that someone did not pay a carpenter for, so he took the wardrobe door away. Those are the ridiculous ones, but there are some vastly more serious ones. There are certainly rape and terrorism cases, which were dealt with very quickly.

Karl McCartney: I presume they are the larger percentage of that 600.

Professor Steve Peers: As I say, I have not seen a breakdown by crime. I do not know if that is produced. I have seen statistics several times. I do not recall ever seeing it broken down by crime.

David Armond: In 2015-16, 2,000 offenders were arrested in the UK on European arrest warrants, and 150 wanted by the UK were arrested in the EU. There is now a proportionality test that has to be made, and it is conducted by members of my agency with legal advice, about whether an EAW should be executed. That takes out a whole range of the kind of cases that Steve referred to being below the threshold, so the majority are for serious offences. I could get the Committee a breakdown, if you are interested in seeing that.

Chair: That would be extremely helpful.

Q1149 **Alistair Burt:** Good morning. Before I ask my particular question, I want to follow up on what Dominic Raab was saying, because it is quite important. If I have got it right, what Dominic was trying to get over to Mr Armond was whether we are at more risk as a nation because the rules on preventing EU nationals coming in are weaker than those to stop people coming in from outside the EU. Do the rules to prevent those coming in from outside the EU mean that we can refuse entry to people we do not like as well as people we think are dangerous? The rules governing EU nationals mean that we can prevent people coming in who are deliberately dangerous. To what extent are we weaker with the EU rules than the rules applying to non-EU nationals?

David Armond: I am not an expert in immigration rules. That is not my area of competence. Through access to ECRIS, which is the European criminal records service, and through membership of the various tools, where people present a threat, in relation to terrorism, serious crime or, indeed, some offences you might consider to be more minor, we have that intelligence. We have access to that information. We can take decisions at the border or when someone arrives at a custody suite about whether we should be making applications to have them removed. If it is a political judgment as to whether it is desirable that an individual can visit this country to make public speeches, that clearly is not the case for Europeans.

Q1150 **Alistair Burt:** It is possible to keep out people who are dangerous. That is the purpose of the rules. I am sure I am not alone in knowing a little more about Europol than Eurojust, for example. Could one of you outline the main purposes of Eurojust and the extent to which it has been active in any particular cases that we would know of, to demonstrate the work



that it does?

Professor Steve Peers: The best person to ask is probably Mike Kennedy, who used to be the director. It is a while since I have looked at the statistics, but there has been a dramatic increase since it started in the number of cases dealt with by Eurojust every year. It started to level off eventually, after increasing dramatically for a number of years. Basically, it is a forum for the co-ordination of investigations.

My understanding, from having met Mike Kennedy and others over the years, is that it works relatively well. People are quite happy with the way in which it works. It has proved useful, in some individual cases, in sharing information where the investigation had a cross-border dimension and trying to co-ordinate the steps that were taken, despite the different nature of each country's police and criminal law system. It has been directly linked to some arrests, raids and so on that police officers have made to gather evidence or potentially arrest people. You would have to look at the annual reports to get details of individual cases, or have someone like Mike Kennedy, who has had first-hand experience.

David Armond: Eurojust is not our primary partner. The Crown Prosecution Service is the UK body that deals mainly with Eurojust. It is a platform for liaison magistrates and it is exceedingly helpful. It plays a key role for us in law enforcement, in relation to arrangements for joint investigation teams, so it facilitates meetings, provides legal advice, resolves cross-border and judicial issues between countries and facilitates the establishment of a joint investigation team. The benefit of that is that, effectively, you can run an investigation and exchange evidence once an arrangement is set up without the need for an international letter of request.

Q1151 **Alistair Burt:** You said at the beginning of your remarks to us that we are safer because we are involved with these European agencies, and Europe is safer because of our engagement. What has been more important in terms of our engagement: the fact that we are a member of the EU or the fact that our security and intelligence systems are very mature, well thought through and, therefore, stand in their own regard in terms of our co-operation? Therefore, in leaving the EU, there is no reason why the mature security services and the engagement that we have should be lost, because they are valuable in their own right, not simply because we are a member of the EU.

David Armond: I will go back to the answer I gave before. In 2008, it is fair to say, we did not have a firm opinion about Europol or its merits. It was considered to be an agency with some potential that had not been realised. The decision was taken to put a British candidate forward to try to make the organisation as useful as it possibly could be. Rob Wainwright seized the seat and is still in position today, coming to the end of his tenure.



He has managed to turn the organisation from what looked more like a talking shop into a structured, pan-European organisation that produces an annual threat assessment, collects intelligence in relation to those crime threats, analyses it, shares it and co-ordinates activity across Europe. One of the features of globalisation is that serious organised criminals and terrorists know no boundaries. It is important that we co-operate in a co-ordinated fashion with our European partners.

We are, jointly with the Germans, the biggest contributors to the intelligence systems, and there are protections around that intelligence that ensure it is protected and does not go anywhere we do not want it to go. Then there is a series of operational groups that co-ordinate activity across the key threats, which are managed through the COSI—the European security committee. In those areas, the UK is leading 40% of the work and is engaged in the vast majority of it. The benefits go beyond good co-operation. They go through a structured, ordered approach that improves the effectiveness and efficiency of the European response to the threat.

Q1152 Alistair Burt: Essentially, it is clear that none of us wants to weaken security across Europe by us leaving the EU, so the onus should be on everyone to keep in place not just the technical structures, but also the opportunity for individual contributions and leadership to make sure we remain safe. It may be new and different. It is going to be different. It is not like people joining something and going through the negotiation process to join something. We are already there, so it will have to be a bespoke deal if we are going to keep ourselves safe.

David Armond: I absolutely agree with that. I know personally the police chiefs in Europe, and they are very driven to ensure the relationship with the UK remains and is preserved going forward. We will have an arrangement to work co-operatively with the Europeans, whatever the results of these discussions are.

What we would lose is any sense of influence over the direction Europol took, for instance. There cannot be a British director, as a non-member. There are 50 people in senior posts who are Brits in Europol. Their contracts would come up for review, I am sure, and it is questionable as to whether they could be involved. We would not have any influence, because we would not be members of the Europol management board. I do not know what the future of the organisation would be. It has been driven by the UK, quite frankly, since 2008.

David Anderson: We are probably all sounding very gloomy. One absolutely has to look for opportunities here, not just threats. I can illustrate the reality of what we are saying. Take the example of Denmark, which currently participates fully in Europol, but has an opt-out from the post-Lisbon measures, so it is unable to participate in the new Europol regulations.



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In December, the Presidents of the European Council and Commission and the Danish Prime Minister issued a joint declaration about future Danish participation in Europol, in which it currently participates, saying, "Such arrangements must be Denmark-specific, and not in any way equal full membership of Europol, i.e. provide access to Europol's data repositories, or for full participation in Europol's operational work and database, or give decision-making rights in the governing bodies of Europol".

One could say that is cutting off the nose to spite the face. One could say we are probably a much bigger contributor to Europol than Denmark is. Nonetheless, it is an indicator of how some people at least within the institutions think about these matters, and the distinction that they draw between being a member state or, at the very least, being a member of the Schengen arrangements and being a third country, even one which in the past has fully participated.

Q1153 Stephen Timms: You said earlier that quite a lot would depend on how theological we are going to be about not applying ECJ judgments. The ECJ plays quite a big role in the arrangements we are talking about this morning. The Prime Minister has made it clear that she does not want the UK to be subject to those judgments in the future. How likely is it in practice that the EU could deviate from Court of Justice rulings and stay compliant with the post-Brexit agreements with the EU that we are envisaging this morning?

David Anderson: I would hope this is resolvable. Plainly, the European Court is going to keep jurisdiction so far as the other 27 are concerned. Its concern will be to bind us sufficiently to the system so that we are respecting effectively the same standards, but that does not mean that we have to submit directly to the jurisdiction of the European Court of Justice ourselves.

There are two possible models, although others may know more about them or have better examples. If you look at what Norway and Iceland have agreed on the European arrest warrant, albeit it has not been enforced after all these years, the requirement is that they keep under review the jurisdiction of the European Court. There may be a provision to discuss any divergence that might emerge between national jurisprudence and the jurisprudence of the European Court. Perhaps most hopefully for the UK, I believe that the Canada-EU passenger name record agreement provides for the two national jurisdictions to regulate their respective sides of it.

That is what I meant by theological. If those middle ways are going to be problematic, we really have a problem, but I would have thought the genius of our diplomats and lawyers ought to be capable of negotiating something that could be swallowed, even if in practice it is likely to mean a high degree of ECJ influence over the development of our own law.

Q1154 Stephen Timms: In the areas we are talking about this morning, are



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there examples where ECJ rulings have been problematic for the UK? There clearly have been examples in other areas. Have there been in these areas?

David Anderson: In my opinion, the recent rulings of the ECJ in relation to data collection and data retention in bulk, by which I mean at its most basic the power to require telecoms providers to keep records of to whom we each spoke, when and where we were at the time, completely dwarf everything else. There have been three judgments now from the Court of Justice in Luxembourg, which to my mind have gone well beyond the jurisprudence of the European Court of Human Rights.

It has even been suggested, in the case brought by David Davis and Tom Watson, in which we had judgment on 21 December, that it is simply wrong to require that data to be collected and retained in bulk, except possibly in high-crime areas, which raises issues of its own. That is a problem for the whole of the EU. I was at a meeting of intelligence regulators last week from all over northern Europe, and none of them had a good word to say for the judgment. The Swedes, the Dutch and others are as troubled by it as no doubt the British Government are, so it would be a problem for us whether we are in or out.

It is certainly not a problem that will be solved by leaving. To me, it seems like the Hotel California; we will check out, but we will not really leave, because we will be able to continue receiving data only if we can demonstrate that our ways of protecting that data are equivalent to theirs. It is a problem that even the Canadians and the Americans are experiencing at the moment.

Q1155 **Stephen Timms:** You were speaking a moment ago about the co-operation agreement being developed between Denmark and Europol. You have quoted from the recent statement about this, but it is going to be dependent, among other things, on oversight by the European data protection supervisor and, again, the jurisdiction of the ECJ. Specifically in the case of Europol, what are the prospects of the UK securing bespoke agreement without satisfying those conditions, specifically the ECJ jurisdiction?

Professor Steve Peers: Denmark is in a different position because it remains a member state. Denmark has signed treaties with the EU in other areas, like civil co-operation, where although it has technically opted out of the EU law as such, it participates on the basis of also accepting EU court jurisdiction. It is a fusion between international law and EU law, but it does that as an EU member state.

As David said, to enlarge the point that he made, it is very unusual for the EU to insist that non-EU countries sign up to EU court jurisdiction. I know this has been a big debate about Brexit in general, not just in this field, but it is very unusual in trade or anything else for the EU to insist on it. Only a few treaties make mention of the EU court having jurisdiction on the non-EU country's side.



It is more common—the example that he gave is one of a number—to have a clause in it that says the two sides keep each other's case law under review, particularly the case law of the Court of Justice on the EU's side. If there is divergence, there is a discussion about how to try to resolve it. That precedent has been used quite a number of times; he gave just one example. You will find it a lot in civil law, for instance. That could be easily copied and would be a very reasonable thing for the UK Government to argue for as a long-established precedent.

It leads to potential problems down the line. What happens if there is a divergence between our courts and the EU court, particularly on data protection? There are specific issues with data protection, because there is a separate approval process to say that the UK has adequate levels of data protection. That can be challenged, not just by the EU institutions or a member state in the EU court, like the European Parliament has challenged the EU-Canada deal, but also by individuals. Even if we are perfectly fine during the Brexit negotiations or afterwards, having convinced the EU institutions to go along with and approve a deal with the UK, private individuals might challenge it.

Davis and Watson are MPs in this Parliament and there is an Austrian law student, Max Schrems, who has brought some significant cases. I even asked him, "Would you challenge the UK after Brexit?" He said, "Yes, but I will be at the back of a long queue I am sure", because he knows of other people, NGOs and so on who will do it. That is a factor to take into account.

There will be some great difficulty from the point of view of data protection. That is going to be the single biggest difficulty. The challenge is not so much convincing the EU institutions to go along with it, as it is quite right to say that the Ministers and the authorities are quite happy to continue co-operation with the UK. The problem is the activists who will go to court and bring these legal challenges. They cannot be easily negotiated away, because they are based on the European Charter of Fundamental Rights. As a primary law of the European Union, that cannot be easily negotiated away. The EU will not agree an amendment to the charter for the sake of a departing member state. That really is the biggest problem by far in this area.

Q1156 Stephen Timms: Mr Anderson, you touched a moment ago on how places like the US and Canada are struggling a bit with ECJ judgments in the data protection area. Can you tell us a little more about that? Are they finding ways of resolving those difficulties? How are they affected?

David Anderson: The Commission says to third countries that, if they are going to share our personal data, they need to have equivalent standards of protection to ours. With the US, a safe harbour agreement was negotiated, which the Commission thought would do the trick, but the European Court thought that was not good enough, so it struck it down. Another agreement has now been negotiated, the privacy shield, which I think is also under challenge.



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With Canada, the current issue is the exchange of passenger name details. As you will know, that is not just the details on your passports. That is also when you booked your ticket, with whom you are travelling, how much luggage you are carrying—really important stuff for policing. There is an agreement, in respect of which the advocate general of the Court of Justice has suggested that it is not good enough. I do not think we yet have a judgment from the court. I certainly know from my contacts in those jurisdictions that they preoccupy people within those administrations extremely.

Q1157 Chair: Can I pursue the point that both of you have been making? I presume you are referring to a data adequacy decision, because this has come up not just in the context of justice and home affairs. It is very important to the tech sector more generally. Did I understand you, Professor Peers, to say that it is the Commission that gives such a decision and says that the way in which data is handled in a non-member state is okay for sharing, but that, if it is challenged in the courts, that would force the Commission to withdraw it or to tell the United Kingdom, “You will now have to change the way in which you do certain things, for us to continue to issue a data adequacy decision relating to you”? It would be very helpful if you could clarify that.

Professor Steve Peers: The way in which that now works was clarified by the EU court in a case called Schrems, which was brought by the Austrian law student I referred to. A private individual or NGO goes to the national data protection authority, or possibly straight to the courts, and argues that the Commission’s decision is invalid because either data protection standards were bad at the time it was made or, in the case of safe harbour, they got bad later. We found out about Snowden’s revelations, assuming they are correct. That was the argument being made: that they deteriorated later on.

The EU court clarified that the national data protection authority either can be sued in court or has to bring its own concerns to court, and then the national court, if it thinks there is a strong enough case, has to send questions to the EU court, because this is about the validity of an EU act, and national courts have to ask the EU court about the validity of EU acts if they doubt it. The EU court rules on whether the challenge is valid or not.

The challenge itself does not automatically end the Commission decision, but the court’s ruling would, if it is successful. Mr Schrems was successful, but later challenges, against privacy shield and so on, might not be. We have to wait and see. If the most recent challenges get resolved in the next year or so, we might have a bit of a template as to what would be possible to negotiate between ourselves and the EU, although they might not be resolved in that timeframe.

Q1158 Chair: If a data adequacy decision, having been granted, was then withdrawn, what would be the practical consequence of that for the exchange of information and the things that we have been discussing?



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Would its restoration depend on what the UK outside the European Union did and how quickly, in order to come into conformity with whatever reason was given in the first place for withdrawing the data adequacy decision?

Professor Steve Peers: The EU court would possibly give a time period to adjust the rules. It did so once in relation to EU-US PNR, for instance, and a few other cases. If the decision is struck down, you try to negotiate a new one. That is what happened with safe harbour, which as it happens was in the advanced stages of being renegotiated anyway, so it was reasonably easy to get a replacement within a few months because they had already been talking about it. It just created a deadline. That is one way to deal with this: simply to renegotiate within a reasonable timeframe.

Another way to deal with it is to fall back on other options. For the tech sector, which to some extent crosses over with the police sector because of the co-operation between them, you could try to fall back on standard contractual clauses. That is what the law allows for, although they are being challenged in Ireland right at this moment. The question is whether the Irish courts will ask the ECJ if standard contractual clauses are good enough, because they apparently allow, in the US case, the NSA to come in and collect data, so they could also be challenged. In the areas we are dealing with here that are directly to do with police co-operation, there are usually fall-back clauses saying that, in individual cases, if it is urgent you can still share information, so you could try to rely on them.

You lose the fluency and the simplicity of having an adequacy decision that says, in principle, here is a blanket decision and you never have to make a case-by-case analysis. All the data can just keep on flowing. That is by far the best thing to have. Not every country has one, but it is by far the best thing to have and keeps things ticking over much more easily than they would do otherwise.

Q1159 Mr Lilley: This is an area in which I am more ignorant even than other areas, so forgive me if I ask some rather naïve questions. I am just trying to explicate what you have been saying. You are saying that the European directives as interpreted by the European Court, and the European Charter of Fundamental Rights as interpreted by the European Court, restrict the right of member states to collect data and lay conditions down on how they keep it and on their sharing it with third countries. Is that right?

Professor Steve Peers: Yes. It does not apply to every aspect of data sharing. It does not apply to the intelligence agencies as such, but it certainly applies to tech-related data sharing, which often overlaps with what the police and intelligence agencies do.

Q1160 Mr Lilley: Does that mean that, if we left and were no longer subject to European legislation, we would be able to collect and keep more data



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than we do at present? Is that the case, before you tell me whether it is advantageous?

Professor Steve Peers: We could, but then we would run a significant risk of not getting an adequacy decision if we wanted to share data with the European Union.

Q1161 **Mr Lilley:** Right, so we would be able to collect and keep more data in more intrusive ways than we do as members. I have to say that I rather sympathise with the European legislation, but I am just trying to find out what happens if we leave.

Professor Steve Peers: We would be able to do that, but there would be the consequence—

Q1162 **Mr Lilley:** That is my next question. We would not then necessarily be able to share data with, now, a third party since we would be a third party to the EU 27. Rather, they would not be able to share stuff with us. Is that it?

Professor Steve Peers: The problem would be in both directions. They would not be able to accept and process the data. There would be challenges to Europol or French police receiving information from the UK on the grounds that it violated EU law, for instance.

Q1163 **Mr Lilley:** Similarly, if at present the Americans volunteer some information to them, they will say, "Go away. Do not let me have this information, because you collected it by a way we do not like".

Professor Steve Peers: It all depends on the way in which these challenges are brought. The argument in the Max Schrems case was that Facebook was at fault in a sense because it was covered by American rules on the way the NSA collected data, and the resolution of that case ultimately was to amend the rules on the EU-US agreement, which are now being challenged in different ways in turn. It all depends on how it pans out.

In the meantime, Facebook and everyone else continued to operate because the laws were not being enforced as the negotiations were nearing their end. The data protection authorities had set down a deadline, which was then reached, to have a new deal. How things would pan out in practice, in terms of whether authorities would refuse to send or to process data, would really depend on how the litigation worked. We can be fairly clear, however, that there will be litigation. Lots of people have litigated this at various levels within the EU and within the European Court of Human Rights. We have that constraint as well. We also have the constraint of the Council of Europe data protection convention, which we signed up to. Those are both constraints that we would have, even outside of the European Union.

Q1164 **Mr Lilley:** I am still trying to find it at a very basic level. We have collected some data that we would not have been allowed to collect if we



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were members of the European Union. The EU will not allow itself to share that data, but it would not have been able to have access to it if we had been members and had not been able to collect it. What is the difference?

Professor Steve Peers: The difference is that there would be a broader barrier to data sharing, because the decision about data adequacy is about the whole system. If there is one significant flaw, that stands as a problem for the whole system and the whole decision on adequacy of data protection.

Mr Lilley: The EU would not be able to accept any data from us.

Professor Steve Peers: As I say, there are backups. If you do not have a data adequacy decision, there are backups, like standard contractual clauses or emergency assistance in individual cases, but they are not as fluid or as easy to use as a general decision on data adequacy. In some cases, like Europol, the EU side has to make a decision on data adequacy before it can even approve the agreement. It is not something that would come along later. It is a condition precedent and, with PNR, there would have to be an assessment as well.

Q1165 **Mr Lilley:** At present, we cannot collect data that shows that Mr Smith has been in touch with Mohammed Abdel and somebody else, who are known Islamists. In future, we will be able to collect it but we will not be able to share it with the Europeans. They, however, will be able to share their data with us, as long as we promise to treat it in the same way as we previously treated it as members.

Professor Steve Peers: The way the assessment works is that they look at the third country as a whole. If the third country has what they would regard as inadequate levels of data protection, that means that you cannot have the simplified levels of data transfer that you have if you get a data adequacy agreement. The specific example that you gave of information on suspected Islamists and their associates would not be a problem under any interpretation of data protection law. The big problem, as David Anderson was saying, is with the collection of data on the whole population. That is the potential problem, rather than targeted information on criminal activities, which is never a problem.

Q1166 **Mr Lilley:** You would collect it on the whole population only in order to distil out of it stuff about whether Mr Smith has been in touch with lots of people.

David Anderson: The European Court says that such a power is liable to give the population the "feeling", in its word, of being under constant surveillance, despite the fact that this database may only be looked into by duly authorised law enforcement officials investigating a serious crime or something of similar gravity, such as a missing person.

Q1167 **Mr Lilley:** Here, I have some sympathy with the European Court. I am trying to say not whether the European Court is right or wrong, but how



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we will be affected by no longer being subject to it.

David Anderson: The real issue is the personal data of Europeans being transferred to the UK. Steve is right in that, when the court looks at these adequacy determinations, it takes a very broad view. In the Schrems case that he mentioned about Facebook, there are various comments, possibly prompted by the post-Snowden narrative, about the blanket nature of certain American powers. This was a factor in saying that the safe harbour agreement was not good enough.

I am not saying that it is a block to anything. I am just saying it is a neuralgic issue on which British judges and European judges, British Parliament and the European Parliament, have traditionally taken different lines, to a greater extent than on any other human rights-related issue that I can think of, so of course it will be possible to make an agreement of some kind, but it is likely to be a keenly contested part of the negotiation.

Mr Lilley: Thank you. I am still confused, but at a higher level.

Q1168 **Craig Mackinlay:** We have a variety of JHA measures, whether it is Prüm, PNR, Europol, Eurojust or ECRIS. I would like to focus on ECRIS because it is something that I have had experience of. I still sit as a magistrate and, in the more than 10 years that I have sat—I know it only came in in April 2012—I have only ever seen one foreign criminal record, and that was from Slovakia. I must admit that at the time the bench was shocked, because it was the first time that we had ever seen one. Why is this system not working? What then happens is that the defence solicitor claims this person in front of you has clean hands and no criminal record in the UK, whereas, if you have a long-term criminal in the UK, you will have a perfectly adequate criminal record system that works within our boundaries.

It is simply not working. Why is it not working? This is really to Mr Armond, who mentioned ECRIS. If we do not have it, obviously the CPS do not have it and one would assume the police did not at some time have it either. We are told about this grand network of things to keep us safe but, in the one that I have seen first-hand, it simply does not work. Why is that? Do you have any experience of it, Mr Armond?

David Armond: I have some experience of it and I have some statistics to give you, which tell a slightly different picture. ACRO, the criminal records office, is the agency that deals with exchanges. It is the central authority for the UK. In 2015-16, it sent and received 173,000 requests and notifications via the EU framework for the exchange of criminal records data. It is not only around criminal trials; it is also around, for instance, taking judgments about whether an individual can have a certificate to say that they are cleared to work with children. These tools are used quite significantly now, but it is a relatively new phenomenon and it has only really clicked in since about 2014.



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I have quite an interesting statistic here. Last year, the Scots alone sent back nearly 16,000 records on EU offenders who had been convicted in the UK, and exported that data so that the records in other countries are up to date. It is a tool of increasing utility, used by a range of actors, including law enforcement and the courts.

Q1169 Craig Mackinlay: I am going to pursue that. I can understand, if there is a DBS application, that this is the ideal database to search, but, in the courts, is it just not being used? My experience is that I have seen it once, in all the years that ECRIS has been on the books.

David Armond: I can only give you the statistics that I have, and I have no experience similar to yours as a magistrate. The facility is available. It is used by the CPS and by investigators, and it is used increasingly.

Professor Steve Peers: Can I add some statistics? One that I saw given to the Commons European Scrutiny Committee from the Government is that the use of criminal records had gone up 1,600% since ECRIS was in place. In the Brexit White Paper, on page 62, there is a statistic that the majority of our outgoing requests for criminal records are under ECRIS. There were 155,000 in the year being looked at. We also sent, in response to requests, 46,000 extracts of criminal records to other member states. It seems to be quite significant. Having met a number of police officers over the years when discussing the EU legislation on this issue, they are always very keen to be involved in it.

It is at the police level, as Mr Armond was saying, rather more than at the magistrates level that it gets used. Maybe it gets used in terms of filtering down whether someone might be a suspect or something like that. It is perhaps useful to know if they have a conviction on similar facts. It is not just at the magistrates level that you would look for it to be used.

Q1170 Craig Mackinlay: I do not believe the police have this, because, if the police had it, the CPS would have it and we would have it. I do not believe it is being used at the police level.

David Anderson: You may be right. I have sat in various criminal jurisdictions, part-time obviously, for the last 10 or 12 years, and all I can say is that, in my experience as a sentencing judge, I am quite often told that someone has had convictions in Lithuania or whatever it is. Whether that was achieved through ECRIS or whether the Lithuanians are as good as the Scots at filling in the forms and notifying all the convictions to the UK, one just does not know.

The other thing to remember about ECRIS—and David hinted at this—is that it is not just used for sentencing. My understanding is that, if someone applies, for example, for a firearms licence or for a CRB check, in principle at least, their convictions in Lithuania or Poland ought to show up on the record. How effective it is in practice, I cannot tell you, but most of us would agree that, in principle, it is a good idea.



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The only other thing that I would say about ECRIS—and this seems to me a curiosity—is that I believe this is one in which no non-EU country participates at all. Norway and Iceland, for example, fall back on the provisions of the 1959 Convention on Mutual Assistance in Criminal Matters. What the difficulty of principle is there, I do not know. As lawyers well understand, sometimes the lack of precedent can be an obstacle as well.

Q1171 Stephen Timms: I want to follow up on the discussion that you were having with Peter Lilley about the consequences for the UK if we do not get this data adequacy designation, which would mean that government agencies in Europe could no longer send us information that is useful to us. Am I right that the same judgment determines whether private companies can swap personal data between the UK and Europe, or is that influenced by a separate decision?

Professor Steve Peers: The Schrems case was specifically about private companies and their relationships with police and intelligence agencies. Davis and Watson was specifically about UK legislation. The general data protection directive also applies to relationships between private companies, and its replacement regulation, which the Government have said they will put into British law next year by the due date, equally applies between companies as well.

Q1172 Mr Carmichael: I want to pick up this point about ECRIS and the use in criminal courts. The question of what is tendered in terms of previous convictions in a criminal court is down to the prosecuting authority, be that the CPS in England and Wales or the Crown Office and Procurator Fiscal Service. My own limited and very low-level experience of that, which is well out of date now, was that, in Scotland for example, we would take the SCRO information, as it then was, almost routinely, but PNC information, which was information from the rest of the country, we used much more sparingly. Does that accord with your own understanding of current practice?

David Armond: After the death of Alice Gross, there was a directive from the Home Office to police forces saying that there should be a target to aim for an application for criminal records for foreign offenders in 60% of cases. I am not quite sure whether that was a judgment of success. It indicates that there was perhaps a slower take-up than there might be. I also understand that some automation of the processes is coming on stream to increase the volumes. The increase over the last 12 months in the number of applications tells me that the system is now bedding in in the UK.

Q1173 Mr Carmichael: I want to look at the suite of information-sharing systems that we have. We have the Schengen information system, ECRIS, Prüm and the passenger name records data. When it comes to negotiating a future relationship with these different systems, do we do this as a suite or are there priorities among these different systems that are of higher significance compared to others? Do we take it all as a



whole?

David Armond: The data that you have talked about is equally important, but for different reasons in each case. Bearing in mind the difficulties that David Anderson has outlined over the recent ruling in the courts on bulk data, there could be more difficulty, for instance, with PNR information. If I were looking at the suite that is available, I would say access to Prüm, which is not yet fully on stream, as you know, and which comes into play later in the year, and access to PNR data is of equal importance as investigative tools.

Q1174 **Mr Carmichael:** If, in the worst case, we do not have access to these systems for trading information post-Brexit, are there viable alternatives?

David Armond: It would be a less optimal alternative, but there is an institution called Interpol and there is a methodology to exchange data between the 190 countries that are now members of Interpol. Of course, there are mutual legal assistance treaties to obtain data. There are a number of mechanisms that we could use, but they are not as speedy or effective as the arrangements that we have with the Europeans.

David Anderson: Some of the alternatives might be of quite a different nature. For example, if you did not have as much information about the people who were on a flight, you might need to step up the port officers' efforts at the port, search more people and call more people away for questioning.

The other thing that one has to do is put this in some sort of perspective. We are not in a lecture theatre, and we must not imagine that we live in a world where everybody is meticulously counted in and counted out, desirable as some people might think that that is. When you look, for example, at how little we know about the people on that ferry from Belfast to Cairnryan and how little we might know about where they originated from and how they got into Northern Ireland in the first place—this is something that I drew attention to in a report that I wrote last December—you can see that we are living in a very far from perfect world. I would echo what David said: this is not an area where this technique or that technique is crucial in itself, but it is an area where police and others very much need useful sources of information. Particularly if you are looking in the terrorism field at jihadis coming back from Syria, often by quite ingenious routes—they do not necessarily make it easy for us by taking the direct route—the more of this stuff we can share, the better.

Q1175 **Mr Carmichael:** You lead me on very nicely to the next angle I want to consider here, which is the relationship between law enforcement authorities and prosecution authorities in the north of Ireland and the Republic. What do we think would be the impact there of our removal from these systems? Is there space here for a bespoke agreement that would cover the island of Ireland?



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David Anderson: I cannot speak with first-hand authority about this because, although I talk quite regularly to the PSNI, this is not something that I have raised directly with them in the past. I should say, first of all, that there is extremely good co-operation between the PSNI and the Garda, and between the prosecution authorities in the respective jurisdictions. On the face of it, this would seem to be something that could perfectly easily be done on a bilateral basis.

Having said that, I simply sound a word of caution, because the House of Lords EU Committee travelled to Belfast and to Dublin and took evidence on that, including from two former Taoiseachs of the Republic. They were told, certainly in Dublin, that some of these mechanisms are extremely useful to cross-border co-operation, perhaps partly because they take some of the political sting out of it. Take the European arrest warrant, for example. You could imagine making an extradition treaty with Ireland, but perhaps even nowadays that would be politically a little more difficult than one would imagine.

Q1176 **Mr Carmichael:** Without the arrest warrant, you are into letters of request, which are done at the insistence of law officers who are, to whatever extent, ministers of Government.

David Anderson: Yes, and you have questions about nationals and political crimes. I am not suggesting that it could not be done, but my sense is that the European arrest warrant is quite widely used on the island of Ireland and presents advantages that people would be reluctant to lose.

Q1177 **Mr Carmichael:** What precedents are there for third-party access to these information systems, such as the SIS II, without being in the wider Schengen arrangements?

David Anderson: There is no precedent for any close operating agreement with a country that is neither in the EU nor in Schengen. For ECRIS, there is no precedent for any arrangement with anyone outside the EU at all. Now, it seems to me there is absolutely no reason why we should not be the first, but no doubt some would say that SIS II is accessed by Norway, Iceland, Switzerland and Lichtenstein in part because they are members of Schengen and it is the Schengen information system. We of course, even now, do not access all of it. We do not access the border and immigration-related material under SIS II.

Q1178 **Mr Carmichael:** That is because we are not part of the Schengen travel area.

David Anderson: Yes. With PNR, there are agreements for wider access, as we know, with US, Canada and Australia. I see no huge obstacles of principle, but all this will require negotiating time and negotiating bandwidth, in a way, and one will be overturning some precedents and making new law.



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Professor Steve Peers: The data protection issue that we have already discussed will come up each time.

Q1179 **Mr Carmichael:** Data protection takes you on to questions of jurisdiction of the European Court of Justice, which then becomes, as Mr Anderson told us earlier, a matter of theology or, at the very least, a matter of doctrine.

David Anderson: Yes, there are obviously questions as to what degree of co-ordination or influence we are prepared to accept.

Q1180 **Mr Carmichael:** This takes us back to Hotel California. How much leverage do you think we are going to have in negotiating access? We see all these difficulties. What do we bring to the table?

David Anderson: We have brought a colossal amount to the table.

Q1181 **Mr Carmichael:** That is just as part of the whole system. We have people like Rob Wainwright. You gave an excellent exposition of his influence and the way in which he has driven a model that has very much suited our purposes. That has passed. What will we bring to the table in the future?

David Anderson: When I have gone to Brussels to talk about counterterrorism, I have invariably been bowled over by how appreciative everybody is for the lead that the UK has taken in that area, where we are completely unchallenged as the initiators of any number of good ideas. I am not just talking about things like data retention and PNR, which may be politically controversial, but even things like making it difficult to buy the ingredients for bombs. It is not much good making it difficult to buy bomb ingredients in Kent if all you have to do is make a day trip to Calais. We took the lead on that, as we did on putting replica firearms beyond use. It is not much good doing it in Hampshire if they can be bought in Slovakia and imported.

We are hugely respected for that and I am sure that we will carry some of that into the negotiations. We also, of course, provide not only the sort of intelligence that we are talking about today, but also the much higher level of intelligence from people like GCHQ and MI6, which is not governed by EU law or EU mechanisms, but which other countries know perfectly well has been instrumental in averting atrocities on their own soil.

Q1182 **Mr Carmichael:** Do we still have that to take to the table?

David Anderson: Yes, but does that mean that they are going to prostrate themselves and say, "The Brits are special and you can have everything you want"? Of course not because, in other respects, we are awkward. They see us as an awkward customer when it comes to issues of data protection. They see us as awkward in relation to whatever it is we say about jurisdiction of the European Court. We may have other bespoke demands. We have not talked about, for example, future



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opt-ins and opt-outs. Will they say, "If you want this, you also have to sign up for all the future developments that the EU comes up with" or are we going to say, "No, we want another bespoke arrangement like we have been used to in the past, where we can opt in to anything we want"? Some people might think that that is cherry picking. We might think it makes very good sense.

Q1183 Mr Carmichael: At the least, we will be left in a situation similar to the one you described with Denmark where we are second-tier, when the other agencies have gone to the third, fourth and fifth tiers.

David Anderson: This seems, in a way, an area that ought to be solved relatively easily, because there is such a strong common interest in doing it. One of the rather nasty little things about it is that, although with Europol, if you fall over the cliff, there is a safety net not very far down—I cannot believe that we will not make some operational arrangement with Europol—the same is not true for everything else. We have mentioned ECRIS, where Norway falls back on a convention from the 1950s. If we did not have the European arrest warrant, we would really be back in the dark ages in terms of extradition, with the nightmares of the Costa del Crime and all the rest of it. The price of failure is quite high. Hopefully that will ensure success, but I do not think that it is an altogether straightforward road.

Mr Carmichael: The price becomes apparent later on. It is not necessarily apparent at the time when you cut the deal.

David Anderson: That is true.

David Armond: You were asking what we bring to the party that is beyond being part of that institution. I would echo what David said. First, it is about leadership in this particular arena. Leadership from British law enforcement and from the intelligence agencies is sought globally, not just within Europe. There is then the quality of the intelligence that the UK can provide at every level, from national security down to law enforcement intelligence, which is very well sought after. These are the two issues that we bring to the table in significant quantities.

Q1184 Mr Carmichael: This might be a slightly unfair question, but let me ask it anyway. All this has a financial cost attached to it. In the brave new world, how are we going to negotiate that, when it comes to the maintenance of databases of this sort and the mechanisms for sharing between different law enforcement and prosecution agencies? It is expensive.

David Armond: What we are prepared to invest in this matter will be a consideration for the UK and those above my pay grade. By negotiating an operational agreement with the EU of the same nature as the Americans and the Australians have, we would have access through a liaison system to the intelligence. I am not entirely sure that there is any charge on that; nor is there any charge to maintain a liaison bureau, on



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the basis that this is of as much assistance to the Europeans as it is to the third-party member.

Q1185 **Mr Carmichael:** This is an emerging and evolving field here. A border management security information system is currently being worked on within the EU. How are we going to stay part of that, or is it something that we just have to say we will walk away from now?

David Anderson: That is an absolutely key question. The history of the development of this sort of thing in Europe is that it happens in huge jumps when something bad happens. The European arrest warrant, which had been hanging around for years, got through in the weeks after 9/11. After Madrid and London, we had various big steps forward. In 2015, we got PNR, and more recently, after Brussels and Germany, we got the security union. Of course, the British Commissioner for Security Union is giving evidence this afternoon to the Home Affairs Select Committee.

The point I would like to get across is that this is very much work in progress. This could work a lot better than it does. I will give you an example. I was at Dover not long ago, talking to the constables who were looking at people coming off the ferries, trying to decide who to stop, and they had a handheld device. I asked, "Do you get SIS II on that device?" They said, "Yes, it is very useful. We had an alert and we spotted someone on the German watch-list last week". I asked, "Does it work well?" They said, "Yes, but the trouble is that the Germans use different classifications to us and different categories." You could imagine that that is the sort of thing that needs fine-tuning. If that is going to be a more effective tool in the future, someone is going to harmonise the categories.

One very much hopes that the Brits are going to be around the table when that is done, because, as so often, we do things slightly differently from anybody else. Eurojust is probably the best example of that. The Scottish Crown Office, in their evidence to the House of Lords committee, made this point very strongly. We have had two directors of Eurojust. It is very useful for our prosecutors. The joint investigating teams work well. However, the rest of them have this civil law idea of what prosecution is, which is completely different from our idea, not only in England but in Scotland. Their concern was that, once we leave, that voice is not going to be around the table and the organisation is going to be less useful to us simply because we cannot influence its future development.

Mr Carmichael: Yes, because they are not going to devise a system that necessarily works for our jurisdiction. They will look to their own first.

Q1186 **Joanna Cherry:** Good morning, gentlemen. David Anderson, I wonder if I could start with you and go back to your Hotel California analogy, when you were talking about privacy and data protection. At the end of last year, in your report in your capacity as the Independent Reviewer of



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Terrorism Legislation, you talked about this issue at page 23, paragraph 3.2. You said the following: "It should not be assumed that Brexit will relieve the UK from the need for compliance with standards of privacy and data protection set out in EU legislation [...] or by the CJEU". Is that correct?

David Anderson: Yes.

Q1187 **Joanna Cherry:** You went on to say that that was because, "As recent cases have shown, the continued ability even of third countries to share data from within the EU will impose commensurate obligations upon them to treat those data in a manner that conforms in many respects with EU privacy norms". Does that remain your view?

David Anderson: Yes, it does.

Q1188 **Joanna Cherry:** Should we understand this to mean that, even if the UK leaves the EU, in order to share data from within the EU, we will continue to be required to comply with the norms set by EU legislation and by the Court of Justice?

Q1189 **Mr Lilley:** In respect of EU personal data.

David Anderson: Yes.

Q1190 **Mr Lilley:** But not in respect of UK data.

David Anderson: I have not really focused on that. I entirely respect everything Professor Peers says about that. I had not seen that as so much of an issue. Plainly, it is nice for us if they can use our data. It is really a problem about the incoming data.

Q1191 **Joanna Cherry:** What I am getting at, and what you were getting at in your report, is that we will not be able to share their data. They will not send us their data unless we comply with their legislation and the decisions of the Court of Justice.

David Anderson: Unless we offer protections that both the Commission and, ultimately, the Court of Justice deem to be equivalent. There is a little bit of play in that.

Q1192 **Joanna Cherry:** We will be removing ourselves from having any say in the legislation and any locus to argue before the Court of Justice, but we will still be required to comply with the legislation and the decisions of the Court of Justice if we want to share EU data for the purposes of justice and security and law enforcement.

David Anderson: Yes, I could not agree more. I am reminded of two boats floating in a river where we have a foot in each. In a way, that helps us keep them together but, once we have jumped into one boat and got rid of the other, we will not be there any more as a voice for operational efficiency over privacy of personal data. Some people might say that that is a thoroughly good thing and that we need more privacy of personal data, not less. However, it will certainly raise the possibility that the future requirements of the Commission and the European Court



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are even more difficult for us to comply with than the current requirements.

Q1193 **Joanna Cherry:** Would we be right in understanding that that could be detrimental to law enforcement and the fight against terrorism in this country because, if we do not comply with their requirements, we may not have access to the data we need from them?

David Anderson: Indeed. Two days ¹after the ruling in the Watson and Davis case, a truck ploughed through a Christmas market in Berlin and a mobile phone was found on the passenger seat of the truck. Why would you not want to go straight to the provider of that mobile phone, be it in Poland or whatever, and find out who that person had been speaking to for the last three or six months, in order to see whether they were involved in the crime at all and, if they were, whether it was a lone operator or something more organised? That is just one among a very large number of operationally crucial uses of data of this kind. If we did not have it, of course law enforcement would suffer.

Q1194 **Joanna Cherry:** Just to develop that analogy, if we leave the EU and we do not comply adequately with its legislation and the decisions of the Court of Justice, then the data coming from that mobile phone would be available to all members of the EU but not to the United Kingdom.

David Anderson: We will have to see what Watson and Davis means. I would caution against anyone taking me to have declared what it means because the English Court of Appeal will be having a look at it in the weeks ahead. Certainly, on one reading of that judgment, there would be no point asking the Polish provider because it would not be allowed to keep any data at all.

Q1195 **Joanna Cherry:** Let us look at this, because you and I have both worked in the field of law enforcement. If you actually have the physical phone, you do not need to go to the records; you can interrogate the phone in the same way that you can interrogate a computer. Is that not correct?

David Anderson: You can often get something out of a phone, if you are able to get into it, but, if you read my report, *A Question of Trust*, and annexe 10 in particular, you will see a huge number of examples collated and provided by the European Commission of just how useful this material is to law enforcement and how difficult, in some cases, it is to reproduce it from other sources.

Q1196 **Joanna Cherry:** If we put Davis and Watson to one side for the moment, or if we assume that the British Government will be successful in arguing that Davis and Watson only has limited application, in the event that that phone lying on the seat of the lorry in Berlin could be interrogated or its records could be interrogated to produce useful information in the fight against terrorism, if the United Kingdom is no longer part of the European Union, there is a substantial risk that, if we do not comply with the EU

¹ Note from witness: The attack was two days BEFORE the judgment, not two days after



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legislation and the judgments of the Court of Justice, our European friends will not share that information with us because, as a matter of law, they will not be able to.

David Anderson: Do you mean the information extracted from the phone itself?

Joanna Cherry: Yes.

David Anderson: Yes, it is a risk with any kind of data sharing. Of course, it works both ways. Our law enforcement would very much like to have readier access to that sort of data from the United States, Canada or other countries, but particularly the United States because that is often where the data is kept. In every case, it is a question of the requesting country asking and the receiving country trying to work out whether the safeguards are sufficient for the information to be released.

Q1197 **Joanna Cherry:** Can I look at the evidence that you have given us so far on the way in which the United Kingdom has been a leader within the European Union on issues of security and law enforcement? In an article that you wrote last year in *Prospect* magazine, you gave three terrorism-related reasons why it would be good for the United Kingdom to remain in the EU. One of them was this example of how we have been a leader in this area, but the other two related to the development of effective mechanisms in the EU and the benefit of arrangements within EU law being underwritten by international human rights standards. Do you remember that article?

David Anderson: I do.

Q1198 **Joanna Cherry:** Can you elaborate upon those two issues for us?

David Anderson: Sorry, what was the second one?

Joanna Cherry: The second one was the international human rights standards and the first one was effective mechanisms.

David Anderson: Effective mechanisms, I suppose, in a way, are the subject matter of what we have been talking about. I am not saying that we must have everything in European criminal justice law. There are six directives, for example, about the standards that criminal proceedings must live up to that, needless to say, we live up to already. The purpose of that directive is to make sure that, if a British hooligan is in trouble in Bulgaria, he gets something resembling a fair trial. When it comes to the co-operation measures, which are the arrest warrant, the information databases, Europol and Eurojust, it seems to me self-evident in an internet world, and in a physical world where people are presumably going to continue to cross borders in rather large numbers, that mechanisms should exist for co-operation. Just as the Leicestershire and Derbyshire police are able to use the same systems and co-operate, so it should be true to the extent possible across Europe.



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The other point that you raised looks in with that, because we are very often still quite suspicious of each other. We are not convinced that other member states meet our standards, and having an assurance that the highest international standards of human rights protection will be applied to those mechanisms and those laws is a reassurance, particularly to people who might not otherwise be inclined to accept them as necessary or justified.

Q1199 Joanna Cherry: When you were talking in your article in *Prospect* magazine about the effect of mechanisms that had been developed in the EU for fighting terrorism, you said, "No doubt some of these benefits could be replicated by negotiation from outside the EU. But in the words of Rob Wainwright—the Briton who is director of Europol, the EU's law enforcement agency—this course would be more costly and certainly much less effective". There you gave the opinion that negotiating benefits from outside the EU for the purposes of law enforcement would be more costly and less effective for the United Kingdom, using the words of Rob Wainwright. Does that remain your view?

David Anderson: I was quoting it as his view, and similar views have been expressed by others who are more closely involved operationally than I am. I notice, for example, the current Director of Public Prosecutions said to the House of Lords committee that the European arrest warrant was three times faster and four times less expensive than the alternatives.

Q1200 Joanna Cherry: I wonder if I can direct my next question at all three of you, but starting with you, Mr Anderson. Rob Wainwright said last year that negotiating security pacts from outside the bloc of Europol would be a "damage limitation exercise". Do you agree with that statement and can you elaborate on what is meant by that?

David Anderson: There are aspects of Brexit, I am quite sure, that present benefits and opportunities, whether you are looking at agricultural policy or international trade policy. I must admit that I do not myself see criminal justice, policing and security as one of those areas. I see it as an area where we have to preserve as much as possible of what we have. I am quite optimistic that a way will be found of doing that, but I am concerned that we will never be able to replicate the leadership that we have shown in the past. I am also concerned that, if the negotiations become toxic for other unrelated reasons, and if we do not have the political bandwidth that we need to come to sensible agreements in this area, there will be substantial risks if we do not have agreements, transitional or otherwise, in place by the time that we leave.

Q1201 Joanna Cherry: Mr Armond, you spoke earlier about Rob Wainwright in very glowing terms and he is very highly respected. Do you agree with his statement that negotiating security pacts from outside Europol would be a damage limitation exercise?



David Armond: The terms I would use would not be quite as strong as that but, when I gave evidence to the Home Affairs Committee, I said that, unless we could replicate the current set of arrangements, any lessening of our access to intelligence and to those tools would be suboptimal. I was challenged on that and asked whether I was really saying that risk could increase, and I said that, if you consider the current arrangements to be the most optimal, anything less than that is suboptimal and we should be seeking to replicate these arrangements or have alternative arrangements to ensure that we continue to keep our people safe.

Q1202 **Joanna Cherry:** Professor Peers, I will just give you the quote again. Rob Wainwright said that negotiating security pacts from outside Europol would be a “damage limitation exercise”. Do you agree with that statement and, if so or if not, can you tell us why?

Professor Steve Peers: That has to be correct, yes. How can we have a better relationship with Europol once we have left? We certainly cannot have the management role that we have had or the influence that comes from having a management role and staff members fully in Europol. It may be possible to reproduce as much access to data as we currently have, although, in practice, it is normally not something that non-EU countries have. According to the Government’s report in June on our relationship with the EU and security issues, EU member states may directly submit and conduct searches of the Europol information system but non-EU countries have to ask Europol to do so on their behalf. Non-EU countries are not automatically connected to the SIENA system, which is the information exchange network that Europol has.

Some of the things can be negotiated, but the management issue and full access to the Europol information system is usually, traditionally, off limits to non-EU countries. Unless they are willing to accept something really quite exceptional, it is bound to have a negative impact.

Q1203 **Joanna Cherry:** Finally, I would like to ask all three of you this. The Committee visited Ireland last week and spoke with Irish politicians. They have significant concerns about the impact of the United Kingdom leaving the EU on cross-border co-operation between the Republic of Ireland and Northern Ireland, and it would be fair to say that they have expressed very significant concerns to us. Can each of you give us an outline of what you think the impact could be on this issue of the United Kingdom leaving the European Union for justice and security purposes?

David Anderson: Speaking specifically about Ireland and the Irish border?

Joanna Cherry: Yes.

David Anderson: If one were looking for opportunity, and looking really hard, one could say that a hard, fortified border between Northern



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Ireland and the Republic might be of assistance in law enforcement terms. It is a common phenomenon, as you know, for people to jump bail in Northern Ireland and end up in the Republic, for example. I do not know anyone who thinks that is feasible. You are looking at a border that is three times the length of the Anglo-Scottish border and twice the length of the Anglo-Welsh border. It is absolutely peppered with crossings, official and otherwise. Even if it were politically desirable, which plainly it is not, I do not think there would be any question of seeking to fortify it.

You are then left with the extremely good relations that currently exist between police in the UK and in Ireland. We of course have a common travel area. We have that by the grace of the European Union. We might not like thinking of it that way because, of course, the common travel area has existed since the 1920s, on and off. I would be very optimistic that the common travel area could continue in the future and that the EU, which has invested heavily in the peace process, would want to support that.

However, what history shows us about the common travel area is that it can only work where the immigration policy of Ireland and the UK is aligned. For example, there were controls on the Irish sea routes not only during the war but for a considerable period after the war, and those controls were only removed when the two Governments agreed to align their immigration policies. That is why we now have, for example, joint visa schemes for India and China, visa information exchanges and so on.

There is no reason why that should not continue for Irish citizens, British citizens and third-country nationals. The difficulty is with other EU nationals. If our criteria for entry become very different to the Irish criteria for entry, we have a problem. If a plane from Warsaw lands at Dublin airport, it is full of people from Poland and some of them fancy trying their chances in Northern Ireland or Great Britain, and if there is no defended border for them to surmount, either across the island of Ireland or across the Irish Sea, it is very difficult to see how we will ever know that they are there unless, of course, we do even more than we are already doing to place duties on employers, doctors, landlords and all the rest of it.

I just do not know the answer. The House of Lords committee, when it looked at the Irish question, thought that perhaps we would have to tolerate some de facto immigration into the Republic.² We can chop logic about exactly what the test looks like for letting these people in, but, if there is no border, that really becomes rather academic. It seems to me that the logic of giving special status to Northern Ireland is to create some sort of control across the Irish Sea, which gives added protection to

² Note from witness: some de facto immigration into NORTHERN IRELAND", not "the Republic".



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Great Britain. One could imagine that that would be politically very controversial.

I imagine that the common travel area will continue. I imagine good police co-operation will continue. Sorry this answer is too long. The only other element that I would mention is the trade element, which of course is nothing to do with today's deliberations, but it seems very hard to avoid some sort of hard infrastructure to detect smuggling and conduct spot inspections on consignments. That in itself could provide a focus for grievance and create further problems for the security of the island, although I am quite sure that both countries and the EU are determined to do all they can to minimise that.

Q1204 Joanna Cherry: I realise, Chair, that we are running short on time, but I wonder if I could ask Professor Peers and Mr Armond to comment on the impact of the UK withdrawing from the EU on cross-border co-operation in relation to justice and security issues between north and south Ireland.

David Armond: I will be very brief, because I absolutely endorse everything that David has said. The only things I would add are these. There is a perceived weakness in our armoury under current arrangements through the CTA. Once you are into Dublin, if the strength of border controls in Dublin is any weaker than ours, you are into the UK. You can cross from Belfast to Stranraer on a ferry in the same way as you can travel from Southampton to the Isle of Wight. There is a perceived weakness there.

In relation to ongoing law enforcement co-operation, it is very strong and I am hearing nothing from law enforcement partners to suggest that that would change at all. The only issue for me over the years has been a very clear expectation from the Garda that they not only want a strong north-south relationship with the UK, but they also want a west-east one. We do not do business just through the PSNI; we also do it from the rest of the UK. It is very important to them.

Professor Steve Peers: I agree with my colleagues, but I will briefly raise a specific example of a point that I made before. It is not just about what the UK can agree with the EU institutions or, indeed, with the Irish Republic Government, because whatever is agreed there—and you would hope that there is a good agreement—can then be litigated by private individuals. A significant proportion of the privacy litigation that reaches the EU is via the Irish courts or Irish people's groups going directly to the EU court. That raises a particular issue if our future arrangement is to some extent that Ireland is going to check people coming into Ireland because they might then go and cross the unchecked border into the north of Ireland. If that is going to be our arrangement, of course data protection issues arise directly in terms of what the Republic of Ireland shares with the UK. There might be arguments about how that will work.



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We already have a significant number of cases in Ireland on the European arrest warrant. You can find them very easily by looking at the reports of the Irish law courts online. A number of them have already gone to the EU courts. A number of them involve British citizens, and already there was litigation, really within weeks of the referendum vote, as to whether the mere fact of the future Brexit should stand in the way of applying the European arrest warrant system. You definitely have to be aware of the role of private litigation in trying to unpick whatever deal might be met. You have to think very carefully about the sorts of legal challenges that might be made and think about guarding against them in the way you draft that deal.

Q1205 Michael Gove: I would like to return to one or two points that Peter made. Reference was made to the Watson judgment. Before that judgment, it was unambiguously the case that the United Kingdom had a regime for gathering and storing data for the purposes of national security, which, as a result of that judgment, the European Court of Justice felt was too intrusive. Is that correct?

David Anderson: With respect, no. Anyone who uses the word “unambiguous” in relation to EU law is already being quite bold and, as someone who has practised in EU law all my life, I certainly would not apply it in this case. The Court of Justice would say that it was simply applying to our own domestic law the principles that it had worked out in Digital Rights Ireland when it struck down the directive. Indeed, so ambiguous was it that our own High Court had decided that DRIPA was unlawful and had to be set aside. It was only because the Court of Appeal took a stronger view and sent a question to Luxembourg, inviting it to depart from Digital Rights Ireland, that we got the ruling back that we did. Now, you could say that that ruling went further than anyone expected—it certainly went further than the court’s own advocate general—but it is not a one-off. It is a decision of the Grand Chamber.

Q1206 Michael Gove: That is a very full answer, but not necessarily to the point that I was making. The question is: is it the case that, as a result of European law and ECJ judgments as applied, Britain currently, as a member of the European Union, finds it more difficult to acquire and to retain this information because, in crude terms, the ECJ places a higher weight on the privacy of the individual and a proportionately lesser weight on national security?

David Anderson: That is absolutely right. Lawyers always have riders, and I apologise, but there is a national security exception in the treaty, which I suspect the Government will be pinning quite a lot of hopes on, and nobody knows quite what this means. Watson and Davis is a difficult decision, for police in particular, in many fields well outside national security.

Q1207 Michael Gove: Yes. The nub of this is that, as a result of European law, Britons are less safe.



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David Anderson: I am not going to say that, partly because we have to wait to see from our own Court of Appeal what this judgment means. If it throws into doubt the power that Parliament enacted in DRIPA 2014, and which now finds its place in the Investigatory Powers Act, that is very concerning for law enforcement, not just in the UK but in all the member states of the EU.

Q1208 **Michael Gove:** Precisely, because Parliament thought that it would be appropriate to gather and to retain this information in order to ensure that UK citizens would be safer. European law says that you cannot do that. Therefore, Parliament's express will and its desire to keep this nation and its citizens safe has been undermined and overridden as a result of an ECJ judgment. Now, some might say "and a good thing too" because civil liberties matter more. However, given that we are talking about whether UK citizens are safer, they are less safe as a result of that law.

David Anderson: This is a judgment in which 12 member states took the British line, and many of those member states and their police forces have found this information very useful and have taken the view that the intrusion into people's privacy is perhaps more theoretical than real. The Court of Justice seems to have taken a different view and we will have to see what other courts, both in England and elsewhere, interpret it to mean.

Q1209 **Michael Gove:** Once we leave the European Union, we are no longer obliged to follow European Court of Justice judgments. Therefore, we could have a regime for gathering and storing information that would allow our intelligence and security agencies, our police and others more information about people who want to kill and do damage to British citizens.

David Anderson: It seems to all of us very likely that, even after we have left, we will be required to have a system for the protection of personal data that is equivalent to that in force in the EU, which is what I meant by Hotel California. We are not going to escape this case law altogether.

Q1210 **Michael Gove:** However, we could gather that data for the purposes of keeping our own citizens safe if we wished to. If the European Union said "I am terribly sorry but, in our high-minded attachment to civil liberties, we refuse to have access to that data", that would be their own affair, but we could gather it, maintain it and retain it.

David Anderson: The EU's interest would be in the personal data of its citizens and, if that were liable to be collected and retained by mechanisms that it considered to be indefensible violations of privacy, we could expect to see the consequences in terms of its willingness to share its data with us.

Q1211 **Michael Gove:** Yes, but we could gather more data than we would otherwise be able to.



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David Anderson: I do not think there is a way of gathering data only on our own citizens.

Q1212 **Michael Gove:** And citizens of third parties outside the EU.

David Anderson: One cannot simply take a mobile phone account and know the citizenship of the person attached to it. Therefore, it is inevitable that any bulk collection mechanism that we have is going to affect EU citizens living in this country.

Q1213 **Michael Gove:** Part of the problem with the safe harbour judgment was that, again, it was assumed that America had more of an interest in national security and less of an interest in safeguarding privacy than the European Union. Presumably, if Britain is outside the European Union, we are in a stronger position to gather and to retain data with America and other like-minded nations that also have an interest in keeping their citizens safer—data that we would not have been necessarily able to maintain or to gather while we were in the EU.

David Anderson: If we are talking about the operation of the Five Eyes agreement, that is not affected by EU law, because it is generally recognised that that sort of co-operation at the highest intelligence level is simply not something that is touched by EU law at all.

Q1214 **Michael Gove:** Why do you think the UK and the other countries are participants in the Five Eyes agreement but no EU nation is, other than the UK obviously?

David Anderson: You are luring me into high politics there. The Five Eyes is a historic arrangement, and a very successful one. There is a high degree of trust between the five partners and, so far, there has been no move towards broadening it out.

Q1215 **Michael Gove:** I want to ask about ECRIS briefly. Is it the case that every other European member state maintains its criminal records on an electronic database domestically? If I were in Romania and I wanted to secure access to someone's criminal records, would they be on a single computerised database in Romania?

David Anderson: I do not know.

Professor Steve Peers: I think that is the case, but I cannot be absolutely certain.

David Armond: Not all of them are maintained to the standards that we would maintain them in the UK, if that is your point, Mr Gove.

Q1216 **Michael Gove:** Yes. I understand that Lithuania can deny access to criminal records on request, if the individual Lithuanian citizen says that they do not want that access to be shared. That is something in an EU Commission document on the operation of ECRIS. Is that your understanding?

David Anderson: I did not know that.



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David Armond: I did not know that either, but I am sure it is correct.

Professor Steve Peers: I did not know that. There is an EU Court judgment that pushes the efficiency of sharing data under ECRIS, but it does not touch on that particular point.

Q1217 **Michael Gove:** Okay, but it is the case that we have centralised information on our criminal records that is electronically available—and I suppose this is really a question for David—so that, were it the case that Craig, as a magistrate, or anyone else wanted to have access to the criminal records, if it was considered relevant, they could get that electronically. Actually, I suppose it would be the prosecuting authorities.

David Armond: Yes.

Q1218 **Michael Gove:** I have one final thing on the European arrest warrant. Can you tell me what would happen if a European prosecuting authority—say the Romanians—decided that it wanted to apply for a European arrest warrant for a criminal offence that was being investigated in Romania? What protections, which I currently enjoy under UK law, would I have if they wanted me to go to Romania? For example, how long could I remain in Romania under investigation, in custody possibly, before my rights were breached as they currently exist in the UK?

Professor Steve Peers: That depends, in the first place, on Romanian law, whether there is some kind of limit on detention and how you would be able to challenge your detention. There is EU Court case law on pre-trial detention in terms of the conditions of detention. You cannot be sent to a country at all, or it must be suspended at least, under the European arrest warrant if there is a problem with the conditions of detention in that country. In that case, you would remain in the UK, not being sent there at all.

There is also case law on the length of pre-trial detention, at least in the requested state. There is a case called *Lanigan* where someone was sitting in Ireland waiting to be sent to the UK and challenged the length of that detention. The EU Court said that there was no absolute limit as such, except you cannot be detained indefinitely and you must be able to raise arguments that it is simply taking too long. Logically, although there is no case law yet, you ought to be able to challenge the length of pre-trial detention once you have already been sent to Romania, at least under the standards of the European Court of Human Rights. Those are the arguments that you would be able to make.

Q1219 **Michael Gove:** In broad terms, the Romanian prosecuting authority could request that a European arrest warrant be granted by a British magistrate. I could then go to Romania. Once in Romania, there is no limit on pre-trial detention. I would have the right, of course, in Romanian courts to contest that. In Britain, as we know, there is a limit on pre-trial detention, but none necessarily in Romania or one or two other EU countries, so I could be there *sine die*.



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Professor Steve Peers: The EU Court has said that you cannot detain someone indefinitely pending a European arrest warrant.

Michael Gove: There is no limit.

David Anderson: There is a limit imposed by the European Convention on Human Rights, which thankfully we are all part of.

Q1220 **Michael Gove:** What is the limit?

David Anderson: Whether that is being properly operated in Romania, I do not know. I would have thought the European arrest warrant system needs to acknowledge the possibility that, if someone is going to suffer either inhuman and degrading treatment or some other fundamental violation of their human rights, then the country that receives the request should be unable to send the person. I believe that is the subject of litigation at the moment and has recently been the subject of judgments. Professor Peers is more expert on this than I am.

Q1221 **Michael Gove:** There is a difference between “you cannot be kept indefinitely” and a limit, and we do not know what the limit is at the moment.

Professor Steve Peers: Just because a country does not have a precise limit on pre-trial detention, it does not mean that it is impossible to make an argument under their constitution or ultimately, of course, to the European Court of Human Rights, if you have not got anywhere under the national system, to say, “Hold on, I have been detained here indefinitely and the trial has never happened” because there is of course also an underlying right to a trial within a reasonable time in the ECHR. That would be violated in that scenario, as well as the detention aspect. Those would be your arguments under the national constitution and ultimately under the ECHR.

Q1222 **Michael Gove:** What is the length of time of the limit for pre-trial detention in the UK?

Professor Steve Peers: My understanding is that it differs in different parts of the UK. All these problems could exist under the Council of Europe or whatever other extradition system existed rather than the European arrest warrant.

Q1223 **Michael Gove:** They might do, but the nub of it is that, having signed up to the European arrest warrant, we are in a position whereby a British citizen could be extradited to a country like Romania—magistrates would have to give effect to that, as a result of having signed up to this aspect of European law—and then a British citizen could find themselves in a European country with no effective guarantee over the length of time that they would be detained before they faced trial. They have the right to challenge that judgment, but they do not know how the courts in that country, the ECHR or the ECJ are going to determine their case.



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Professor Steve Peers: That of course happens sometimes under extradition law. In addition, as part of the EU, there is a system, which does not exist under the Council of Europe, of European bail recognition, whereby you could be let free under the law of the requested state and you could remain in the UK waiting for the Romanian proceedings to reach a stage at which it would be more appropriate for you to be sent, but be at liberty in the meantime. That is not applied as much as it should be, but it exists and there is no alternative to it outside of the European Union.

Michael Gove: That is very helpful. Thank you.

Chair: You have been very generous with your time and I have one final question.

Mr Lilley: I was hoping I was going to get called, as it were, rather than just commenting on other people's comments.

Chair: You have been called.

Mr Lilley: Well, I suppose I was.

Chair: Sorry, I called you earlier.

Mr Lilley: I limited myself to a fraction of Ms Cherry's questions because I thought we were leaving them for later.

Chair: No. Look, if you have an additional question that you want to ask, Peter, of course.

Q1224 **Mr Lilley:** This is following up my previous point. You mentioned the terrible atrocity at the German Christmas fair and how it would be useful in principle to be able to access the phone records, presumably to know both where the assassin had been and whether he had been in contact with other people. You then observed that that might, of course, not be possible under the Watson thing. Obviously we want to help the German authorities in those circumstances, but our prime concern should be that, if a similar atrocity occurs in this country, when we leave, as I understand it, we will be able to keep that data, so we will be safer. We will be able to follow up what happened. The example you gave was an example that suggested that we would be safer when we leave, because our legislation would not be overruled by the European Court. Your nods will be recorded in the minutes.

David Anderson: Well, I was not nodding at that.

Mr Lilley: Oh, right. You were not nodding at that.

David Anderson: No.

Mr Lilley: You were just nodding off.

David Anderson: No. If I was nodding, it was out of respect rather than agreement.



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Mr Lilley: Wonderful, so you do not agree with that.

David Anderson: I do not think it is as simple as that because of Schrems and this case law that we have discussed, whereby they will only share their data with us if we respect equivalent standards to theirs. What they seemed not to like about the United States—

Q1225 **Mr Lilley:** Sorry, I am not talking about them sharing data with us. I am saying that, if a lorry drives into a market in Birmingham, we surely could collect the data of phone companies within this country. We would have the records of where that phone had been and who had been spoken to, and we could use that.

David Anderson: We could do what we liked with data collection in this country if we had no interest in getting our hands on the personal data of Europeans. If we took that autarchic line and said, “We are not interested in anything you send us and we are just jolly well going to do things our own way”, then we could do it untrammelled by the European Court. I am saying that, if we want records of various kinds for various purposes, be they financial, travel records or whatever, then even our domestic powers of collection are going to come under scrutiny, much as they are under scrutiny at the moment. I am not saying that it gets worse when we leave; it may even get a little better.

Q1226 **Mr Lilley:** I do not understand why our domestic powers of collection could come under scrutiny, except in so far as we are giving that information to them. I can see that our powers of how we use data that they give us would come under scrutiny. That is perfectly reasonable. They would say, “You can only have this if you promise to keep it in a special legal compartment that is protected and that you do not treat in the way that you treat your domestically collected data”.

David Anderson: They are there to look after the interests of EU citizens. For as long as there are going to be EU citizens in the United Kingdom, they are going to be looking after their interests and they are going to bear in mind the extent to which their personal data may be, as they see it, intruded upon by our surveillance powers when they are deciding whether to give us that adequacy determination. I am not suggesting that it gets worse when we leave, although we lose the ability to influence policy in this area in Europe. We cannot escape the reach of this case law altogether.

Q1227 **Mr Lilley:** This seems to be a speculative concern of yours. Are you aware of the EU ever having refused to co-operate with another country or imposing some kind of legal sanction on another country because of how it treated EU citizens’ data in that country?

David Anderson: Yes, the Schrems decision in October 2014 would be the answer to that.

Professor Steve Peers: That is the one we have mentioned about Facebook and how safe harbour was struck down. It just so happened



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that privacy shield was negotiated shortly afterwards, but that is in turn being challenged and some of the alternatives to the safe harbour process are also being challenged.

Q1228 **Mr Lilley:** Could you explain this term “safe harbour”?

Professor Steve Peers: That was the name of the policy that in effect was an agreement between the EU and US, which was a process of American companies signing up and saying that they applied certain privacy standards and therefore it was okay to simplify the transfer of data between the EU and the US.

Mr Lilley: It was about the transfer of data from the EU to the US, not about data collected in the US about EU citizens in the US.

Professor Steve Peers: No one ever challenged that, but of course it is quite possible that it could be—

Mr Lilley: That is what Mr Anderson said would be their concern.

Professor Steve Peers: That would be the locus of bringing an argument about a private litigant, but I can imagine that a broader concern about the UK’s privacy and surveillance regime would come into play at least at the stage of making the adequacy assessment. That argument would be made and there would be a debate to be had at the political level, and that may very well be something that someone would argue about as a private litigant. As a private litigant, you would only have an argument if your own data is being transferred like Mr Schrems’s.

Q1229 **Mr Lilley:** I am sorry, Mr Peers. I was not talking about the transfer of data from the EU to the UK, but the collection of data in the UK from people who happen to be EU citizens wandering around the UK.

David Anderson: We may be getting a bit theological ourselves, but I would suggest that the distinction you draw is not in law likely to be a particularly significant one. If you look at the example of the Canada-EU passenger name record agreement, the issue is whether these passengers’ details are to be safely provided to the Canadians. You could say, “Those passengers started off in Europe so it is nothing to do with them”, but then, on the other hand, at the end of their flight, they are in Canada. I am not sure that it is the physical location of the EU citizen that matters, so much as the fact that their personal data is liable to be used by a third-country Government. The EU is likely to be interested in the sorts of uses that are liable to be made of that data, wherever the EU citizen happens to be at any given moment.

Q1230 **Mr Lilley:** You mentioned the Eagles’ song and I can commend you read it further. It says, “We are all just prisoners here of our own device”. I think you are becoming prisoners of your own device, if you do not mind me saying so, by imagining all sorts of things that might be done that the EU has never done before.



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David Anderson: I am not saying that leaving makes it worse. I am absolutely not saying that. However, I have spoken to high-up officials and law enforcement people in the US and Canada who are extremely preoccupied by these judgments and spend quite a lot of time working out how to respond to them. We may have a bit more leeway outside than we do in, because we will not, after all, be subject to fines and penal proceedings as we are currently as a member state. Balancing that, we will not have influence on the court or the way that the decisions are made. All I am saying is that this is not something that can be left out of account and it will be a feature in any negotiation we have on any of the issues that we have discussed today.

Q1231 **Mr Lilley:** I have one last aspect. You mentioned the prospect of Poles going to Dublin, coming over the border and taking the ferry to Scotland. Why would any Pole do that? We have, as I understand it, visa-free entry from 56 countries and territories throughout the world to the UK. I cannot believe that we will not have visa-free entry for visitors from Poland and EU countries to the UK. Why would you go to Dublin rather than coming to Heathrow, Luton or wherever?

David Anderson: If we required a visa, plainly you accept that the principle would apply. Even if we did not, I assume we may have some time limit beyond which one cannot stay in the country or one cannot stay in the country without satisfying certain conditions, and it might be advantageous to the Pole not to have a British stamp on his passport. I am only speculating. I do not know what deal we are going to make.

Professor Steve Peers: If this person were subject to an entry ban—the sort of people we did not want to come, having banned them from entry—then of course it would make sense for them to try to find entry by that route, because Ireland may very well not have an entry ban on them as a member state of the European Union. Having done that, they evade our entry ban by that mechanism.

Mr Lilley: Right, and then the Irish do not co-operate.

Professor Steve Peers: The awkwardness would be that we may very well have entry ban standards for banning people not just for very serious crimes—the sort of thing that Ireland would ban them for anyway—but for a previous overstay or something like that, which cannot, of course, be a reason for Ireland to refuse entry to a national of another member state, with Ireland still being a member state. There is no problem with Ireland banning the rapists and murderers from coming on to their territory if they are loose, but the problem is with the less serious crimes, such as immigration overstays, where they could not refuse an EU citizen entry to their territory, whereas we may very well want to. That is the problem.

Q1232 **Chair:** I have one final question. Would we be right in thinking that there really is very limited or no potential here for any bilateral agreement between the UK and individual EU member states in the



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subjects that we have been discussing because the EU would say, "We have competence as a collective institution in all these matters"?

Professor Steve Peers: There is no external relations case law on this area yet. The data protection ruling related to Canada may touch on these issues. If you look at the traditional case law of the Court of Justice written under the treaty, there is exclusive external power if a bilateral treaty with a member state and a non-member state would affect EU laws or where there is power to negotiate in EU legislation.

Now, on data protection law, there is power to negotiate on EU legislation. That would probably therefore mean that anything within the scope of data protection law has to be an EU process or negotiation with the UK, rather than individual member states.

On criminal law it is less clear but I would think, at the very least, about access to databases, which has a data protection element anyway. However, if a database is run by the European Union or set up as a national network by EU legislation, as the Prüm system is, then access to the main database or to the main system would have to be the exclusive competence of the EU.

Subject to data protection law, I imagine that we could have bilateral agreements with each individual member state on access to data in their national databases, which may very well of course then be uploaded separately into the EU system. Doing things that way is likely to be more complex than simply having access directly into the EU system. Possibly, subject to the concern about exclusive competence over data protection law, that is something we could do, whereas with pure criminal law, like the European arrest warrant, it is arguable either way. I am not absolutely certain either way what the European Court of Justice would say on things like that, in terms of exclusive competence or not.

Chair: Thank you very much. You have all been very generous with your time and you have been of great assistance to the Committee this morning. Thank you very much for coming.