



HOUSE OF LORDS

Select Committee on the European Union

Home Affairs Sub-Committee

Corrected oral evidence: Brexit: The European arrest warrant

Wednesday 5 April 2017

10.45 am

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Members present: Lord Condon (acting Chairman); Baroness Browning; Baroness Janke; Baroness Massey of Darwen; Lord O'Neill of Clackmannan; Baroness Pinnock; Lord Soley.

Evidence Session No. 2

Heard in Public

Questions 21 - 30

Witnesses

I: Mike Kennedy, former President, Eurojust and former Chief Operating Officer, Crown Prosecution Service; Aled Williams, former President, Eurojust.

Examination of witnesses

Mike Kennedy and Aled Williams.

- Q21 **The Chairman:** Good morning and thank you very much for joining us. As you are aware, the Committee is looking at criminal justice co-operation with the European Union after the United Kingdom leaves the EU. In these current sessions we are looking in particular at the impact on the European arrest warrant. Clearly, with your backgrounds, we are very grateful that you can provide us some evidence on that.

This is a public session and there is a live webcast of our deliberations this morning. You will be sent a transcript of anything that you say this morning, so you will have the opportunity to look at that and comment on it, if necessary. Before we start getting into questions, it would probably be helpful to the Committee if you would just remind us of your individual backgrounds and why they are relevant to what we are looking at this morning.

Mike Kennedy: I am Mike Kennedy. I worked for the Crown Prosecution Service for many years, and was seconded to be the UK's representative at the provisional Eurojust in 2001. Subsequently, I was elected as its president for three years and then re-elected for a second term of three years. I left Eurojust—it is not possible to do a third term, unfortunately—and I came back to be the chief operating officer in the Crown Prosecution Service for just over five years.

Aled Williams: My name is Aled Williams; I am Welsh. Like Mike, I worked for the Crown Prosecution Service for a long time. I am a solicitor, like Mike, and I was the first UK liaison magistrate in Spain. That was in about 2002. I was there for a few years and, after that, I went to Eurojust, where I was deputy to Mike as the UK national member for a time. Then I became national member and subsequently the president of Eurojust.

- Q22 **The Chairman:** Thank you very much, Mr Williams. If I could start with a general overview, we have seen from the Government's White Paper, the Prime Minister's statements and subsequent ministerial statements that the Government's intention is to bring to an end the jurisdiction of the Court of Justice of the European Union in the United Kingdom. We have flagged up in previous reports that that is going to lead to a potential tension between this objective and the Government's also-stated intention to continue deep co-operation in dealing with crime, terrorism and criminal justice. I wonder if you could give us your interpretation of what you think the Government's red line is on the Court of Justice of the European Union, and your assessment of how that will impact mutual recognition of judicial decisions generally and, very specifically, the European arrest warrant. I know that is unfair and a lot to ask in one go, but really it is how you interpret what the Government have said so far and how that is going to impact judicial co-operation, in particular the arrest warrant.

Mike Kennedy: It is very difficult to establish exactly what the red line is or where it is drawn, if there is a real red line. It seems clear from what has been said that there is a desire to extricate the United Kingdom from any influence, and certainly any precedent influence that had to be followed, coming from the European court. If that is the situation and the European court is not to be a final arbiter on any of the instruments of mutual recognition or, indeed, other instruments, it seems very difficult to see how they would operate in practice.

It is interesting because the last Government and the current Prime Minister, when she was Home Secretary, had, I believe, quite a lot of praise for the court following our agreement to enter into the upcoming European investigation order, which the UK signed up to and accepted the jurisdiction of the court on. Clearly, a lot has happened since that agreement was made. We have had the referendum and we have had a series of pronouncements on all sides about the court and about its future influence.

Aled Williams: I would basically agree with the line that Mike has taken, but I would add a rider. I am not sure that the quite understandable concern expressed about the jurisdiction of the Court of Justice of the European Union is necessarily going to have an impact on practical co-operation, and that is because most criminal justice co-operation in the European Union effectively remains intergovernmental rather than supranational. I appreciate that Europol is now in a state of flux because, from 1 May, it becomes more of a supranational organisation, but Eurojust very much remains an intergovernmental body, despite the proposal for a regulation. The fact that you have an intergovernmental approach to co-operation, to a limited extent, mitigates the conflict with the idea of having a supranational court decision on instruments, as Mike has pointed out.

The Chairman: Based on what you have said, do you see it being feasible that we could keep our involvement in the European arrest warrant and yet reject, in general terms, the Court of Justice's jurisdiction over us?

Aled Williams: No, I would not be quite as optimistic or as sanguine as that. There will be different prospects for different organisations and institutions within the framework of European Union co-operation. I would be optimistic about the UK continuing its presence and participation at Europol and at Eurojust. I would be less optimistic about the situation with the European arrest warrant. The only way it could be possible for us to maintain the benefits of the European arrest warrant would be by—it sounds as though I am adopting a party line here—greater use of Eurojust. In the framework decision on the European arrest warrant, there is reference to using Eurojust, which has been done in the past, to try to resolve conflicts over the operation and execution of European arrest warrants. That has been done with some success.

The Chairman: Forgive me for interrupting, but it is quite interesting in the sense that you are not sanguine about that, as you say, but the fact

that you are relatively relaxed about the future is not an argument that we have heard so far. Is that based on your pragmatic involvement in Eurojust, being in the hot seat and being out there, or is it linked to other things that you have heard in the general discussion over the last couple of months? What has given you that confidence that we have not heard elsewhere?

Aled Williams: I would like to think that it is based on my experience at Eurojust, rather than on prejudice, as it were. So far as experience is concerned, I remember that, during both Mike's time and my team at Eurojust, there was a system whereby third countries, which the UK will become, had a presence at Eurojust as liaison prosecutors. That seemed to work and I can see that continuing in the future.

The Chairman: I am going to be unfair and ask you, Mr Kennedy, if you share your colleague's relaxed attitude about that.

Mike Kennedy: It is difficult for me to be as optimistic as Aled seems to be. If we are talking about the European arrest warrant, we are talking about a multilateral agreement now involving 28 member states. Each has agreed to quite a complex series of arrangements, and one of those arrangements is that the European court will have final jurisdiction and the possibility of having a preliminary referral for an authority. It is difficult to see how that can be replicated without some sort of superior overarching judging authority, a court, and that is the court at the moment. I know that the questions later on talk about the possibility of some other arrangements, which I think would be difficult. What Aled is saying is that the willingness of practitioners to work together to find the evidence, to catch criminals and to bring them properly to justice will be there, but for me it is about the existence of operational mechanisms that will actually allow that to happen. If the UK is outside the arrangements, it is going to be very difficult to put arrangements in place for the UK to be a sort of semi-detached member in making those arrangements.

The Chairman: We will come to some of the specifics later on.

Lord O'Neill of Clackmannan: I get the impression that both of you are looking at this from the standpoint of European administrators. If you could put yourself in the role of the bloody-minded defence lawyer seeking to frustrate the process, mess it about and make it last as long as possible, Mr Williams, do you think that your somewhat sanguine attitude would necessarily be robust enough to stand up to the devious means of a defence lawyer who is seeking to frustrate the process?

Aled Williams: I am sorry; I am a glass-half-full person, I suppose. If the great repeal Bill takes over, it will not necessarily need to do much linked to the Extradition Act. The fact that the legislation in place would still require time limits to be observed, certainly so far as the UK is concerned, means that there would be a limit to the degree of frustration that the bloody-minded could wreak.

Baroness Browning: Is your optimism, or your glass-half-full approach,

based on the fact that because you have worked so close to this you are aware of how important it is to both parties, to the UK and to the EU? Somewhere at the back of your mind, are you convinced that, whatever the problems, both sides are going to try to make this work somehow? Is that in your mind?

Aled Williams: I think it is, yes. I was struck when I was reading some background material on this by the figures for the numbers of people who had been sent back to the other member states from the UK and the numbers who had come from the other member states to the UK by way of European arrest warrants. The difference was something like seven or eight to one. It is quite a marked difference. There is going to be a mutual interest in arriving at an agreement.

Lord Soley: A lot depends on the rigidity of the red line, does it not? If the red line becomes slightly more of a pink line, there are going to be possibilities for arrangements. Do you think that is a realistic assessment? A red line means absolutely no co-operation, which I have always personally seen as a bit unrealistic in the modern world. What is your assessment of that?

Aled Williams: That ultimately seems to me to be a political question, as to how the red line is going to be interpreted. On these kinds of issues, I immediately turn to Mike to see whether he would like to provide an answer.

Mike Kennedy: If it is a red line around the court and the court is off limits, some other arrangement has to be put in place if the current multilateral agreement is to continue, in any shape or form. It is difficult to see what that might be, how that might work and how we, as a non-member state, might persuade the other 27 to put something in place that would be acceptable to us and all of them or to each of them individually.

The Chairman: We can carry on teasing out interpretations of the Government's intentions. I think Baroness Massey would like to carry on with that theme.

Q23 **Baroness Massey of Darwen:** Thank you, Chairman. As you say, it is to try to dig into the Government's intentions. You have answered fairly completely on the EAW, but can we just dig a bit deeper into that, if possible? The Home Secretary said that she agrees "with the principle that the European arrest warrant is an effective tool", and that it "is essential to the delivery of effective judgment on the murderers, rapists" and so on, whom we have managed to get judgment on: "It is a priority for us to ensure that we remain part of the arrangement, and I can reassure Members in all parts of the House that our European partners want to achieve that as well". That was in *Hansard* on 6 March. What does this mean exactly? Could you interpret that for us? Can we remain part of the European arrest warrant while we are outside the EU? How would it work?

Mike Kennedy: First, the remarks seem quite clear to me in one sense: that the Home Secretary feels that the EAW is a successful instrument and is regarded as a successful instrument. Okay, we have come across a few glitches and problems here and there, but it is not just a successful instrument for us; it is a successful instrument for the other member states. They and we want to proceed with it. The difficulty is how that fits with not complying with or following the European court's decisions. The way through this must be some form of negotiation. Presumably, the Home Secretary is hoping that that can be done by herself and her team, and that there can be some solution to this that will allow the red line to be observed, but will also allow us to continue with the arrangements that are currently in place.

Baroness Massey of Darwen: Who negotiates with whom?

Mike Kennedy: I should imagine that it is negotiation together, either individually or on a multilateral basis.

The Chairman: Would you care to speculate on what that sort of negotiation might lead to? What might a compromise or an agreement look like, based on what the Home Secretary has said so far? We are not asking you to second-guess the political intentions but, with your enormous experience, both of you, can you contemplate any sort of mechanism that might enable us to bridge the red line and the ambition in the way that the Home Secretary is speculating?

Mike Kennedy: There would need to be a series of preliminary meetings to identify what is desired on both sides. I am sure that would involve people from the Home Office and civil servants there, people on the other side for the member states themselves, and undoubtedly the Commission would be involved too.

The Chairman: Sorry, it was not really the mechanism that I was exploring; it was the outcome. For European court jurisdiction, would there have to be some other judicial oversight mechanism that both parties agreed to?

Mike Kennedy: One would assume that if the red line is around the European Court of Justice, it means that an alternative has to be found that would be acceptable to all sides. That would take some negotiation. There are probably some possibilities, but it is quite difficult to envisage.

One thing to remember is that, from the UK perspective, the court has not actually ruled on any of our cases, as far as I am aware, and the referrals for preliminary judgments or preliminary rulings have been allowed since only two or two and a half years ago. I do not think we have made a referral, so we have come to it saying that this is a mechanism that is working without the European court's view. That is an interesting arguing point. Lots of issues were resolved when the European arrest warrant agreement came into force back in 2003-04, which dealt with issues that nobody expected to be dealt with so quickly, such as the extradition of member states' own nationals to another jurisdiction to

face prosecution, which I know you have talked about already. Those sorts of things will raise their head again, I am sure.

Baroness Massey of Darwen: If these negotiations had to be done bilaterally, separately for every single country, would that not be extremely complicated?

Mike Kennedy: Yes, without doubt.

The Chairman: Shall we move on to dispute resolution mechanisms? Lord Soley would like to explore that with you.

Q24 **Lord Soley:** The Secretary of State for Exiting the European Union indicated that it may be possible to have arrangements in particular areas for arbitration and dispute resolution. He gave examples for trade and for justice and home affairs. He indicated that the Government have already done some work on this. My first question to you is whether you have made any assessment of what a bespoke adjudication arrangement might look like and if there are any other examples around that we know of, which we perhaps ought to be looking at.

Mike Kennedy: I have not made any assessment. There may be other examples. I heard the evidence that this Committee heard last week from Sir Alan Dashwood about the EFTA arrangements. Now, that is simply outside my field of experience, so I could not really comment on it, although I have heard talk about the possibility of some form of arbitration scheme being arranged if a particular case went through a revamped EAW system. That arbitrary body might be able to make a decision or recommendation, rather than the case being referred to the European court, as it would be normally.

Lord Soley: I might come back to Professor Dashwood's arrangement but, Mr Williams, do you have any comments on what possible bespoke adjudication systems there might be?

Aled Williams: I do not, really. Apart from the trade suggestions, there seem to have been only two examples. There is the agreement with Norway and Iceland, which obviously has its own problems, and the only other one I would suggest is some kind of adjudication role at Eurojust. Of course, that has its own problems in itself, because the UK would not be a member of Eurojust. I hope it would maintain a presence there, but it certainly would not be a member.

Lord Soley: Having a presence there would not really involve us in any discussions that could lead to adjudication. Is that your assessment?

Aled Williams: There would be a difference between discussions and decisions, I think.

Lord Soley: What about the Norway-Iceland example? It seems to have worked, does it not?

Aled Williams: As far as I know, it is still not in force. Is it?

Lord Soley: They have access to an arrangement, or am I mistaken on that?

Mike Kennedy: It is important to remember that Eurojust is simply a body of judges and prosecutors brought together to facilitate the exchange of information and the more efficient fight against cross-border crime, as it were. The European arrest warrant is one of the instruments that help make that happen. Eurojust does not have any real operational role in the way that the EAW operates currently, save for facilitating exchange between people and putting people together who might be able to help one another in execution, et cetera.

There are two other areas in which Eurojust is involved. First, the deadlines that the EAW sets, certainly in 2004, are very tight deadlines and were seen as unusually short. If they are breached, that breach should be reported to Eurojust. Secondly, if two competing EAWs are issued in respect of the same person, Eurojust has a responsibility to arbitrate between the two competing countries to say which should take precedence. Apart from that, Eurojust was not involved in the negotiation of the EAW arrangements to any great extent, although it facilitates their operation.

Norway, the United States and Switzerland have representatives at Eurojust to help with cases that involve their country and, indeed, to help themselves when other countries are involved with them. Similarly, at Europol there are people from countries outside the European Union but those people, certainly at Eurojust, do not have any involvement in the management, administration or decision-making in how the organisation operates.

Lord Soley: Can you just explain to me a little more about how those representatives engage? Do they just have discussions about what would help resolve the situations that they presumably have? What happens?

Mike Kennedy: A practical example would be that if there was a drug trafficking case involving Norway, which involved Sweden, the UK and Denmark, let us say, whoever initiated the case would invite those representatives to come to a meeting to talk about the loose ends in the case that needed tying up in those other jurisdictions. The representative from Norway would be invited to attend that meeting.

Lord Soley: They are participating in part of the process, but basically by invitation, and always at the invitation of the European Union, not of anyone else.

Mike Kennedy: Essentially, yes, it is at the invitation of the European Union, because the agreement between Eurojust and those third states would have to be approved by the European Union Council of Ministers.

Lord Soley: Am I right in assuming, from what you have said so far, that any adjudication process would struggle to replicate what is done by the

court at the moment?

Mike Kennedy: It is difficult to say, because we do not really have any direct experience of the court's decisions in UK cases. I do not know whether that would be replicated. It would be a case of trying to devise something that one would hope would keep everyone happy and would offer some opportunity for rights to be wronged, if needed, at the highest level, but it would be performing a similar function to the court, I would say.

Lord Soley: I am not sure how much knowledge you will have of this, but the other 27 countries might have views about the extent to which they would be prepared to engage with a non-member country, such as the UK now, in effect to set up special courts, arbitration systems or whatever. Professor Dashwood said that this would have to be some sort of court mechanism. Is that your view? Do you have any comments to make on that?

Mike Kennedy: I think some would find it irritating to have to negotiate this again. Some might accept it. It would be difficult. We would be starting from a position that the other member states would understand, because of the referendum and what is happening, but I cannot see that there would be a huge amount of sympathy for our situation.

Aled Williams: I agree. In general, it is hard to see Eurojust really duplicating the decisive role of the Court of Justice of the European Union. In practice, Eurojust would be useful and will continue to be useful for heading off problem cases at a relatively early stage. If there is a problem in the execution of a European arrest warrant within the parameters that Mike indicated earlier, the case is referred to Eurojust, and the UK, in a liaison prosecutor role, clearly not as a member state, would be able to convene what is called a co-ordination meeting to discuss this and to bring the interested parties to Eurojust for the matter to be discussed there. That is the practicality of it, and very often agreement is reached at these meetings.

In all the time Eurojust has existed, although there has been a lot of talk about difficulties with conflicts of jurisdiction, for example, where two member states want to take forward a particular case at that stage, I do not think there has ever been a case where a conflict of jurisdiction has gone outside Eurojust. It has always been resolved within Eurojust. In the last 10 or 15 years, there have been only about two instances of a conflict of jurisdiction case at Eurojust. On only one occasion, to my knowledge, has it been necessary for the college of Eurojust, when it has not been possible for the parties of the conflict to reach an agreement. On only one occasion has it been necessary, and there is a mechanism within the Eurojust decision at the moment for the college as a body to decide.

Lord Soley: This is my final very brief question and summary, in a sense. There is no obvious arbitration or dispute resolution system that you can suggest we should look at.

Mike Kennedy: I do not know of one. It might be possible to construct something.

Lord Soley: The Government are obviously working on something, as the Secretary of State said, but you are not aware of one.

The Chairman: We could consider the possibility of a bilateral extradition agreement, and I invite Lord O'Neill to take us into that.

Q25 **Lord O'Neill of Clackmannan:** We looked at this last year, as a Committee, and we snatched at the Norway-Iceland bilateral extradition agreement, which mirrors the EAW as far as possible. Then we noted inconveniently that Norway and Iceland were members of Schengen and that we were not. It is fair to say that we now know there is no guarantee that the UK could secure a similar agreement outside the EU, given that we are not even members of Schengen. Under Article 37 of the extradition agreement that Norway and Iceland have concluded with the EU, the Court of Justice does not have jurisdiction over disputes, but instead there is provision for "constant review" of the Court of Justice case law. Could you try to explain to us what an arrangement along these lines would mean? How does it affect the jurisdiction of the Court of Justice, relative to the status quo? What relevance, if any, do Norway and Iceland have? What problems do they have? They do not have recourse to the preliminary ruling procedures that are involved in this.

Mike Kennedy: First, I was not involved at all in any of the negotiations to do with the Norway-Iceland agreement, which I think has been agreed for over 10 years now, but is still not in force. I do not quite know why. I tried to do some research on this, but I came to a dead end. I understand that the papers have not been deposited. One thing that the Commission told me was that Norway respects the judgments of the European Court of Justice. I sit as an expert on a criminal justice policy panel for the Commission in Brussels, so I have some dealings with them, but because of the short notice I have not really been able to find out much more than that. Norway and Iceland are not part of the arrangement, so it is difficult to say how this might have affected them or not affected them, because they have just simply not been involved.

Talking about the preliminary ruling point, we in the UK have been part of the instrument since the very beginning. It was not until 2014 that we had the possibility of making a referral. I do not think we lost anything on that, although I know and perhaps the Committee knows too that we had a lot of problems on a practical basis with countries that have a legality principle, which I think you know means that, if they have evidence, they must prosecute. There was no discretion not to prosecute in minor cases where items of low value were involved. One of the things that the UK might have done in those early days was to refer some of the smaller cases, for thefts of bicycles and so on, to the court for a preliminary ruling on that point, but we did not. We have moved on.

We held bilateral negotiations, hosted by Eurojust, with some countries, in particular Poland, to try to deal with these cases of thefts of bicycles,

farm animals and so on. After some time, they worked towards a resolution, so it is possible to work things through on a practical level without necessarily having the court's ruling on it. Even if the UK were not part of it, which is clearly what is going to happen with the red line, the court and its rulings will always have persuasive authority. Defence lawyers and prosecution lawyers would be using previous judgments of the court to argue their case. They would not be binding precedents. That is the important thing and that is what the Government wants to avoid. There may be a way to work through that red line by saying that it is actually not following the precedent of the court, but using it as persuasive authority.

Lord O'Neill of Clackmannan: Just going back to this point, why have Norway and Iceland not put this into force? They spent many years negotiating and, when it comes to the point of stepping up to the plate, they are not doing it.

Mike Kennedy: I do not know. I heard that there were debates in the Icelandic parliament about surrendering their own nationals to other jurisdictions for prosecution. There was some concern about that in their equivalent of our House of Commons, and I think that that has been overruled by the Government subsequently, but I am not an expert on that and would not profess to know the detail.

The Chairman: Next, we would like to consider the relevance of a potential fallback position of the 1957 Council of Europe Convention on Extradition, and Baroness Browning will take us through this.

Q26 **Baroness Browning:** We have been advised that if, at the end of two years, no agreement has been forthcoming with the EU for a new extradition arrangement, we should not rely on the 1957 Council of Europe Convention on Extradition, because some member states have already rescinded that legislation. The idea that they would enter into bilateral agreements to bring it back is unrealistic. Can you give us your view on that? Can you also let us know how robust you think that piece of legislation is? Are there any bilateral extradition arrangements that the UK has with third-party countries outside the EU at the moment that you would identify as exemplars of good extradition agreements?

Mike Kennedy: It would be a pity, in my view, if we had to fall back on the convention. The convention of 1957 is now 60 years old. When I was responsible for extradition in the Crown Prosecution Service, many years ago, the timelines for extradition of individuals from one country to another, and in particular from some countries to other countries, were horrendous. It sometimes went on for two or three years. The European arrest warrant introduced two things that took all that away. The introduction of deadlines, with pressure put on authorities to execute and process individuals who were subject to warrants very quickly, improved things no end. I am sure you have heard all the examples that have been quoted about that previously. It also removed the exemption for extradition of own nationals, so we would be going back to those situations. We could be going back to not just the practical problems of

having those countries re-legislate to allow us to work with them on the convention, but we would have the old-fashioned way of doing things very slowly and not as effectively or efficiently as operating under the warrant.

You ask about an exemplar for an agreement. It is difficult to say, because there will always be agreements that look good but where in practice difficulties arise. Individual cases will cause problems, as I am sure you have heard, both for the warrant and, indeed, for the convention cases. I was involved in a terrorist case a long time ago involving a bombing on the metro in Paris. This took many, many years—over 10 years—to resolve. Under the warrant, I am sure it would be dealt with far, far more quickly than that. That is an extreme example, but there were many other cases, particularly with some European countries that I will not name here. It took a long, long time.

That said, the convention still operates with Switzerland. Switzerland is a party to the convention and we are a party to the convention. I have no recent experience of what is happening with Swiss extradition requests and UK requests to Switzerland. It would be far better if we could negotiate something akin to the present arrangements. The real danger with all this of course, as I am sure you are aware, is that we have a two-year deadline. Negotiating within that deadline, particularly if there have to be 27 bilateral agreements, is akin to impossible.

Aled Williams: As for the improvements that have been brought about by the European arrest warrant, it is important to say that the EAW introduced a system of court-to-court contact, whereas the convention is still essentially a diplomatic governmental approach to things, which partly led to delay. That would be a great loss. I think that most people would agree that, given all these factors, going back to the convention would be counterproductive in relation to the security of our citizens and delays.

Baroness Browning: If it goes back to a diplomatic level, would it be true to say that politics gets in the way?

Aled Williams: Yes, although having said that one sees that even with the European arrest warrant there are cases where politics has had its role. That is where the argument for the Court of Justice of the European Union comes into its own. In a relatively recent case, Aranyosi or something, the difficulty was that the prison conditions in Hungary were so appalling that Austria, or whichever the requested member state was, did not want to return that person. That was a human rights issue about that. It went to the Court of Justice, which with some fairly fancy footwork was able to please both sides without saying that in no circumstances would it be possible to return somebody. It would be necessary for the requested member state to look at the particular details of the case in each instance. In general, I agree with Mike that going back to the 1957 convention would be a mistake. As for exemplars, it is very difficult to think of countries with which we have extradition agreements that have always worked very well.

The Chairman: Before we move on, could you just say a little more about how, with the current European arrest warrants, deadlines are enforced, challenged or even manipulated? Do the deadline issues work pretty well at the moment?

Mike Kennedy: I do not have any recent experience on the figures, but certainly in the early years there was at least an attempt to meet the deadlines. When I was president of Eurojust we had an annual report in which we detailed those countries that had reported that they were having problems in meeting the deadlines set in the articles of the European arrest warrant decision. It is a naming-and-shaming exercise, rather than a breach of the deadline meaning that the warrant is invalid. That is certainly not the case. It encouraged a lot of improvement and, as we have just been hearing, the fact that this was a court-to-court arrangement rather than a government-to-government arrangement meant that a lot of the previous arrangements in the convention were not involved, so a shorter timescale was possible.

The Chairman: Did the naming and shaming work, or did people have to be repeatedly named and shamed?

Mike Kennedy: I do not remember countries being repeatedly named and shamed but, then again, it was quite difficult to ensure that everybody was reporting what they should be reporting.

Baroness Pinnock: I might have missed it, but have you said what the current guidelines on deadlines are?

Mike Kennedy: No, I have not. I am sorry, Baroness; my experience is outside.

Baroness Pinnock: What were they when you were president of Eurojust? Do you know?

Mike Kennedy: The guidelines are set out in the arrangements. It is 30 days, and then 90 days for more complicated cases, essentially.

Baroness Pinnock: I am sure I have read it somewhere, but I could not find it.

The Chairman: We will now think about potential transitional arrangements.

Q27 **Baroness Janke:** In view of what has been said already, do you anticipate that there could be some transitional arrangements whereby the status quo could prevail for a period or be represented in an alternative way, with an interim body or something like that? Can you conceive of such a situation being acceptable? Does the fact of the Prime Minister referring to working with existing European institutions make us think that this might be a possibility? What is your view on that?

Mike Kennedy: I hope that there would be good will on both sides that would enable some transitional arrangements to be put in place,

presumably a continuation of what we have at present, until both sides could get things sorted out, so that there can be legislation in each of the jurisdictions as is required to operate any new mechanism that is being negotiated.

Baroness Janke: However, the European Court of Justice has been quite demonised and is seen very much as a red line. Can you conceive of something that might not be the status quo but might offer an alternative transitional arrangement that would work?

Mike Kennedy: Any sort of alternative to the court is going to be quite difficult to negotiate and agree. I just do not know how long that would take, but I suspect it would take longer than is available. Any transitional arrangement would have to have arbitration. You will be discussing in your transitional arrangements what your final arrangements are, effectively, so I would suspect it would be more straightforward to adopt the current arrangements in transition for a period of time. That might have to include the court.

Baroness Janke: You could not see perhaps an interpretative body or something between the courts and the UK as being another possibility.

Mike Kennedy: It is a possibility, certainly.

Baroness Janke: You feel that generally anything that is not the status quo would take quite a long time to agree.

Mike Kennedy: That is my feeling. I may be wrong; I do not know.

Aled Williams: I agree in general terms. As I say, the only body I could see having that sort of role, although in restricted terms it is already sketched out in the framework decision for the European arrest warrant, is Eurojust. Having said that, there would be considerable difficulty on the UK side in accepting that extension of Eurojust competence, partly because the very words "judge" and "prosecutor" mean different things in different parts of Europe at the moment.

The Chairman: If at a high level the overall negotiations faltered, the United Kingdom left with no deal and the two-year time limit was reached, is there any danger of there being a cliff edge in relation to European arrest warrants and related issues, or are you confident that the practitioners in the field would find some way of getting some work done on extradition even if, at the highest level, the talks had faltered? Can you conceive of a cliff-edge scenario where this all just grinds to a halt and we stop doing extradition, or are you confident that practitioners would still be able to find a way through this?

Mike Kennedy: Practitioners will have to adhere to whatever framework they are operating within. If it means the arrest of a person, there has to be proper authority for that arrest. It currently comes from our Extradition Acts in the UK and the arrangements that we have within the multilateral European arrest warrant decision. If we repealed that and did not replace it with anything, it would be difficult for us to issue any

warrant under that agreement. We could of course rejig the Extradition Act to move countries from part 1 to part 2 and so on. Prosecutors, judges, practitioners and police officers can do a lot of things to make things happen, but they still have to operate within a fairly rigid legal framework.

The Chairman: A no-deal scenario could potentially lead to a cliff edge or abrupt stop for some of these issues, for the United Kingdom.

Mike Kennedy: Yes, I would think so. I would need to look at that and how much we could apply the convention, if possible.

The Chairman: Other legal experts have suggested to us that the convention is now almost of no relevance, through time and legal developments in the individual countries. Although theoretically it sort of looks as if it provides a fallback, the harsh reality is that it probably does not. Therefore, there might be a sort of cliff edge if there is no deal.

Mike Kennedy: I could not disagree with that.

The Chairman: We mentioned the position of own nationals earlier.

Q28 **Baroness Pinnock:** I think we have already discussed a lot of this in and among responses to other questions, but it is worth just asking this question so that we have a clear answer for the record. It is about extradition arrangements. We keep talking about Norway and Iceland, and I wonder why we do sometimes, because they are both really small countries. Iceland especially is a very small country compared to ours, and it does not have the immediate links to mainland Europe that we have. I am not sure quite how useful they are as examples in our discussions.

I will ask the straight question about the extradition of own nationals. What are the prospects of the remaining EU states considering extraditing their own nationals to a post-Brexit UK where the UK has not submitted to the European court jurisdiction, is not in Schengen and has not opted into the suite of criminal procedural rights legislation designed to mitigate the limited ground for refusing a European arrest warrant? On the other hand, do you anticipate that the UK would be prepared to continue extraditing its own nationals to EU member states after leaving the EU? It is a straight question, really, so who would like to respond?

Mike Kennedy: Often in this country we underestimate how big a decision it is for some of the European Union member states to extradite their own nationals. In many countries before 2004 it was simply a no-go area. In fact, when the agreement was put into legislation in Germany, it was struck down first by the German constitutional court, its most senior court, because it was contrary to the constitution to extradite own nationals. Historically, Poland and several of the Scandinavian countries would not extradite their own nationals either. We have always been willing to extradite our own nationals. We are in that situation now. One might say that if they have done it with us in the past, and we have a reasonably well-respected if not very well-respected legal system, why

would they not extradite their own nationals to us under new arrangements? The 27 countries have made that commitment. Why should it not continue? Nothing has really changed dramatically. That might be an argument and that might be something that we could expect.

I should say that under the convention, just in case you were wondering, countries that did not extradite their own nationals would prosecute them. If they refused to extradite a man from Sweden to the UK, let us say, the UK authorities could send the requisite evidence and, indeed, police officers or prosecutors, if needed, to go to Sweden with the evidence and help the Swedish authorities with the prosecution in their jurisdiction, because they retain jurisdiction of their own people. Although they might not have been extradited back here, they could have been prosecuted in that jurisdiction, which is a point that people sometimes forget. I would be quite hopeful that that could continue.

Aled Williams: I would also be. That is my usual cheerful view of life really, and Iceland has a very good football team, does it not? I would think that the prospects of some trade in extraditions or surrenders between the UK and the remaining EU member states would continue.

Baroness Pinnock: Following our previous discussion, where there are no deadlines, timelines and all the rest of it, it could develop into a long, drawn-out thing, could it not? Earlier, we talked about extraditions that took years before the current arrangements. Could that be the downside?

Aled Williams: In my understanding, there is no proposal, as far as I am aware, for the Extradition Act to be radically altered by the fact of our withdrawal.

Baroness Pinnock: Who knows?

Mike Kennedy: Your final point, which I did not address, was about whether we would be prepared to extradite our own nationals to other jurisdictions. One of the criticisms of the warrant, which you are probably aware of, is that some of the jurisdictions that we extradite people to, as we heard in the Hungarian case, do not have the equivalent prison conditions and it takes some jurisdictions a long time to complete the judicial prosecution process. There might be the argument that, "We do not really want to extradite our UK national to your jurisdiction".

Baroness Pinnock: That would rather undermine the whole thing, though, would it not?

Mike Kennedy: It would, yes, but two things that the EU agreements introduced were mutual trust and respect for each other's systems, and mutual recognition of the orders made by those systems, including the arrest warrant.

Aled Williams: I would anticipate that from the UK's point of view there would probably be tiers of places. We would think, "Okay, we are going to surrender somebody to Germany", without too many concerns about the

human rights implications. Without naming a less fortunate member state, there might be more concerns about surrender, so you would effectively have a tier system in practice afterwards.

Q29 **Baroness Browning:** Could you just give us a flavour of what happens in practice if, for example, somebody is extradited from the UK into another EU country? Is the timing of it in time to stand trial, or do they go into a custodial situation? How do the different rules on bail apply in different countries? Are there complications to do with how different countries treat people awaiting trial?

Mike Kennedy: Yes. There are 27 different legal systems, if not more, and they all have a different way of operating. There are generally two types of people who are surrendered with the warrant: people who have already been convicted and are serving a sentence or should be serving a sentence; and people who have yet to be convicted. I suspect that the majority of people who had already been convicted to serve a sentence would be surrendered and would go directly to prison to serve that sentence.

There is then the second category of people who are being surrendered subject to prosecution and subject to a trial process, which may take some time, often many months or longer. The bail arrangements in each of the European Union countries are different, so I could not give you an assessment of what would happen. I know there have been cases where people have been very unhappy not to have been granted bail in the jurisdiction to which they have been surrendered, when they probably would have been given bail in this country. The European Union has started to do some work on a common process or at least a process that is parallel or similar in the different jurisdictions, so that there is some consistency and mutual respect is built between the systems for that particular part of the process.

Baroness Browning: When we send somebody who has been extradited by another EU country from the UK to wherever, do we know at the point of departure whether they are going to receive bail or do they wait until they get there before they find out?

Mike Kennedy: My understanding is that they will wait for a hearing in the jurisdiction of the country to which they have been surrendered before a decision is made on whether they are granted bail.

Aled Williams: As I understand it, the European supervision order is supposed to alleviate the problem of somebody who is sent to another member state and is refused bail there, because he is a national from another member state.

The Chairman: The final area on which we would welcome your guidance is our influence or lack of it going forward.

Q30 **Lord Soley:** The view has been expressed that there will be a divergence between the two systems if Britain comes out, because Britain has an adversarial system of justice and the European Union countries mainly

have an inquisitorial system. That means that, with Britain outside, EU countries will tend to go down the inquisitorial road in the development of their legal practices. That will create even less of a proper fit between the British and European Union systems. Would you agree with that? Do you think that is a danger?

Mike Kennedy: It is a possibility. First, we need to remember that there are three other common-law jurisdictions within the European Union: the Cypriots, the Maltese and the Irish. The Irish are particularly strong in their views on maintaining compatibility, as far as possible, within the common-law system. I know that we have been on the same side of the fence as the Irish on a number of issues.

Of course, if we withdraw from the negotiating table, our influence will not be there. We will not be able to make the arguments that would help our practitioners to operate more effectively and more in harmony with the other jurisdictions, so there will be an empty chair representing 60 million people that will not be filled. It is inevitable, I suspect, that the other countries will work to suit themselves. It is also important to remember that many of the continental systems, if we can call them that, of the other 27 are very different from each other. The system in Spain is not the same as the system in Italy. There are lots of similarities, because they have a more common background but they are not common-law countries.

I would not say that it would be a huge change, but there is bound to be more influence if we are not sitting at the table. Indeed, Mr Williams and I ran Eurojust for the first 10 years or so. We have an excellent director of Europol, whom I am sure you have met, and he is a Brit. British and UK representatives have done a lot of good work in this area. It would be interesting to see what will happen. I do not think that our influence will be terribly strong if we are not even at the table.

Aled Williams: It depends, when you are talking about the direction of travel, on how the EU itself is going to develop. On the idea of the United States of Europe, there was a federalist view, but that vision is perhaps not as strong today as it was in the past. If there is greater emphasis on a Europe of nations in those circumstances there will be a renewed emphasis on mutual recognition, for example, rather than the creation of a supranational framework.

Lord Soley: Opposition has always come in the past, predominantly from Britain, to the establishment of a European public prosecutor. Do you think that is likely to happen? With Britain outside, could there now be movement towards having a European public prosecutor, or would other countries resist that, including the three common-law systems?

Mike Kennedy: I may be wrong, but I think it has already been agreed that there will be a European public prosecutor. A number of countries have already decided that this will happen. I do not think it is quite finalised or in place yet, but arrangements are being made, and nine or 10 countries, if not more, have agreed to be part of this.

Lord Soley: Do you know if the other three common-law systems have?

Mike Kennedy: As far as I know, Ireland has certainly been very stridently against the European public prosecutor or its involvement in it, as the UK was on the same basis. I am fairly sure that Cyprus and Malta are in the same situation, but I am not certain. The situation tends to change as Governments change.

Lord Soley: A public prosecutor for Europe would tend to take Europe down its own very different road from the road the British were going down as an external power.

Mike Kennedy: There has been a House of Lords inquiry on this subject, which I have given evidence to, but it is being arranged to take place within the national systems. There will be a European public prosecutor, but he or she will have lead prosecutors in each of the jurisdictions. I think the idea is that it will be either attached to Eurojust or part of Eurojust.

The Chairman: You know what we are trying to look at and examine with this report we are leading up to. Is there anything more you would like to say to the Committee that you have not had the opportunity to say, based on our questions so far?

Mike Kennedy: No, thank you. I wish you every success.

The Chairman: On behalf of the Committee, thank you very much for coming. Your evidence has been very helpful. Thank you very much indeed.