

Home Affairs Committee

Oral evidence: [Home Office delivery of Brexit: policing and security co-operation](#), HC 635

Tuesday 5 December 2017

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Members present: Yvette Cooper (Chair); Rehman Chisti; Mr Christopher Chope; Stephen Doughty; Preet Kaur Gill; Sarah Jones; Tim Loughton; Stuart C. McDonald; Will Quince; Douglas Ross; Naz Shah.

Questions 1–112

Witnesses

I: Sir Alan Dashwood QC, Emeritus Professor of European Law, University of Cambridge, Barrister at Henderson Chambers, Piet Eeckhout, Professor of EU Law, University College London, and Valsamis Mitsilegas, Professor European Criminal Law, Queen Mary University of London.

II: Elizabeth Denham, Information Commissioner, Steve Wood, Deputy Information Commissioner (Policy), and Professor Lorna Woods, Director of Research, School of Law, University of Essex.

Examination of Witnesses

Witnesses: Sir Alan Dashwood QC, Piet Eeckhout and Valsamis Mitsilegas.

Q1 **Chair:** I open our session today and welcome our witnesses. Thank you very much for coming to give evidence and thank you for your patience in starting. Unfortunately, the occupational hazard of voting in this place means that we were here until 1.30 this morning. It is unfortunate timing, in that we have chosen today to try to get to grips with the legal details and complexities of the security treaty but we are well coffeed up and look forward to your evidence. Can I ask each of you to introduce yourself and explain your background in this field, so Alan?

Sir Alan Dashwood: I am Alan Dashwood. I was a Director in the Legal Service of the Council in Brussels and, after that, Professor of European Law at Cambridge. When I retired from Cambridge I became a part-time professor at City University and now I am simply a barrister.

Piet Eeckhout: I am Piet Eeckhout. I am presently Dean of EU Faculty of Laws and also Academic Director of UCL's European Institute. My area is EU law generally, with a particular focus on EU external policies and external relations, and some general knowledge about justice and home affairs so others on the panel may have more detailed expertise on that.

Valsamis Mitsilegas: I am Valsamis Mitsilegas. I am Professor of European Criminal Law and Head of the Department of Law, Queen Mary University of London. It is a pleasure to be back in this Committee. I had the honour of serving as a specialist adviser to a different incarnation of the Committee 10 years ago in one of its first inquiries on EU justice and home affairs.

Q2 **Chair:** Thank you very much for coming to give evidence to us. We want to explore as part of this the approach to the security treaty and what needs to be done as part of the Government's objective, continuing security co-operation. Can I start by asking you about the underpinnings for the transition arrangements and what will be required during the transition legally to underpin continued security co-operation around the European Arrest Warrant, Europol and access to the security databases? Do you think that it is legally achievable to maintain exactly the same current security co-operation that we have in each of those areas during the transition and, if so, can you do it through the Article 50 withdrawal agreement? Sir Alan.

Sir Alan Dashwood: Thank you, Madam Chair. The short answer to your question is, yes, I do believe it is possible. As you know, close security co-operation is one of the two pillars of the future relationship that the Government envisages between the EU and the UK. In practice, that means we should organise things so that there can be a relatively seamless transition between membership of the Union, the transitional arrangements and the new partnership.



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I am perfectly confident that Article 50 can be used as a legal basis for transitional arrangements. I say that because Article 50 itself refers to the arrangements for withdrawal, which, it seems to me, would naturally include a transition. That interpretation is reinforced by the practice that has always been followed in relation to accessions where, although, like Article 50, Article 49 says nothing about transitional arrangements, it is accepted as completely normal that these should be in place as part of the accession agreement, so I am perfectly confident that Article 50 can be used for this purpose. How to achieve it is perhaps technically a little trickier but perfectly doable.

The EU itself seems to be willing to contemplate two possibilities: a continuation of relevant parts of the substantive acquis, and from the point of view of this Committee that would be the substantive acquis on internal security, which you find in chapters 4 and 5 of Title 5 of Part 3 of the treaty on the functioning of the European Union, the TFEU. One possibility is simply the continuation of the substantive acquis on security with related aspects of what you might call the constitutional acquis, because I think the EU has made clear that the institutional arrangements that apply with regard to any part of the acquis, which is to continue through the transition period, must be applied in accordance with its own nature. In other words, the Commission with its powers, the Court of Justice with its jurisdiction and, presumably—although this isn't mentioned in the European Council's guidelines—direct effect and primacy during the transition period while the acquis is effectively being prolonged in this area.

The EU does seem to be willing to consider the possibility or certainly does not exclude the possibility of a tailor-made solution, which could entail different institutional and organisational arrangements. My own view is that in practice that would be very complex and time consuming to negotiate, and so I think that a continuation of the acquis is likely to be the more practical solution.

Piet Eeckhout: I would agree with everything Sir Alan has just said. I think Article 50 can clearly serve as a legal basis for such a transition. Although I would note that if the transition is characterised by a full extension of the acquis in the course of the transition, with all the rights and obligations, there is a slight contradiction between the text of Article 50, paragraph 3, which states that the treaties shall cease to apply at the point of exit from the European Union, withdrawal, and of course a transition that would maintain the full acquis would be in some sort of tension with that provision.

On the other hand, as I have argued with a colleague in a paper for Common Market law review, certainly from reasoning from EU constitutional principle it is also very much in the EU's interest and would be part of the EU's constitutional architecture to have a transition that is as smooth as possible, and that would be possible with a full extension of the acquis.



I also think that the complete extension of the acquis is by far the easiest solution. It is not for me to comment on the political arithmetic there and what is politically achievable. But certainly, also in legal terms, that would be by far the easiest way forward because as soon as you start excluding certain areas of co-operation, certain parts of EU law, you end in quite difficult questions of where to draw lines in a sense. You can look at those questions in the same way as difficult questions—particularly in this area that we are looking at today—have already arisen with the protocol on the UK and Ireland and the protocol on Denmark, so these legal difficulties will also present themselves with a much more bespoke transition agreement.

In terms of a transition that would replicate the full acquis, there may be a number of difficulties mainly at the institutional level. As I read the positions that are adopted, the idea would be that the United Kingdom would no longer be a member state of the European Union and, therefore, no longer be represented on the institutions of the European Union. In terms of maintaining the legislation of the EU, that in itself does not present insurmountable obstacles. In terms of participation by the United Kingdom in the EU agencies—such as Europol, for example—I am not sure what solutions could be found there for the United Kingdom, no longer being a member state but continuing to apply the full acquis, as to what sort of representation it would have on those agencies. That would be a matter for negotiation I think.

Valsamis Mitsilegas: Just to add to that. When we talk about the constitutional acquis it is not only the acquis concerning the institutions—the role of the Court of Justice, for example, or the Commission and the UK's representation on the agencies—but we should remember the substantive acquis in this field, which involves, for example, the continuing operation of the European Arrest Warrant or the continuing access of the UK's authorities to EU databases, is always underpinned by rights as enshrined in the Charter of Fundamental Rights and this will apply in any transition period. It is very difficult for me to think that it will not. We have to be very clear about this. I know your next session is specifically on data protection but this will be one of the biggest issues I think in the transition period but also after that.

Q3 **Chair:** How long can you continue with a transition period underpinned by an Article 50 withdrawal agreement? Do you think that there is a time limit or do you think that you can start a transition with an indefinite process and, if we want the transition period to last until a new security treaty is in place, how long do you think it is likely to take to negotiate a new security treaty? Do you see this as a seamless process that is achievable or do you see obstacles along the way? Can I start with Mr Mitsilegas this time?

Valsamis Mitsilegas: This is a political question rather than a legal one. In the interests of both parties, if there is a political will to have such an agreement, it is to have a process that is as seamless as possible. I do



not think that the European Union would be interested in too long a transition agreement. Within the broader context of the current negotiations, my feeling is that the transition agreement would be very limited and targeted and we need to have a very clear idea of what we want to achieve afterwards.

Some of the questions on the transition agreement remain regarding the day after, so what is the degree of involvement of EU institutions in a security agreement on the day after? What is the role of the Court of Justice, for example? What is the obligation of the United Kingdom to demonstrate regulatory alignment—which is a trendy phrase these days—in the field, for example, of the rights of the defendant in criminal proceedings or on the right to privacy and data protection? What would be the mechanisms that these arrangements will ensure that the UK will follow as much as possible or mirror the *aquis* the day after the transition agreement expires? I think these questions will be the questions that will have to be looked at very carefully in order to achieve a seamless transition.

A final point to say, which I think is sometimes overlooked, is that the United Kingdom is currently very much part of the EU security arrangements. The UK has invested a lot of money in order to be part of the Prüm database, the Schengen Information System too, and if you read the current Prime Minister's statements in this House, when the transition period of five years after the entry into force of the Lisbon Treaty expired the UK had to opt out of the third pillar and back into 35 measures. This has all been rehearsed within these Houses. The *aquis* are part of these databases. It is very costly to extricate and it is at least in the UK's interest to have a very smooth transition from A to B.

Q4 Chair: We want to explore some of those content issues with you a bit further but just your sense of the timing issues first. I am interested in whether you think, given the length of time that you think it is likely to take to resolve the security treaty issues, including obviously ratification timetable for security, so the length of time it will take to resolve the complexity of the issues, given what the Government have said they want to achieve, and the length of time for ratification, do you think it will be legally possible to get a transition arrangement that lasts until that security treaty can be in place?

Valsamis Mitsilegas: I do not think it is impossible but the devil is in the detail.

Piet Eeckhout: On that point I think, again in legal terms, Article 50 probably allows a transition that is of indefinite duration although, of course, the longer that indefinite duration may last in practice the more tension you would have with the provision that states, as I said, that the treaty ceases to apply at the point of exit and they may continue to apply nonetheless. Imagine that the withdrawal agreement would provide for such an indefinite transition and that the question would come before the EU Court of Justice—which it might because the court may be asked to



give an opinion on the withdrawal agreement—I would not imagine that the Court of Justice would have huge difficulties with an indefinite transition that is predicated on the entry into force of further agreements, which obviously enables both sides to take the time that is needed for any negotiations on the security agreement. Generally people now speak about a two-year transition. I personally think that is a very short period to do all of this work, not just on the security side but of course also on the trade and economic side.

The one further point that I might add is that I think in this area it may be easier politically also—if I may venture into political comment—to come to a bespoke agreement. That has effectively been the practice throughout the last couple of decades with how justice and home affairs was first done outside the EU, by conventions and then the third pillar and then brought into the Lisbon Treaty. Of course, the UK has always had the opt-out and opt-in, so I would imagine that from the EU side there may be a greater readiness also to contemplate arrangements there that are more bespoke than possibly in—

Q5 **Chair:** In the final security treaty?

Piet Eeckhout: In the final security treaty, yes.

Q6 **Chair:** Given then this timetable, would you agree it would take around 18 months to go through the full formal ratification process for a security treaty? Given how long you think in practice it is likely, given the sort of international experience on the negotiating of a bespoke security treaty, assuming the willingness to do so—I want to press you on what you said about the two years being a bit short—do you think there is any chance of achieving all of that within two years?

Piet Eeckhout: I would be rather sceptical about it, yes.

Q7 **Chair:** That is very, very mild language. Sir Alan?

Sir Alan Dashwood: I am perhaps a little bit more optimistic. First, as to the length of the transition period, I do agree that two years is rather short. Both sides to the negotiations have said that they want the transition to be time limited but, in my view, a wiser solution would be to have a longer period as setting an absolute limit, while recognising the possibility that some elements of the final partnership could be brought into force before that time limit.

I would argue that security is perhaps one of the easier areas to negotiate because the UK is already so committed in this field. The Government is committed to continuing co-operation, at least at the existing level if not developing it further. Although it is quite likely that the ultimate security agreement will be a mixed agreement, it would be possible to bring in to force, provisionally, the parts of the agreement that had been concluded by the UK on the one hand and the EU on the other. Since most of the competences in the field of security are EU competences—not exclusive ones but the EU has competence in this



field—even if ratification by all of the 27 may take a very long time, it sometimes takes two to three years to get in a full set of ratifications, I think it is perfectly conceivable that the most significant parts of the future security agreement could be brought into force provisionally, under powers that the EU Council has, during the transition period and thereby replacing the application of the existing *acquis*.

Q8 **Chair:** Would you have to build that into the Article 50 withdrawal agreement or is that using powers that exist even without the withdrawal agreement?

Sir Alan Dashwood: They are powers that exist already.

Q9 **Sarah Jones:** Michel Barnier made a speech last week in Berlin and he said that the appropriate legal and operational conclusion from the UK wanting to become a third country, when it comes to defence and security, is that the UK will no longer be a member of European Defence Agency or Europol. Was that like a legal thing or was that a political statement and what is the basis of what he said?

Valsamis Mitsilegas: I can start. It will be very much a legal thing. Brexit will mean the UK is no longer a member of the EU institutions and agencies, and Europol is one of them. With Europol especially, what we tend to forget is that the UK has contributed enormously to the shaping of EU security co-operation. The current director of Europol is British. Two of the three first directors of Eurojust, the EU's judicial co-operation body, were British and currently we are faced with the prospect of the UK no longer being a full member state, so this is both legally and politically correct. You cannot have it both ways.

There are arrangements for association of third countries with EU agencies, for example—I think what applies mostly to the UK—the arrangements between Europol and, say, the United States of America. Liaison officers from the US are located in The Hague. They are sitting together with their European counterparts and they have an operational picture on a day to day basis. The key problem with agencies, like Europol, is what happens to the UK's access to the European databases and whether the UK will be the recipient of the intelligence reports and the intelligence profiles that Europol can provide. Currently, the UK is the second highest contributor within the EU to the Europol database. The UK is a user of the Europol database and there is a lot of intelligence that the UK also receives in return. Brexit will challenge this and the key question is: how do you cope with the reality that you will no longer have access to this wealth of information, especially in the future on an ongoing basis? I don't think Mr Barnier was being flippant about this. I think this will be the reality and the challenge is to find ways in which the UK continues to be associated in the most efficient way, in terms of security, with these agencies after Brexit.

Q10 **Sarah Jones:** You say about the Americans having a presence and having certain access. Would it be possible, in any scenario, for the UK to



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still be a member-ish of Europol and how far could that go?

Valsamis Mitsilegas: It will not be a member. It can have liaison officers. It might be able to have some observer status on the Europol management board. This does not give you any decision-making power. The UK has tried this in some of the justice and home affairs agencies already in areas where it does not participate. Frontex is one example, the European borders agency where the UK is not part of it but is an observer, for example. In my view, the management structures are not so much the key for me. The key challenge for me here is the operation. I find it hard to see how the UK will retain its unlimited access to the Europol intelligence products, as a third country. It may be given some access to bespoke files, which involve UK participation and co-operation with other EU member states but this will always be subject to the approval and authorisation of the EU agencies.

Q11 **Sarah Jones:** Within EU law, can membership of Europol be extended during the transition period? After we have left the EU, can we retain membership during that period?

Piet Eeckhout: I would think that should be possible to be arranged. If the *acquis* in that field is continued and the UK continues to commit itself to the same obligations as before, I would imagine that ways can be found to continue to have that involvement. But there might be quite a technical negotiation to be had about that. It would not be immediately clear to me that the EU would automatically say you can continue to have the complete access and role that you had before, particularly if you are no longer a member state, and the idea seems to be you are no longer represented in the institutions and how that would affect the agencies I am not so sure about that. I would think there would need to be a negotiation about that.

Sir Alan Dashwood: If I may come in briefly on your two questions. In my opinion, everything is there to be negotiated, particularly as regards the future partnership. I cannot see any reason why the UK could not negotiate full membership of these agencies as part of the future partnership. I don't think there is anything in the treaties that prevents that, and it is only the EU side of the negotiation that is very clear that it will not contemplate any solution to any issue that would involve amending the treaties. I don't think there would be a need to amend the treaties and, short of that, it may well be necessary—I think it probably would be necessary—to amend the legislation on Europol and the other agencies, but if that is what everybody wants then they will do it.

As far as the continuation of the *acquis* during the transition period, I agree with Piet. I think that is perfectly possible.

Q12 **Sarah Jones:** You would say the statement that we cannot be a member of Europol is not necessarily correct. You have a different view.

Sir Alan Dashwood: You probably cannot be a member under the existing legislation, but that can always be amended as a consequence of



what is negotiated for the purpose of creating a future partnership, which will be not only in the interests of the UK but very much in the interests of the EU as well.

- Q13 **Chair:** Just to follow up on that, would it require amendment to legislation to keep Britain in Europol during the transition period?

Sir Alan Dashwood: I am not sure about that. Do you know, Valsamis?

Valsamis Mitsilegas: I don't think so. I think it depends on how you frame the transition period. If we have a situation where the two parties agree that there would be a transition period on the justice and home affairs acquis as it applies today, I do not think we need to have any further change in the legislation. I would go politically for that solution because it will mean that everything continues to operate as it is now, during transition period.

- Q14 **Sarah Jones:** I have one other question, which is just a view really. You mentioned that the UK uses Europol more than any other agency and we are generally seen as a driving force across lots of these areas of justice and home affairs. Whatever arrangement we come to when we leave, do you think we are less likely to maintain that kind of influence?

Valsamis Mitsilegas: There are two questions in this I think. The first one—and I agree with Professor Dashwood—I think the strength of the UK in all of these negotiations in the field of security is that the UK is a very strong contributor to European security, and it has driven European integration and provides a lot of information and intelligence. In that sense, my sense is that in the future the UK can achieve a relationship that is very, very close to Europol but, in my view, full membership of Europol is only open to EU member states, so it will not be full membership. It will be close.

Influence will be lost to some extent in terms of the strategic development of the EU agencies. Currently, there is a British director of Europe, well, obviously, he has a say. Some commentators argue that the UK has managed to export its own domestic model of intelligence-led policing into the EU and Europe is the best example of that. This will inevitably take a hit after Brexit.

- Q15 **Rehman Chishti:** With regards to security and Europol, the biggest challenge in the world at the moment is through terrorism. The United Kingdom has data-sharing on intelligence with many countries around the world, where, if there is a possibility of a terrorist attack, whether it is here in the United Kingdom or whether it is in, say, parts of Africa or South Asia, Pakistan, we would share that information with our Middle Eastern partners. At this point in time, with regards to data-sharing, irrespective of Europol, what percentage would you say there has been data-sharing with those partners outside of Europol that has led to a successful thwarting of a terrorist attack in this country? If that is working well, then there is a possibility that we will have good data-



sharing with other partners on a bilateral basis.

Valsamis Mitsilegas: I will say a few words on this question. I do not have data statistics to share with you. I think we also need to distinguish in our conversations between the two different issues, which are closely related but also, in terms of the EU, rather separate. First of all, is the intelligence co-operation that falls strictly outside of the scope of EU law? This is a matter of national security and it is a prerogative for states to have their own arrangements.

Secondly, when we come to the EU, of course member states have their own bilateral arrangement with third states. They have to do them in a manner that is consistent with EU law, so of course the UK has its own kind of bilateral information channels with third countries and it also participates with EU institutions. My view on this is that you are weak and you become poorer by the fact that you do not participate in the EU capabilities that become more and more sophisticated. The EU database has become more and more sophisticated and it can give you a wealth of analysis of information.

The Europol database is one example; the Prüm system with DNA data is another example. Also something that may sound very technical—but we tend to forget—being in the EU gives limits to the EU member states on what they can do and what they cannot do. An EU member state, in order to co-operate externally, must comply with EU law. With the UK being a third country after Brexit, the UK will no longer be able to co-operate with EU member states if its own standards are not equivalent to EU standards in the field. That is something that may happen in the future, especially in the field of data exchange.

Q16 **Tim Loughton:** It is slightly worrying that if some of our greatest legal minds are not quite sure of the transitional arrangements about our membership of Europol, what hope do negotiators have? But I want to come back to Sir Alan's point, where you said that there is no reason why the UK could not remain as a member of Europol in all but name, in which case what advantage is there to the remaining Europol states not to have that sort of relationship with the UK in the future?

Sir Alan Dashwood: It is my view that it would be very much to their advantage and, for that reason, I believe that they will agree to very close future co-operation on security matters. I am perfectly confident this can be negotiated as an important element. I would say the future partnership will have two great pillars. One will be security and the other trade, in a very broad sense. In my opinion, security is as important an element of that future relationship as trade will be and I think it is unfortunate that it has not been emphasised more in the debate so far.

So far as the transition is concerned, I am equally confident that a solution can be found. It probably would not be necessary to amend the Europol legislation in order to allow us to continue to participate pretty fully, perhaps not as a member but still pretty fully during the transition



period, but clearly the sooner the definitive set of arrangements can be brought into force the better.

- Q17 **Tim Loughton:** To be clear, Sir Alan, you are saying that you can see no obstacle to the UK retaining as close a relationship with Europol as it has had by being a full member of Europol, in name and in essence, up until now; there will be no advantage to the other Europol nations or their organisational or strategic partners if they were not to negotiate such a relationship and that, in your view, negotiating such a relationship is perfectly feasible?

Sir Alan Dashwood: In my view, it is perfectly feasible. I do not think one can claim that the UK's position would be exactly the same as it is now as a member state, because we would not be taking part in the kind of strategic decisions of the Union that we do at the moment. But so far as participation in security agencies is concerned, yes, I think the UK should be able to negotiate very full participation.

- Q18 **Tim Loughton:** And Europol should want that?

Sir Alan Dashwood: Yes.

- Q19 **Tim Loughton:** Other than some structural differences about: we might have observer status rather than be a full member at the table deciding where the officers are going to be and what the strategy is, there is no great difference. Can you comment on what will be the difference between that relationship and the current relationship that, say, Denmark has as a non-full member of Europol and the states and the other 15 organisational partners have? Would it likely impact on the relationship that Denmark would subsequently have with Europol?

Sir Alan Dashwood: I doubt that it would impact on Denmark's relationship because, in my view, we would be seeking to negotiate something that very closely resembles our existing position within these agencies. I do not take the view that it is necessary to be a member state in order to be a full member of Europol. I don't think the Europol legislation requires this. The Europol legislation I think does assume this but the treaty does not require it.

- Q20 **Chair:** You would need to change the legislation, but not the treaty?

Sir Alan Dashwood: I think the legislation would need to be amended, but not the treaty.

- Q21 **Tim Loughton:** Can I ask if you both agree with Sir Alan's assessment?

Piet Eeckhout: With the greatest respect, I think there may be a number of difficulties here that do not so much reside in the question to what extent the United Kingdom's partners in the European Union, the other member states, may see the advantage of continuing to have a full participation by the UK in, for example, Europol, other agencies, in the legislation and policies in this area. It has been highlighted here—and I would certainly agree—that those partners would want the UK to continue



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to be on board for the purposes of protecting security and all the underlying policy objectives.

There are difficulties with the constitutional and legal integrity of the European Union. For example, the question of: would the legislation need to be changed? Europol is now set up through an EU regulation and an EU regulation setting up an agency applies to the member states of the European Union and not to third countries. I would think that the legislation would need to be looked at.

More generally, for example, if you look at the Europol regulation, a large part of it is concerned with ensuring that data protection policies and legislation is becoming ever more developed at European Union level. That ties in with other areas of EU law, which are all predicated in this field on what the EU Court of Justice calls the principle of mutual trust, which binds the member states. All of these components of the overall legal picture would not automatically apply to a third country, so I do think there are some legal obstacles in the sense of, I am not saying that this excludes a very close relationship but these are all matters that would need to be looked into, for example, to ensure that the United Kingdom continues to respect EU data protection legislation and continues to respect the EU Charter of Fundamental Rights.

Of course, to the extent that the European Court of Justice has a role to play in interpreting the relevant legislation and norms to ensure that the United Kingdom in some way or other does not diverge too much from that case law, other member states might really want the United Kingdom to stay fully on board but I think there are a number of legal difficulties that need to be looked into.

Q22 **Tim Loughton:** But they are not insurmountable?

Piet Eeckhout: I do not think they are insurmountable, no.

Tim Loughton: Mr Mitsilegas, do you agree?

Valsamis Mitsilegas: I agree with this analysis. If we are looking at the future of Europol, where the UK remains a Europol member state, like Mr Eeckhout I find it constitutionally very difficult to accept. Then we need to be very clear that the UK should be fully bound to the case law of the Court of Justice.

Q23 **Chair:** Let me clarify. If we sustained full membership of Europol as part of the security treaty, then we would need to still be covered by the European Court of Justice?

Piet Eeckhout: The EU would probably require, at least in that field, that there are guarantees that the case law of the Court of Justice is respected also by the United Kingdom.

Sir Alan Dashwood: I agree with that.

Q24 **Douglas Ross:** Going back to the transition period, the Committee has



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received a legal opinion that suggests that the UK, while in that transition period, would not be subject to the agreements between the EU and the third countries. Do you agree with that assessment, that legal opinion?

Piet Eeckhout: Indeed, I would. I think there is an issue in the sense that it depends on what agreements you are looking at.

Q25 **Douglas Ross:** If we look at sharing passenger name record data for law enforcement.

Piet Eeckhout: It may be useful to give a general introduction to this. To the extent that some of the international agreements have been concluded by the EU only and not also by the member states—so they are not mixed agreements—then of course, as a matter of almost definition, if you are no longer a member state of the European Union, it is the European Union as such that is bound by those agreements and, as a third country, the United Kingdom would no longer be an automatic party.

For those agreements—and that is the majority, which are mixed agreements—having the EU as a contracting party together with the member states, one needs to do more. One needs to look effectively at each of those agreements to see in what terms they have been constructed. For example, in the field of trade, most of the agreements are effectively a kind of bilateral agreement in the sense that they have provisions stating on the EU side, “This agreement applies to the territories of the member states of the European Union”. That suggests that if you are no longer a member state of the European Union you no longer benefit.

On passenger name records, this is very much an area of shared competence. I would not be so sure; I fear I have not looked into it. It may be that the UK could simply claim it has signed these agreements to the extent that it has, and so continue to be bound by the obligations and continue to have the rights. The general issue that presents itself is, even with the transition, if you are no longer a member state of the European Union, obviously the EU’s contracting party status to any international agreements lapses for the territory of the United Kingdom. I think that is the general issue.

Sir Alan Dashwood: Yes, I agree. As Piet said, for a lot of agreements, particularly trade agreements, these are essentially bilateral. They are concluded by the EU and its member states for the one part and the third country concerned for the other. In my view, it will be necessary, in principle at least, to renegotiate these agreements. It may not difficult.

Q26 **Douglas Ross:** Just on that point, would you all agree that that would not be difficult—a not insurmountable challenge—for the UK to do that in the timescale potentially involved?

Sir Alan Dashwood: It is a big challenge because there are a lot of agreements.



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Q27 **Douglas Ross:** But the complexity of the individual agreements, it would not be insurmountable for the Government or the UK to do that?

Piet Eeckhout: It would depend on the position taken by the third countries concerned, whether they would want to use that opportunity to extract certain trade concessions from the United Kingdom, which are not present in the agreement. It all depends on what position they would take. On the trade side, I would not exclude that some third countries may want to go down that route, particularly with the argument that, if the United Kingdom does not remain in a customs union with the other member states of the EU, the terms of trade have changed because, if you invest in the United Kingdom, the products will not have automatic access to the whole of the EU market. It really depends on the position taken by other countries.

Valsamis Mitsilegas: We will need to look at the content of the agreements, because I do not think this situation is as complicated in practice as it sounds in theory. For example, if you take the EU/USA PNR agreement, the United Kingdom—assuming that it is not party to this agreement in the transition period—can perhaps pass domestic law in this House of Parliament requiring all airlines flying into the United Kingdom, from all over the world, to transfer to the UK authorities passenger name records. You do not need an international agreement to do that. It can be part of your domestic law and everybody around the world complies with it. We can have a debate about the constitutional aspects of what can or cannot happen but, in reality, some of these agreements are not as difficult to contemplate the day after from the perspective of the UK's security.

Q28 **Chair:** Do these all have to be done by March of next year?

Piet Eeckhout: Preferably, yes.

Q29 **Chair:** What scale do we think we are talking about?

Piet Eeckhout: I think the *Financial Times* has at some point looked at all the international agreements that the EU has concluded. Was that 700 or so?

Sir Alan Dashwood: Yes.

Q30 **Chair:** How many of those are security-related?

Valsamis Mitsilegas: In the field of security there are not that many but some of them are quite important. The PNR one would be a priority. Then there is the agreement on extradition and mutual legal assistance with the United States but the UK has its own arrangements, though I do not think it is insurmountable. Then there are the agreements between the agencies and third countries and that is a bit more complicated. For example, Europol has an agreement with the United States. This is complicated because this will depend on the UK's membership of Europe, where you have to sort out the internal constitutional arrangement first



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before you look at the international agreement in a sense. In terms of real-term agreements, I would say that the PNR would probably be the priority now to the extent that the UK law does not currently cover this.

Q31 **Chair:** Do you think it is possible for all of these to be sorted by this time next year? If so, would you expect the work to have begun on getting those agreements already?

Sir Alan Dashwood: It is certainly a challenge but, as Valsamis said, if we are only talking about security agreements the number is fairly small, although they are important. My sense would be that, yes that is doable in the time. I have no idea whether work has begun or not.

Piet Eeckhout: On your question, whether the work should have begun, I think the general issue—and it is the same with trade agreements that the EU has, which presents itself in that context—is that it is very difficult to start those negotiations as long as the internal relationship between the UK and the European Union has not been determined in this field or in other fields. For example, as long as we do not have the arrangements as to whether the United Kingdom is in a transition where it is a full member of Europol or not, it is difficult to start speaking to non-EU countries about the future relationship.

Sir Alan Dashwood: That is true.

Piet Eeckhout: You see that across the field. Those things would have to be done at the same time, but it is quite difficult. There is a kind of sequence there.

Q32 **Chair:** If the transition is resolved quickly, you think we have enough time?

Piet Eeckhout: That would help.

Q33 **Chair:** If the transition takes, say, until October/November next year to resolve, in those circumstances do we have time?

Piet Eeckhout: It becomes harder. I would be very sceptical.

Q34 **Chair:** It is okay to say “yes” or “no” to questions as well. You don’t have to be your usual diplomatic—

Piet Eeckhout: Then the answer is no, I don’t think there would be.

Q35 **Mr Christopher Chope:** Earlier in your evidence, Professor Eeckhout, you speculated about the possibility that the European Court of Justice could be asked to give an opinion on the Article 50 withdrawal agreement. Could you expand upon the circumstances in which that might happen and how long it would take for that opinion to be delivered after it was requested?

Piet Eeckhout: In my view, the legal framework is pretty clear. Any member state or any EU institution can ask the court for an opinion on an envisaged agreement that the European Union intends to conclude. This



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is only at the point where the agreement is not yet concluded, meaning fully ratified and so on. It is only at that point that the court's opinion can be asked. Once the agreement is ratified that procedure no longer applies. Of course, the extent to which any member state or the Commission or the Parliament would be contemplating asking such an opinion, I am not sure about that. Once an agreement has been reached there might well be a sense of, "Let's not jeopardise that by asking for an opinion", but it is very difficult to tell.

As to the time it would take for the court to decide, in those sorts of interventions by the court, the shortest time period I can remember was for the Uruguay Round agreements, which established the World Trade Organization in 1994-95, where the court delivered an opinion in about six months. I remember that very well because at the time I was working at the European Court of Justice in the chambers of then Advocate General Jacobs and working on this opinion, among others. At that point, the intention was for the World Trade Organization to start operating on 1 January 1995 and it was only in March 1994 that the court was asked for its opinion and delivered it in six months. I do not think much shorter can be envisaged.

- Q36 **Mr Christopher Chope:** Six months' minimum. How long did it take for the issue relating to the accession of the EU to the European Convention on Human Rights?

Piet Eeckhout: I think that took about two years.

- Q37 **Mr Christopher Chope:** Would a similar process apply to a potential security treaty? Could that be referred to the European Court of Justice?

Piet Eeckhout: As long as it has not entered into force, any negotiated agreement can be referred to the Court of Justice. We see increasingly there are more of these cases. For example, the passenger name records agreement with Canada was referred to the Court of Justice and the court delivered an opinion last summer on that. The Court seems to like that process and obviously it needs to be asked for its opinion but increasingly the institutions—particularly Parliament and the Commission, but also member states—are keen to do that.

- Q38 **Mr Christopher Chope:** Thinking about a withdrawal agreement, a treaty, is there any way in which the contents of a withdrawal treaty could oust the jurisdiction of the European Court of Justice to adjudicate on that treaty and thereby delay its implementation?

Piet Eeckhout: No, because that is in the treaties. The EU treaties would have to be amended to exclude that. It is Article 2.18 of the Treaty on the Functioning of the European Union that allows for these opinions. I do not think an international agreement concluded—an Article 50 agreement or any other agreement—can oust that jurisdiction of the court, no.

- Q39 **Mr Christopher Chope:** If we have a no-deal scenario, what types of international co-operation in law, law enforcement and criminal data-



sharing and so on will be available to us? Obviously a lot goes on in the rest of the world and we sometimes seem to be obsessed with the EU, but the United States seems to have quite secure borders and it does deal with other organisations to defend its security. What would we do if we have a no-deal scenario?

Valsamis Mitsilegas: You fall behind. You already have relations with the rest of the world. I don't think it is that you have to wait for Brexit to suddenly have security relations with third countries. The UK does have those and these will continue. With the European Union, what will happen is that I think then you will have to fall back to bilateral relations only, so the UK with Germany, with France and so on. If this happens the challenge for the United Kingdom is twofold. The first one is—and we talked extensively about databases—you lose the intelligence capability that concerted EU action gives you.

The second one is—an area that we have not discussed that much today but it is very important—in judicial co-operation in criminal matters, for example, the European Arrest Warrant or the mutual legal assistance between member states, the UK warrant that is to be relegated to C or D list territories within the European Union. Currently, EU law gives member states the weapons to have very speedy and flexible co-operation. For example, we see the European Arrest Warrant issued against the Catalan leader who is now in Brussels. This will all be processed very quickly. It is a very highly-politicised case where we will have an outcome very soon.

If you are not within the club and you are a third country, then there is no incentive for EU member states—who will view you and think of you as a third country—to process your request with an equal degree of speed or flexibility. The danger for the United Kingdom is that it will leave a very streamlined, fast and flexible system of co-operation and go back to a position of being a third country in the eyes of some of these main collaborators in the field of security, which are the EU member states. I think that is the big risk with Brexit.

Q40 **Mr Christopher Chope:** Surely, in the scenario you describe, after we left, if the EU wanted to get information from our databases it would want to get that quickly. Surely it would want to have reciprocal arrangements whereby those sorts of cases were prioritised.

Valsamis Mitsilegas: Indeed, but maybe I misunderstood your question, because I thought you were referring to a cliff-edge Brexit without any relationship with the European Union. Of course you could have a relationship with the European Union; you could have an agreement between the EU and UK but if you do not have this agreement with the EU, then you fall back on to the bilateral and that is what you are going to have.

Q41 **Mr Christopher Chope:** There could be a bilateral between the EU and the United Kingdom, but that is all, outside any agreement?



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Valsamis Mitsilegas: Not the EU. Bilateral between the UK and each of the EU member states individually, so the UK and Germany, the UK and Belgium, the UK and the Netherlands. It is not the same as an EU agreement.

Q42 **Mr Christopher Chope:** But all these international agreements, Interpol, for example, those are international agreements for security. None of these are going to be removed from the area in which we operate, are they?

Valsamis Mitsilegas: Not at all.

Q43 **Mr Christopher Chope:** Why won't we be able to rely on those sorts of international agreements?

Valsamis Mitsilegas: You do rely on them already. Interpol is there and it is for some a valuable collaboration mechanism, but it does not give you the quality and the depth of intelligence that a body like Europol provides. The Europol intelligence analysis that is happening now is not comparable to Interpol, which is a very loose structure of exchange of some police information across the world. I think they are not comparable.

Q44 **Chair:** What are the extradition arrangements that Britain would fall back on with the EU in the absence of a European Arrest Warrant deal?

Sir Alan Dashwood: The European Convention on Extradition, which because it was judged insufficient—it took a very long time to achieve extraditions—that has been replaced by this much more effective system, the European Arrest Warrant. We would have to fall back on that. There are some member states that have come out of the convention. I think Belgium has simply come out of the convention. Is it Belgium? At least there are some member states that have come out of that convention, so there would be no existing relationship with them at all.

Q45 **Chair:** With those countries, you would not have any legal provision for extradition?

Sir Alan Dashwood: No. It would have to be done on ad hoc basis or a new agreement would have to be negotiated.

Q46 **Chair:** In that cliff-edge gap, while we have nothing in place that would be a pretty good place for criminals to go and hide?

Piet Eeckhout: Yes.

Sir Alan Dashwood: Yes. We can say "yes" this time.

Q47 **Will Quince:** A lot of what I wanted to ask has been answered already, but you mentioned that entering into a new security treaty would be difficult to negotiate until the wider relationship between the UK and the EU has been determined. I am interested to know whether you think that talks are likely to commence between the EU and the UK on such a proposed security treaty before the end of the Article 50 process.



Sir Alan Dashwood: I hope that the talks on the transitional arrangements will begin very soon. As Piet indicated, it is certainly my view that that needs to be worked out as preparation for the longer-term relationship. If the transitional arrangements take the form of a continuation of the existing security activity, so far as that is possible—and it is my view that it is possible—to a very considerable extent that will make it easier to negotiate the future relationship, which of course the complexities of the UK no longer being a member state will have to be sorted out. If the objectives are already clear, which would be to continue the existing relationship and build towards even closer co-operation in the future, it is my view that it would be possible to negotiate this within the two-year transition period and that it would be possible to bring that element of the future partnership into force even before the end of the transition.

Q48 **Chair:** To clarify, given the ratification period that you need, how long do you think you need to negotiate it? Do you think you need six months to negotiate it and then you can do the rest of ratification or do you think the negotiation would take longer?

Sir Alan Dashwood: That goes back to a point I made earlier. I was proposing that provisional applications should be given to the part of the security agreement—which in my opinion would constitute most of it—that can be negotiated and concluded by the EU under its competencies and concluded by the UK. That means that you can give provisional application while you wait for the ratifications to be completed.

Piet Eeckhout: Could I add something to that? From a legal perspective that there is no obstacle, whatsoever, for these negotiations to start immediately, they could have started months ago. There is a legal view in Brussels that, when it comes to negotiating the future relationship between the United Kingdom and the European Union, the negotiations can in fact only start in earnest once the United Kingdom has exited the European Union because they are negotiations with a third country. I do not share that view. I think the negotiations can start now. What you cannot do is to conclude the agreements before the United Kingdom becomes a third country but I don't see any legal obstacle to starting any negotiations on the future relationship at this point. But of course the European Union has made it politically clear that they like to see all of this sequenced in a particular way.

Sir Alan Dashwood: I agree with all of that.

Q49 **Will Quince:** The Government have made clear that they want to not only maintain the existing co-operation but they want to go further and enhance and strengthen. How possible is that to achieve as part of a new security treaty?

Sir Alan Dashwood: In principle, I think it is perfectly achievable, though in practice it might be necessary for this to be staged; for the future partnership to have some kind of evolutionary capacity built into it.



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Q50 Mr Christopher Chope: It is a pretty fundamental thing. You are saying there is disagreement in the EU as to whether negotiations on a future relationship can start before we have left. Who is going to decide on that? If there are different opinions, is that something that is going to have to be referred to the European Court of Justice or how is that resolved?

Sir Alan Dashwood: It depends on who is entertaining these opinions. I don't know whether it is the established view of the Legal Service of the Commission. I don't think it is. It is certainly the view of some legal experts but I don't think it is a position that has been taken in a formal way, either by the Legal Service of the Commission or by the Legal Service of the Council. There may be no need for Ministers to ignore legal advice that they have been given. The advice may not yet have been given. Of course, I have been a legal adviser at the Council. The Ministers very often do not follow the advice that they are given, if at least the political objectives that they have are of overwhelming importance and if there is at least a decent legal argument that can be made in favour of them, which I think is certainly the case here. I do not believe that this view will be a serious impediment to discussions getting going before the end of the Article 50 period on the future relationship.

Q51 Naz Shah: To what extent is there a risk of legal challenge to the UK if the UK maintained access to measures usually reserved only for member states? I will give you an example. If you had an individual who was subject to a European Arrest Warrant issued by the UK, would that individual be able to lodge a legal challenge on the basis of the UK's status as a non-member state?

Sir Alan Dashwood: Would this be during the transition period?

Naz Shah: During or after.

Sir Alan Dashwood: But after we had left the EU. I think the answer to that is that it would depend on the arrangements. If the arrangement is that during the transition period what I was calling the constitutional acquis will continue to apply then, yes, the Commission will have its powers; the Court of Justice will have its jurisdiction. Even under UE treaties, individuals do not have the right to bring actions against member states in the Court of Justice. What they have to do is to bring actions in the National Court and then ask for the matter to be referred to the Court of Justice. I would imagine that that could continue to happen if the solution of prolonging the acquis is adopted. What will happen, once a set of definitive arrangements are in place, will depend on the dispute resolution mechanism that is adopted for that purpose. There might be a continuing possibility of references, if only voluntary, to the Court of Justice but other solutions are possible.

Chair: Thank you. Does anybody else want to answer that?

Piet Eeckhout: Yes. I totally agree with Sir Alan. It depends on the arrangements. Imagine that there is a transition agreed that does not extend the jurisdiction of the EU Court of Justice but, for example,



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includes the continued application of the European Arrest Warrant. It would be possible for any person here—who would be surrendered to another EU member state of course—to go to the courts here and challenge that decision. That case could then not be referred to the EU Court of Justice because it would no longer have jurisdiction. It would be for the domestic courts here then to look at whether rights are adequately protected and any kinds of questions that may arise on the UK law.

Vice versa, if a person in the European Union is arrested in Germany, in order to be surrendered to the United Kingdom, they of course could go to court in Germany. Of course the German courts would still be able to make a reference to the EU Court of Justice, because this would all be part of EU law after transition, agreed by the European Union. That would be another opportunity for the EU Court of Justice to look at whether the arrangements that were reached between the UK and the European Union comply with, for example, the Charter of Fundamental Rights or any other sort of questions that might arise on extradition. If the jurisdiction of the EU Court of Justice were to also be continued in this country, I think the system would remain very much as it is today. Of course, it is always possible for an individual to challenge those decisions. This happens today just as much.

Valsamis Mitsilegas: Can I answer? Also linked to the earlier question about the UK's wish to have a more profound relationship with the EU after the end of the transition period, we should not forget that enforcement actions in the EU—taking the European Arrest Warrant as a good example—in parallel now we have a lot of EU measures from the rights of the defendant, for example. The key question there is: what will happen after the transition period, where the UK wants to have a close relationship with the European Union in terms of fast extradition? But the closer the relationship the higher the duty of the UK to comply, not only with the Charter of Fundamental Rights but also with the EU measures on the rights of the defendant.

When we talk about having a closer relationship than we already have in the future, we should also not forget about the obligations that we have to respect human rights because I think that is something that is not necessarily in the minds of those who are advocating closer law enforcement co-operation. Currently there are avenues to challenge European Arrest Warrants in domestic courts, but I think that in the future, if the UK becomes a third state and it does not have a specific EU/UK security agreement, then again we fall back to more traditional extradition arrangements.

The big difference between the two is that the European Arrest Warrant is a judicial process, so it is at a judge's request. Whereas traditional extradition is a matter for the Secretaries of State, so the process is being politicised again. That gives you a different level of playing field, obviously.



- Q52 **Naz Shah:** In the case of not having reached a deal, in the no-deal scenario, if the UK leaves the EU, what sort of information could the UK police and security services continue to share with EU counterparts and on what legal basis would this take place? Would this affect the intelligence-sharing on matters affecting national security, such as terrorism suspects?

Valsamis Mitsilegas: Intelligence falls under national competence. Even under the current EU treaty, national security is a matter for member states so things will continue as they are. Of course there are grey areas where intelligence is also linked with law enforcement co-operation. There again we go back to our whole conversation this morning about the legal form of the UK's allegiance with the EU, either in the transition period or post-transition. I think it depends on the form. In my view, the most efficient way is to have one treaty between the EU and the UK but we have to be very conscious that, if there is one treaty, then the EU is most likely to wish that its own internal benchmarks, in terms of data protection and privacy, are respected for the UK to have access to this information.

- Q53 **Stuart C. McDonald:** Thinking about a future security treaty, what do you think the prospects are for enabling the United Kingdom to carry on participating in the European Arrest Warrant or is it likely that a different bespoke agreement will have to be negotiated? How long might that take?

Sir Alan Dashwood: I would certainly expect that to be an important element of any future security treaty. Of course, as you know, there is already an agreement in respect of the Arrest Warrant between the EU and non-member states, Iceland and Norway. This took a very long time to negotiate but it has now been concluded by the EU, so there is no reason in principle why that should not be part of the new security arrangements. Since we are going to have a much more far reaching security relationship than either of those countries has, I would expect it to be an element in that partnership.

- Q54 **Stuart C. McDonald:** Do you think it would essentially be carrying on participating directly in the European Arrest Warrant procedures, rather than a bespoke agreement like the ones that Norway and Iceland have ended up with?

Sir Alan Dashwood: Of course this would have to be negotiated, but I see no reason why it should not be possible to negotiate an arrangement that corresponds to the existing situation.

Piet Eeckhout: On balance, I think it might look more like the Norway-Iceland agreement than the current system. For example, from what I have read, there are member states that still reserve the right not to surrender their own nationals in the context of the relationship in Norway and Iceland. Whether you can get across that hurdle in a future security treaty with the European Union, I would not be sure about. It depends—



Stuart C. McDonald: The vast majority of cases involve nationals in their own countries.

Valsamis Mitsilegas: I would play the devil's advocate with the two scenarios. First of all, let's say we have EU-UK agreement on surrender, similar to Norway and Iceland. The current agreement with Norway and Iceland says that both parties must keep under constant review the case law of the Court of Justice. It is not a very binding kind of provision on the jurisdiction of the court but it is something that leaves the door open for courts to look at what each other is doing. If you have an arrangement, though, in the way that Sir Alan has proposed, then you have to comply 100% with the case law of the Court of Justice. I see no other way, personally. I think it is a political choice about how close you want to be. The closer the relationship you want to have, the closer you will have to follow what the court is saying on these matters.

Sir Alan Dashwood: That is probably true. It is important to emphasise that we are starting from a different position, as compared with Norway and Iceland. We are fully part of the existing security arrangements so I believe it should not be politically difficult to continue, even to preserve, the rules about the surrender of nationals.

Q55 **Stuart C. McDonald:** That brings me on to two final and broader points. More generally speaking, this red line around the jurisdiction of the European Court of Justice, how difficult does that make any sort of future security treaty? To what extent will the EU even envisage some sort of alternative dispute mechanism?

Piet Eeckhout: I believe this red line does make matters quite difficult, and not just in this field but in other fields of co-operation between the European Union and the United Kingdom, because the jurisdiction of the European Court of Justice being in a system of international co-operation such as the EU one, which is completely predicated on legal principle and legal rules and a very dense, as you know, package of legislation. It is generally regarded as indispensable to have a neutral arbiter that is able to ensure that all the member states comply with what has been decided and what has been enacted at the European level. It was said by Valsamis, just a minute ago, the closer you want this relationship to look like full membership the more pressure there will be to accept the jurisdiction of the EU Court of Justice in some shape or form.

Q56 **Stuart C. McDonald:** Professor Dashwood, you hinted at that as well. That the closer that you want the co-operation to be, the far more likely it is that the European Union is going to insist on jurisdiction in the European Court.

Sir Alan Dashwood: I think so. However, it is quite remarkable that under the agreement—Valsamis referred to this a moment ago—with Iceland and Norway, the mechanism for ensuring that Court of Justice rulings are taken properly into account is effectively a political one; it is a joint committee. The EU was willing to accept that in the case of Iceland



and Norway. It surprised me a little that they did not create a new jurisdiction for the EFTA Court in this field. As you know, there are institutions that operate under the EEA agreement, the EFTA Surveillance Authority, which has a role broadly corresponding to Commissions, and the EFTA Court, which has a role broadly corresponding to the Court of Justice. I would see this as a possible alternative to the preservation of the powers of EU institutions. Certainly, in the field of trade it would be an alternative. Whether it would be seen as acceptable by the EU in the field of security is perhaps less certain. It would be a matter for negotiation. My general feeling about it is that one must not be too daunted by these red lines. Different solutions may be negotiable and appropriate for different elements of the future partnership.

Q57 Stuart C. McDonald: Professor Mitsilegas, your thoughts on how difficult a deal becomes because of the red line around the European Court of Justice but also what you mentioned earlier, the determination to take the EU Charter of Fundamental Rights outside of UK law.

Valsamis Mitsilegas: Certainly, the closer the relationship with the EU, the higher is the legal and political needs to comply with the jurisdiction of the Court of Justice. Any third country currently doing any sort of business with the European Union must comply with the Union's external action, and must not only uphold but also promote its internal values. I think in the field of security a lot of this comes into play, because of the implications of security co-operation for the protection of human rights and for the position of individuals. In my view, that is why it is very likely that we will have a reference to the Court of Justice on any EU-UK security agreement because there is a lot at stake. We have seen the EU-Canada PNR agreement going to the court. This is a much bigger and more fundamental arrangement. The benchmarks are there.

I understand you will have a session on data protection, following this one, where I think the complexity of this will be very clear. The Court of Justice has not hesitated to strike down the EU-USA Safe Harbour agreement on the grounds that the US system of data protection was not considered to be adequate by EU standards and these considerations will come, I think, in terms of the UK, in terms of challenges to the current legislation on the Regulation of Investigatory Powers and the bulk collection and retention of personal data, and so on. These are very big human rights issues that are very relevant in terms of any future relationship between the European Union and the UK in terms of security.

Following up, I want to point out that all these matters come under the banner of security. A choice might also be to differentiate between different agreements in different areas in this. It may be easier to have a UK-EU agreement on the European Arrest Warrant, for example. There is a very high level of trust there and I think you may be able to compromise more. When we go towards the exchange of personal data and databases, this is a much more complex area for the European Union and its own court has emerged recently as a constitutional court. Saying



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that, the rights of individuals must be respected; mass surveillance is unacceptable. There, it is not only the politics of Brexit but also the politics of human rights that emerge in the European Union and we should all be very cautious about this in any future developments.

Q58 Chair: Do you think that the EU will be able to cope with allowing us continued access to their databases if we do not have the jurisdiction of the ECJ?

Valsamis Mitsilegas: I don't think that full membership in databases or in agencies is possible without the full jurisdiction of the Court of Justice.

Piet Eeckhout: I would agree with that.

Sir Alan Dashwood: Yes, I agree.

Q59 Chair: If the red line on ECJ jurisdiction is maintained—we are obviously about to move on to the data issues—what would you see as being the kind of level of access to databases that is realistically likely to be achieved?

Valsamis Mitsilegas: It may be that it involves individual cases also involving the UK. For instance, there may be a transnational investigation involving the UK—and, let's say, Germany and the Netherlands—on drug trafficking and there is a dossier, so the UK as a third country may be able to have access to parts of the database or to the intelligence produced, for example by European intelligence analysis related to this specific case.

Sir Alan Dashwood: The reason why I slightly hesitated when you asked me about the jurisdiction of the Court of Justice was because I think one needs to take a slightly more subtle approach to this. In my view, it need not necessarily be the full existing jurisdiction of the Court of Justice. I could envisage some kind of arrangement that would allow for the Supreme Court to invite preliminary rulings from the Court of Justice, possibly lower courts. The point I am trying to make is that the involvement of the Court of Justice need not necessarily entail the full jurisdiction that it currently enjoys.

Q60 Tim Loughton: Who will oversee the European access to the UK database and the jurisdiction required for that?

Sir Alan Dashwood: There would have to be co-operation. This would be done within the framework of the existing agencies, presumably.

Q61 Tim Loughton: Is that not the point? There is a mutual benefit to accessing each other's data.

Sir Alan Dashwood: Yes.

Q62 Tim Loughton: Why should the rules preclude one being able to access data as we do now?



Valsamis Mitsilegas: It is not exactly the same, though. If there is an arrangement where the UK has access to the Europol database, it does not mean that Europol would have access to the UK database. It does not work like that.

Q63 **Tim Loughton:** The whole point of the database is sharing data. Sharing data is not a one-way street. Therefore, the UK accessing the shared data with the EU is complemented by, and enhanced by, the EU accessing the data that we are being prepared to—and already do—contribute to the EU. This whole argument is framed around: who would oversee the EU part of the database, as if we are freely giving away our data and there are no considerations over that. This is an entirely mutual arrangement where, surely, it is not insurmountable to come up with an arrangement that mutually satisfies the integrity of that data being controlled by the EU or being controlled and contributed from the UK. Why should that be any different?

Sir Alan Dashwood: I would agree with you that this is conceivable, but I suspect that the EU will insist on the involvement of the Court of Justice in some way, particularly from the point of view of protecting fundamental rights, which are very much in issue in this area.

Piet Eeckhout: What I would add is that, I fear that the EU would not look at this as simply a mutual relationship and will continue to look at this as one of 28 member states deciding to withdraw from the European Union and so not look at this as a relationship between equals. That is not a legal consideration. It is a political consideration. If that were to be the ultimate outcome of Brexit that the relationship is a truly bilateral one between the UK and the European Union that, from an EU perspective, is an invitation to any other member state to leave and pull itself up with its own bootstraps and get into a bilateral relationship with the European Union.

Q64 **Tim Loughton:** That is the point, isn't it?

Piet Eeckhout: Yes.

Q65 **Chair:** If we end up in that kind of messy situation, of having that dispute about access to databases, the extent of ECJ jurisdiction, or not, or whether there is an alternative framework that has to be developed and whether that covers the databases, whether that covers the European Arrest Warrant, and so on, in those circumstances, where it becomes not straightforward, the UK maintains its red line, the EU approaches this in the way that you expect the EU to approach this. In those circumstances, do you think a security treaty would be agreed within two years?

Piet Eeckhout: No.

Sir Alan Dashwood: Not if a lot of all those things happened.

Q66 **Rehman Chishti:** A quick question. We talk about rules. We talk about



procedures but in this reality—which my colleague Mr Loughton talked about—every state has a duty to protect its citizens as the first priority, and from that, God forbid, if there is information that one or another of the European countries has, which was not shared with the United Kingdom and it led to a loss of life in this country, that would be completely unacceptable, and vice versa. Sir Alan, you said that often counsel advice is not taken due to political considerations. The key priority, for the mutual benefit of our citizens, is information that could in one way or another, at whatever level, prevent harm. Is that the way it works—or should work?

Sir Alan Dashwood: I entirely agree. That is why I believe that a satisfactory solution, resulting in very far reaching co-operation, broadly corresponding to the present situation, will be achieved.

Q67 **Chair:** We are shortly moving on to the next panel, but you are saying there is a wide range of possible scenarios here. Those range from the optimistic one, in which you have the transition arrangements agreed very quickly, that they are simply an extension of the existing *acquis* that everybody is happy with, that that happens fast enough to allow the negotiation of any of those third-country security elements that flow from it, that otherwise would be a challenge, in time for March 2019; that the transition agreed is either indefinite or long enough to cover a security treaty negotiation, and that the security treaty negotiation happens very fast because the ECJ issues are all resolved in a flicker and any implementation can be done simultaneously alongside the ratification process.

There is the alternative, other end of the spectrum, in which the agreement of the transition arrangements takes significantly longer and therefore causes challenges for the third party arrangements, that the ECJ issue becomes a really big sticking point in terms of the negotiations about access to both data and the development of a European Arrest Warrant, in which case it is not possible to agree within two years and that, in some process around the arrangements for the transition agreement, there is a conclusion that the Article 50 withdrawal agreement will only allow for a relatively short transition arrangement, and then there is a cliff edge in the middle.

In terms of how we determine which of these two paths we are on, and at what point Parliament should be raising the flag and saying, “Hang on; we are worried about this; we have a problem”, what do you see as being the key points at which there should be a decision point or alarm being raised that we are not on the track that we need to be on in order to maintain security co-operation? When should we be worried? You have a wide range of options. At what point should we be worried that we are not on the smooth track and we are instead on the very bumpy track?

Valsamis Mitsilegas: I think it is already quite late in the day to be on the smooth track. I should raise the flag now and say that we do need to be making some progress now. I think it is already a bit late for



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everything to go well, for your first scenario to come to life. I would not be complacent at all right now. The timeline is very tight and I think you need to be on top of this, on track, every single week, because you know better than I do that politics are very volatile, apparently. We need not to be sidetracked by the various political developments but be very aware that these are real issues that take a lot of time and skill to untangle and then to put back together again.

Sir Alan Dashwood: I would say that by March we need to have a clear idea about what the transitional arrangements are going to entail. I very much hope that the Government will go into that negotiation with a fully worked out plan for what those arrangements should entail.

Q68 **Chair:** Does the Government need to have come up with a clear idea of what should be in the security treaty beyond that? Or just to have the view on the transition arrangements?

Sir Alan Dashwood: The transitional arrangements definitely come first. As far as one can make out—particularly from the Prime Minister's Florence speech—the Government are committing to a far-reaching future relationship, with close co-operation that involves at least the existing level of co-operation and potential for future development. We already know that. Since one cannot do everything at the same time—

Q69 **Chair:** Do we need the Government to have a clear view of what they want the ECJ arrangements, or alternative to ECJ arrangements, to be by March? If it is possible for that to slip beyond March, when do we need the Government to be clear about what they want on that?

Sir Alan Dashwood: They certainly need to be clear about that so far as the transitional period is concerned.

Q70 **Chair:** Professor Eeckhout, any final words?

Piet Eeckhout: Yes, I totally agree. I think March is already quite late. I have to say we will see how these negotiations on the transition go. I know the political difficulties, but you do wonder if the transition is one where the full *acquis* is extended for some time, why the route of deciding to extend the Article 50 negotiations when you remain a full member state is not more fully considered, because that does remove all the difficulties of negotiating a transition if you had simply a two-year extension of the Article 50 negotiations.

Sir Alan Dashwood: There is also an intermediate solution, which I think is legally perfectly viable although it might not be regarded by everybody as politically attractive. That would be to fully negotiate the terms of the withdrawal but agree that the withdrawal agreement should enter into force at a future date, say in March 2021. In the meantime, the UK would remain a member state in the full sense but you would have terms of withdrawal agreed and a final date for the cessation of membership agreed. I believe that is reconcilable with the wording of Article 50.



Piet Eeckhout: Agreed.

- Q71 **Chair:** Clearly, there would be political debates around that but, in terms of the practical and legal issues, what would be the difference between going down the extension of Article 50 route—that bespoke implementation of the withdrawal agreement—and the current implementation of a transition period? Just from the security point of view, what would the key differences be, relative to doing transition period?

Valsamis Mitsilegas: The UK would continue to be a member state and so would continue as we are now, and it would give us a breathing space; we do not have to be as stressed by time going by and we have more time to think about the day after. What is important here is to get continuity in terms of security. That should be the utmost priority.

Piet Eeckhout: It is a one-step process. Whereas the transition will require renegotiation, there will not be full membership and there will be difficulties in agreeing what those terms are. Then you will have to have further negotiations and that is a two-step process. That is the difference.

- Q72 **Chair:** Purely from a security point of view, that is the simplest approach.

Piet Eeckhout: Yes.

Chair: Thank you very much for your evidence. We really appreciate your time this morning.

Examination of Witnesses

Witnesses: Elizabeth Denham, Steve Wood and Professor Lorna Woods.

- Q73 **Chair:** I welcome our second panel and apologise for the delay in calling you to give evidence to us. We appreciate your time this morning and look forward to hearing your evidence. Can I ask you each to introduce yourself and also set out your background in this field? Professor Woods.

Professor Woods: I am professor of internet law at the University of Essex. I am also a member of the Human Rights Centre there. However, I did start my career in private practice as a solicitor in the technology, media and telecommunications field so, I suppose, all things digital.

Elizabeth Denham: I am Elizabeth Denham. I am the Information Commissioner for the UK. I have been in this role for almost 18 months. I took up my role just after the referendum, thinking that my focus was going to be on bringing in the General Data Protection Regulation and the Law Enforcement Directive, which are a European regulation and a European directive.



I have also been a member—I am a member—of the Article 29 working party, which is all of my European counterparts, serving as an advisory body to the European Commission on issues like third countries' adequacy.

It is a very interesting time to be in data protection.

Steve Wood: Good morning. I am Steve Wood. I am Deputy Information Commissioner at the Information Commissioner's office. My role includes responsibility for the delivery of the ICO's international strategy.

Q74 **Chair:** Can I begin by asking a follow-up from our previous panel hearing? The Government have obviously said access to the security databases is immensely important and they want to continue with our access and co-operation with those databases. What do you see as being the main challenges to continuing access to those databases after Brexit? Ms Denham, could I start with you?

Elizabeth Denham: All sides agree that continuing access for data for law enforcement co-operation, for security purposes, to protect the public, is very, very important. Nobody disagrees that access to data is a critical concern. Obviously, the Government have focused on data protection and uninterrupted dataflow as being a very critical policy area for the Brexit negotiations.

The arrangement we have now is because we are an EU member state, we are in a bit of a free zone for the sharing of data, on the commercial side but also on the law enforcement side. What that means is that data can flow because we are in a trusted environment where we are all following an equivalent standard of data protection.

What happens when we become a third country is then we have to look to other ways to legitimise and recognise legal flows of data, so there are some immediate barriers to be able to continue to share data and access to databases. We can go into what those details are.

The other issue that came to mind when I was listening to the prior panel is that, if we are a third country, we then lose control over who says what and who gets access to data because it is the European institutions and the European Data Protection Supervisors that will have a say, and it is also the European Court of Justice. Although there may be a willingness to share data, there are other bodies that will also have a say and an opinion and legal powers to take action. We have to think about that in that context.

Q75 **Chair:** Ms Woods.

Professor Woods: Yes. The need for some form of adequacy decision would be the obvious way to go. This is the consequence of us turning into a third country, so we would need that, as I understand it, even at the beginning of a transition period. That might be slightly more difficult than you would think to start with, even with the implementation of the



GDPR. This is because we lose the mutual trust that we have as a member of the EU. When the Commission assesses for adequacy, it will look right the way across the board, and the surveillance practices of the security services come into play as a third country, where they are excluded when we are a member of the EU because of the division of competence. There is a slight irony there that as a third country more of our practices will be subject to review. Looking at an adequacy decision, which would give you a general flow or more specific agreements we would have to look into. It is going to be about rights protection.

Q76 **Chair:** Mr Wood.

Steve Wood: I very much recognise the importance of data flows, as the Commissioner had just set out. I would also highlight the importance of understanding how an adequacy agreement could come into place in terms of the factors that the European Commission might need to take into account, as Professor Woods has outlined. The assessment would be in the round, looking at a range of factors, from the equivalence of UK law. Looking at our data protection rules, which would be similar or the same as is in the EU at the moment, but also looking at that wide range of factors, such as our surveillance law and so on, which will probably be the pinch-point in terms of what sort of assessment the European Commission seeks to make as part of that adequacy process.

Also, drawing on what the previous panel was talking about, it is uncertain as to what might be achieved by an interim period, a transitional period, in terms of how that might work, where we could be a member of the free flow of data zone, the safe haven that the Commissioner just talked about, during that transitional period. That is something that could come up in the negotiations. We do not know at what point we might need to seek that adequacy agreement that Professor Woods just referred to.

Q77 **Chair:** Before we get into the details of how the data adequacy agreement might be achieved or what would be required for it, let us explore a little bit further this issue about when the data adequacy agreement might be needed by. We heard from the previous panel that they thought legally you could extend the existing acquis as part of the transition arrangements covering security. If that were to take place, under those circumstances, would you expect a data adequacy agreement to be needed early or can that be delayed? When you say, "It is a bit uncertain" what is it that is uncertain and who is in the end going to be deciding this? Is this going to be a political issue or a legal issue to resolve it?

I am going to just throw all of these questions at all of you, so by all means respond to the questions that you think are relevant, rather than needing to answer every question.

Professor Woods: I will start. I think there is uncertainty because the regulation was not written with Brexit in mind, so it envisages a binary



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world of member and not members. The legal reality and the political reality we have do not fit too well with that binary situation.

If you were going to take the *acquis* in total—that you were continuing as a member—maybe then you could argue that you had some special status. I suspect maybe some amendment to the regulation or the directive might be required, but it would be a novelty. Nobody has tried to do it. I don't think there is anything on the face of the directive or the regulation that would preclude that, but it would require negotiation.

Elizabeth Denham: The best way forward is for a transitional agreement on data. We are looking at similar challenges and issues on the commercial side. There has been a lot of discussion. There was a strong report that was issued on Thursday or Friday by techUK about the importance of a transitional agreement on data. Whether the extension of the *acquis* is the solution for a transitional arrangement for law enforcement data, I am not sure, but I think a better way forward would be for the Government to seek a transitional agreement on the sharing of personal data across the commercial sector and the law enforcement sector.

In the future, if the UK Government decide to pursue an adequacy finding under the Law Enforcement Directive according to Article 36, as Mr Wood said, the Commission will look at the UK in the round. The Commission will look at our law, the implementation of our law, our protection of fundamental rights, the case law, our international agreements, as well as the protection of data in onward transfers. What happens when the UK has data from the EU? What kind of protection and arrangement is there going to be in terms of passing it on to other third countries? That onward transfer issue is very important and I think it is something that the Government need to be working on right now.

Q78 **Chair:** One more question before going into that data adequacy issue, just in terms of the transition. If you were trying to get the transition arrangement or a transition agreement to cover all data, as opposed to a specific one around security, is that something that requires a bespoke agreement or is that something that can be done simply by an extension of existing arrangements?

Elizabeth Denham: It could be a bespoke agreement as part of the withdrawal negotiations. The UK stands a very good chance at that kind of mutual recognition agreement in a transitional period, because there is no other country that is as close to the EU when it comes to the law. If you look at the Data Protection Bill that is making its way through Parliament, that Bill is bringing in the Law Enforcement Directive. It is bringing in strong rules for intelligence services according to Convention 108, and the Government are committed to bring in the General Data Protection Regulation and the derogations. There is a comprehensive package of data protection law reform that the UK is committed to bring into force, and that will be in force by May 2018.



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My best advice to the Government would be to move forward on a comprehensive agreement on data. It can be done separately. You could carve out law enforcement. The best way forward to get it done probably would be one agreement.

Q79 Chair: In terms of the timing required to do that, in order for it to be securely in place and have any planning that is needed, when will that need to be agreed by?

Elizabeth Denham: The Government are talking about this right now and we have certainly been giving advice to Government, but there is practical work to be done to be able to think about the kind of regime we are going to need to have in place for onward transfers and the regulation of onward transfers. We will no longer be part of the arrangements that exist right now, such as Privacy Shield. Now I am talking about the commercial side. We have to do that planning. Some deep discussions have to happen in 2018 to get that in place.

Q80 Stuart C. McDonald: Going back to the question of getting a positive data adequacy decision, how likely do you think it is that the UK would be able to achieve that? You seem to be quite positive, Ms Denham.

Elizabeth Denham: As I said, I think there is no other country that is as close to the EU regime on data protection than the UK. We were involved in negotiating and passing the General Data Protection Regulation, which is probably the gold standard of data protection law. The UK has a long history of data protection that predates the European Directive 1995, so our law goes back to 1984.

Q81 Stuart C. McDonald: Can I interject there, though? Is there a sense in which the standards required of third countries are sometimes more exacting than the standards the EU requires of its own member states, and the fact that we might comply with current EU standards is not in itself enough to indicate that we could pass an assessment?

Steve Wood: In terms of what the EU should be looking at, it is a test of essential equivalence. That is what has been established by the Court of Justice in a number of different cases. One of the previous panellists earlier referred to the strike-down of the Safe Harbour arrangement for the transfer of data from the EU to the US in what is called the Schrems case. The test that the court has developed there is a test of essential equivalence.

There has been then some debate about what that means, but the European Commission recently, in a communication about international data flows, has set out that that does not mean that there needs to be a carbon copy of EU law in those third countries to be able to achieve that essential equivalence.

Clearly, we are still learning to some extent how adequacy will work because relatively small numbers of countries have it at the moment in terms of what the pinch-points might be, and it is constantly being



shaped by the jurisprudence of the Court of Justice. The test is essential equivalence, which should not require a higher standard than what is in the EU if that is followed properly.

- Q82 **Stuart C. McDonald:** Professor Woods, perhaps not a higher standard, but you were also suggesting that the scope of the test applies to a broader range of activities, things like security services and so on. Do you see challenges then with passing assessment when those tests are applied more broadly?

Professor Woods: There is a question around the Investigatory Powers Act. In a way it is very similar to the situation in Schrems. There were a range of differences, not all of which are applicable to the UK. We have oversight mechanisms and aspects like that, which were a question in Schrems in terms of people's ability to enforce their rights, but there is a concern about bulk powers. The Government have only just begun consulting on the response to the Tele 2 Watson case, and a response to that is going to be significant. A minimalist and a very black letter approach to what the judgment said might not be the most helpful way to go. We should be looking at the principles the court was setting down, rather than the details of the particular case, because obviously the response of the Court of Justice is always in response to a particular set of facts.

If we go back and we look at Schrems, if we look at the Digital Rights Ireland case, which struck down the Data Retention Directive, and even the case of Google Spain, which is outside the national security sphere but is commercial, one of the things the court was concerned about was this creation of a dossier on people, and that is an ongoing theme in the court's jurisprudence. It is not tied down to the specific facts of whether the Court of Justice rules on, say for example, events data in the Investigatory Powers Act. It did not talk about events data, but that does not mean to say we could not apply the same principles in the same way to events data as we could to traffic data or other forms of communications data. There is a question there, and it is one of the ironies that when you are a member state you get this mutual trust and benefit from the fact that, to a large extent, national security is still the competence of the member state.

The court has been quite expansive as to when commercial operators are involved to find jurisdiction, even given that statement. The fact that telecoms companies were used to collect data meant it started to come within purview.

- Q83 **Stuart C. McDonald:** Are you envisaging that there will have to be a fairly significant rollback contemplated by the Government in terms of bulk powers? Looking at the proposals that the Government are consulting on, do you detect that that is what they are thinking about, or have they not gone far enough yet?



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Professor Woods: I have only skim-read the consultation so I don't like to be too definitive. There are some good points in there, some recognition but it would be a shame to go so far and then, in a way, lose it through a very incrementalistic approach to, "Let's see if we can get away with this. We can't. Let's go on a step further", if I can characterise it like that.

One thing that caught my eye in the consultation was the fact that serious crime is going to be three years, rather than 10 years. I cannot remember.

Elizabeth Denham: I thought it was six months.

Professor Woods: You are probably right. It is an easier standard to get to the level of serious crime because the Court of Justice in Watson said this sort of activity can only be proportionate in relation to serious crime. There is a broader definition of serious crime proposed.

I can understand the examples that were given in the consultation paper, but whether that justifies broadening the scope generally or whether you could say, "We will stick with the same definition of serious crime as we have in the Investigatory Powers Act, plus these crimes we also think are serious", I don't know.

Q84 **Stuart C. McDonald:** Thank you. Mr Wood, Ms Denham, do you have any thoughts on the problems that the Government might have if they are determined to try to hang on to these bulk powers?

Elizabeth Denham: If the Government decide to pursue a full adequacy finding and ask the Commission to look at all of our laws and look at our intelligence services activities in the round, then I agree with my colleagues that it is a pinch-point. It is a vulnerability to achieving adequacy.

There are some things that the Government can do now to address some of those concerns, and one of them is making clear what oversight exists right now in the UK—the oversight that our office has in looking at the retention of communications data, the oversight that the new Investigatory Powers Commissioner has, the tribunal—and looking at and describing in clear terms the fulsome nature of oversight. Oversight is one of the issues that the court looks at. We know that there is going to be more rigorous scrutiny by the court. That is the direction of travel. We know that transparency in intelligence services and the gathering of data is important. We can see what is happening in the review of the Privacy Shield and the US, so we can learn from all of that.

Additional measures may be necessary. It is good that the Government are consulting on the regulations under the Investigatory Powers Act. I think they will get some interesting submissions on that; our office will have comments as well. I do think that the closer we want to be and the more integrated we want to be in co-operative policing—as we have



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heard in the last panel—the more that we are going to have to pay attention to the European Union concerns. That is a bottom line. There is more that we can be doing right now on the ground in the UK.

Q85 Stuart C. McDonald: Finally then, in terms of data transfer, where does the Charter of Fundamental Rights fit into all of this and our ability to share data?

Professor Woods: The Charter of Fundamental Rights is the starting point or the touchstone for the Court of Justice's interpretation of the treaty and also for secondary legislation, the GDPR, the Data Protection Directive and the Law Enforcement Directive. It is an orientation, and the Court of Justice has emphasised that as a fundamental right it is going to be subject to limited exceptions. The standard approach to that is to say, "Is there a legitimate interest?" Obviously, protection against crime and protection of national security is legitimate, but then you start running into problems because you also ask the question, "Is it necessary?" That is one area where I do not think the court has been particularly rigorous so far. "Necessary" is not absolutely, ultimately essential but it is some way a more rigorous test than "kind of handy" or "useful". Does it really make a difference?

Then you have a proportionality test, and one of the questions the court also asks is whether the essence of the right is undermined. It has said—and this was the Schrems case—that if you are doing bulk collection of content data, then that undermines the essence of a right to privacy. There are some things that are just not going to be acceptable.

Q86 Stuart C. McDonald: Does removing the Charter of Fundamental Rights from UK law in itself affect the possibility of agreement around data sharing, or is that a different question altogether?

Elizabeth Denham: As I said in my last answer, there is more that the UK could do to address EU concerns, and I think this country has long respected fundamental rights and long respected data protection. It has been an important part of our law. The ICO has always welcomed this charter right because it recognises data protection as a distinct fundamental right not wrapped up into other rights, but we have always viewed it as a qualified right. It does not trump security or freedom of expression. It is a qualified right.

I do think reaffirming this qualified right to data protection in legal form would go a long way towards satisfying some of the concerns that our European colleagues have but also protecting citizens. The expectation of citizens in this country is that their rights continue to be protected. There is some debate on whether or not a data protection fundamental right should be part of our law reform package that is going through Parliament right now or perhaps in the European Withdrawal Bill. That would be an important signal to both our citizens and to the European Union.



Steve Wood: To add a little bit more to what the Commissioner has just said, it could quite clearly send an important message and a signal. The deeper the relationship we want to have—that was the theme in the last panel in terms of the deeper you go on the spectrum—the greater access to data you want. To build that mutual trust, it sends a really important signal to have that set out in law.

It is one factor that would be considered as part of adequacy. It is not written down, but you have to have that as part of adequacy because obviously adequacy is looking at a range of third countries with different constitutional conventions in the way data protection or privacy rights might be embodied. Given the opportunity we have, given the long tradition we have, it could be a really good way of sending that signal.

Q87 **Sarah Jones:** Following on from that point about how deep we want to go and how that enables us to maintain access to data, can we talk about the European Court of Justice a bit more in terms of what role it could play in UK data protection after Brexit? Then the flipside, which is: will the UK be able to leave the jurisdiction of the European Court of Justice and maintain current levels in any way in terms of access to data?

Professor Woods: There is a risk of divergence. At the moment, UK law implements EU law as understood in the EU and that takes into account the various decisions of the Court of Justice on the subject of data protection. The question is: five years down the line, to what extent have the British courts, the various jurisdictions, paid attention to developments, particularly from the court but also from the European Data Protection Board's guidance? Has that kept pace? That is a risk. English courts court have regard to those things as a matter of domestic law, but the question then would be as a matter of practice how well they do that, given the different interpretive approach that you have between a predominantly common law system and a heavily civil law-infused from Europe. I have questions about the continued connection.

As a matter of law, if we leave the EU then we leave the scope of the European Court of Justice without more ado. Whether we think it is desirable to have some closer connection is possibly more a political assessment. There may be questions, and the Information Commissioner can probably speak to this more than I can. Some of the GDPR provisions in particular are quite complex, and there may be differing interpretations that we may want to have a think about. I assume the same is true of the Law Enforcement Directive.

Elizabeth Denham: That is right, but you are most interested in the discussion about co-operative policing and Europol and Eurojust. Those are European platforms. Those are European institutions. It is hard to think of how we could be outside of the scope of the European Court of Justice in terms of data protection for the data that are used and shared in that environment. With the General Data Protection Regulation, which is the broader commercial side, it is the rest of the public sector. The European Data Protection Board will be an adjudicative body, and it is



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made up of my counterparts, European Data Protection Supervisors from across Europe. They will be making decisions and they will be creating jurisprudence that is subject ultimately to the European Court of Justice. If the UK is outside of that and I am not sitting on that board as the UK representative, then I am not part of making those decisions and I am not part of that jurisdiction. The UK does not have somebody at that table.

What is the effect of that? The guidelines and the decisions around cross-border cases will be made by that board. It will influence courts. UK citizens will need to come to the local regulator, but decisions will be made in a much bigger venue on cross-border cases. All the big Google cases and Facebook and Amazon and all of those big companies will be dealt with at the European Data Protection Board. I do not know if that really answers your question but it is inside-outside.

Q88 Sarah Jones: For the security bit, you think in order to maintain access we would have to remain part of the European Court.

Elizabeth Denham: Those are European institutions, so it is very hard to see.

Q89 Sarah Jones: Yes. Unless we negotiated something.

Elizabeth Denham: Unless something could be negotiated, it is very hard for me to see how we would not be subject to those courts.

Q90 Sarah Jones: Could you talk a bit about Canada and the case around data protection there, and explain why that ruling happened and how that could relate to our situation?

Professor Woods: The PNR agreement is one of a number. Mr Wood probably has a better overview than I do. The Parliament asked for an opinion on the compatibility of that agreement with EU law, specifically the Charter of Fundamental Rights. I think Professor Eeckhout talked about the procedure in Article 2.18, which allows any institution to make that reference. The court held that there were problems with regard to some aspects of the content of the agreement. It was not everything in the agreement, but there were concerns about very broad categories of data being transferred for reasonably open-ended purposes. There was a question about how long the data were being kept. It was for five years, and the court thought that you should whittle away at that data a little bit more swiftly, so there were different points at which it thought the purposes could be differentiated. You can keep all passenger data for the purpose of letting people into the territory, but then when you are talking about people's time on the territory perhaps you should only keep data for people who are flagging up some sort of concern, rather than everyone, and still further whittling down if you are keeping data after people have left.

There were concerns about which bodies within Canada would have access to the data as well as this idea of onward transmission. There is



an underlying concern in European data protection law that they want to protect against the standards being undermined by essentially outsourcing, so, "We are not breaking the law but our friends down the way are". That is why there is this concern about third countries and onward transmission.

In particular, there was a concern that what are currently called sensitive data was being transferred in bulk. These were data that could lead people to infer things, so about religious beliefs from, say, dietary conditions. A lot of the ancillary information you give when you book a flight can be used to make inferences. Those were some of the key concerns with the agreement.

Elizabeth Denham: Those were exactly the concerns. Canada has an adequacy finding by the European Commission but only on the commercial side. Now, with the Law Enforcement Directive, the Commission will be looking at adequacy on the law enforcement side as well, so it is interesting to see that development. I do not know, Steve, if you have anything to add.

Steve Wood: Professor Woods has outlined the detail of the judgment very well there. To highlight one of the key points she mentioned around the issue of onward transfer, what happens to data when they are transferred to a country under that agreement, but then they might be transferred on to a further third country, and how that still interacts with other EU agreements. Generally, when thinking about going back to the assessment of adequacy, our arrangements for onward transfer will be scrutinised as well: the arrangements we have and the safeguards we have. If an EU citizen's data are accessed by the UK and used by the UK, then the UK might try to share that data with another third country. What data protection safeguards we have in place for that onward transfer as well would be part of the safeguards that would be scrutinised.

Elizabeth Denham: The other point that I should have mentioned earlier, if I may, Chair, is that the other role that the UK ICO plays is oversight of these European co-operative arrangements. On behalf of UK citizens, we can do audits and we have oversight responsibilities for Europol and Eurojust and the Schengen Information System too, so we are part of the oversight and representing UK citizens to ensure that their rights are protected. That again would fall away unless it was negotiated as part of an arrangement.

Q91 **Sarah Jones:** I have one other question. The Government talk about envisaging the Information Commissioner to have a role post Brexit. Thinking about your role when you are going off and getting TalkTalk to give you a load of money or whatever it is you are doing, what greater role do you think you will have post Brexit, and what will you lose? You just mentioned a very good point there, which is the right to monitor on behalf of the UK, but what will you lose?



Elizabeth Denham: If on exit we are a third country with no special arrangements, then the UK Data Protection Supervisor will not sit on the European Data Protection Board making decisions. There could be some arrangement for us to be an observer, but the opportunity for us to be there to have full voting rights and to be able to shape the jurisprudence and the development of EU law after exit is pretty remote unless that is part of an agreement.

What will the UK lose if we are not there? We are not representing the interests of UK law enforcement, UK businesses, the culture of doing business, and UK citizens who may want to take their issues forward around cases that are cross-border and being dealt with by the European Data Protection Board.

Q92 **Stephen Doughty:** Commissioner, do you think the Government understand the consequences that you have just outlined and particularly the point you just made in the previous response about the necessity of the European Court of Justice, particularly when it comes to the security arrangements? Do you think they fully comprehend?

Elizabeth Denham: We have had discussions with Government and I have testified before the House of Lords in some of their inquiries. We have certainly had those discussions with Government. I think they recognise the importance of data protection, which is why they drafted the data protection partnership paper in August. Data underpin everything that we do, everything in trade, not just the digital economy but across business and law enforcement. It is absolutely critical. I do think the Government understand that it is critically important. It was one of the seven policy papers.

Q93 **Stephen Doughty:** For example, if I were to ask a Minister in the Commons about the role of the European Court of Justice on security, co-operation and security data, would they give a similar answer to you?

Elizabeth Denham: I am not sure. It depends on which Ministers. Obviously, the Ministers who are responsible for the digital economy and the Home Office are well aware of these issues.

The other thing is the UK has been so strong around the world on data protection and a world-leading regulatory office. That is certainly why I was attracted from Canada to come to work for this office. We also have arrangements around the world. We work with other data protection authorities in the Commonwealth and in Asia. We have global arrangements. It is not that we just work with Europe, but Europe is very important when it comes to trade and co-operative policing and security.

Q94 **Stephen Doughty:** Absolutely. Given the point that was made earlier on about the Charter of Fundamental Rights by my colleague, don't you think it would have made more sense, for example, for us just to have kept the Charter of Fundamental Rights in the EU Withdrawal Bill? There was potential for it to be kept within there. Would that not be a lot



simpler?

Elizabeth Denham: Again, that is a political question that is not for me. My view is that maintaining data protection as a qualified fundamental right is important, both to our own citizens and the expectations of our citizens, but also to send the right signal to the European Union, one of the important signals that we need to send if we want to collaborate and co-operate.

Q95 **Stephen Doughty:** Therefore, don't you think there is going to be an inevitable problem here because, on the one hand, you have a rapidly changing environment with new threats to data security emerging all the time, and that is before we even get into some of the security co-operation issues? We might start at the point of clear convergence, assuming everything goes okay with the Bill that is going through and everything else, and that is assuming a lot of the moment. We are not inevitably going to diverge and, therefore, that is going to create problems for the sharing of data, whether that is commercial or security, in the future?

Elizabeth Denham: We have problems right now, and the court has demonstrated rigorous scrutiny. Getting the balance right between sharing of data for law enforcement, security purposes and individual rights and protection is a challenging problem. My recommendation is that this is the best way forward at this time, especially if we want to preserve the kinds of arrangements and platforms that we have right now.

Q96 **Stephen Doughty:** You mentioned that some deep discussions were needed in 2018 to deal with the practicalities around all of this. Do you think there is time to achieve all that needs to be achieved for a smooth transition or a smooth exit, but retaining the co-operation that we have?

Elizabeth Denham: There is time to get a transitional agreement in place around data. I think there is also will on both sides, especially when it comes to the discussion in the context of today, law enforcement and security. I don't think there is time to pursue an adequacy finding. On average it takes two years and is now more detailed and more wider-ranging under the GDPR Article 45 than it has been in the past.

The European Commission has not issued details or a referential on which factors it is going to consider to be the most important. We don't know what the queue is going to be of other jurisdictions. We know Japan and South Korea are in discussions with the European Commission right now on adequacy. Where would the UK be in a queue? We don't know. That is why I think the work that needs to be done on the transitional agreement is important. I cannot emphasise enough getting our ducks in a row in terms of the onward transfer regime that we are going to have. On the trade side, that might be a replication of Privacy Shield or the Swiss shield in order to ensure that we have protection for data that is



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transferred onward to the US. We have a lot of work to do, and it is practical work that really needs to start soon.

- Q97 **Stephen Doughty:** One last point. Given that it would not be possible to get an adequacy finding under the current timetable—obviously the current timetable is not fixed, despite the fact that you can extend the Article 50 process, and there are other areas and other reasons why we might want to do that—do you think it would make more sense, for example, to potentially extend it by a little bit to make sure that we have that adequacy finding before leaving?

Elizabeth Denham: Are you just talking about law enforcement?

- Q98 **Stephen Doughty:** The whole lot of it.

Elizabeth Denham: The whole thing. Again, pursuing the legal instrument that you need to satisfy the Law Enforcement Directive through the treaty process, that is possible. To get a data deal, to get a transitional deal on data, again, I think that is the clearest way forward for the UK. It wraps up all of the concerns of law enforcement, security and trade. I think that would be the way forward, and dedicated people working on that too.

- Q99 **Chair:** How long do you think it would take to get the transitional deal on data?

Steve Wood: It is very difficult to say because it depends on how much resource goes into the work and the different factors that will play towards it. I guess the Commissioner is emphasising that is the most practical and perhaps best option to devote the energies to initially, while still having a plan for adequacy as well. The adequacy process appears to be quite fluid as to how long it could take, but we are urging the focus to try to get something for that transitional period.

- Q100 **Chair:** I am trying to clarify the answer you have just given. You could get the access to the law enforcement databases through a withdrawal agreement route but, in order to get the wider data issues resolved, you would need a separate transition agreement and that would be separate from the data adequacy later on.

In the previous evidence we heard that you would need the transition agreement basically sorted by March, in order for them to deal with the third country issues. Do you think the timetable that you need for a data transition agreement is also March, or is there a different timetable?

Elizabeth Denham: It is certainly early in 2018, so it is not late 2018. It has to be sorted. I think it needs to be an area of focus. I do think the Government are aware but it needs to be an area of focus. There are many areas of focus that are needed right now in Brexit.

- Q101 **Stephen Doughty:** You said the Government are aware, but I want to drill down on that a little bit more. Do you think they need to be devoting more resources and more attention to this, given the cross-cutting nature



of this and the importance of the issues?

Elizabeth Denham: It is hard for me to say how many Government resources are working on that right now. That might be a question for Parliament to ask Government. They certainly are aware of the issues, and you can see them outlined in the data protection partnership paper, so there is an awareness of those issues. No, the work has to be done to move it forward.

Steve Wood: Just to add something to that, the feedback we are getting from stakeholders across all sectors—commercial sectors, the public sector, different parts as well—is the importance of securing some form of deal to have a frictionless flow of data and for it to be seamless so there is not a bump in the road, because data is so central to the digital economy and the key issues we are tackling in law enforcement as well. We are getting a massive amount of feedback, which Government are getting as well, about the importance of continuity. That pressure is building up from a number of different sides.

Q102 **Stephen Doughty:** Do you think people are worried that they have not had enough certainty at this stage in terms of the stakeholders who are speaking to you?

Steve Wood: Certainly, that lack of information when things are going through a difficult stage often will cause anxiety. As the Commissioner mentioned earlier, trade bodies are providing quite a practical approach and suggesting different areas that will need the focus. The paper that was published by techUK last week we think is quite a helpful contribution to the debate. That dialogue needs to continue to happen.

Q103 **Chair:** To take you back to the security databases again, if we purely focus on those, you could get access to those continued through a withdrawal agreement during a transition period. In terms of access to those databases under a new security treaty, do you think it is essential to get a data adequacy agreement in time for that security treaty, or is there any other way in which you could continue access to those databases without having the data adequacy in place, putting aside obviously the wider concerns and reasons that you might need the data adequacy?

Elizabeth Denham: If I understand your question, you are asking post-transition, so you are getting a transitional agreement so the data taps are not turned off, so the UK continues to participate, contribute data and access data, but afterwards what is the arrangement?

Q104 **Chair:** Yes. Just on the security databases, is there a possible arrangement that you could envisage that will not still require a data adequacy agreement to be in place?

Elizabeth Denham: The new treaty, the treaty that we are talking about, could be sufficient for the adequacy requirements under Article 36 of the Law Enforcement Directive. Those are exactly the kind of elements,



and we keep talking about those elements over and over again, but there has to be assurance ultimately on the basis of what the court thinks, but also what the European Data Protection Supervisors think the controllers are doing with the data. That is why I am saying there are a lot more bodies involved in making decisions, and it is not just the court. You have European institutions with their own data controller responsibilities. You have the European Data Protection Supervisors that can audit and can have a view. If you take care of the safeguarding of the data, the oversight, the transparency, making sure that there is redress for individuals, if you have taken care of all those things and if you have sufficient law and independent oversight in law in place, then the instrument could be used as an adequacy tool.

- Q105 **Chair:** In terms of getting the agreement of all of those players in the system and the views of all of those players in the system, is that something that needs to happen in advance of getting agreement that we could continue to use—passenger name records, for example, or the Europol information system—or are you seeing that as just the interpretive arrangements after an agreement in principle?

Elizabeth Denham: That is the interpretive bodies afterwards. We have to be aware of that.

- Q106 **Chair:** In terms of getting the agreement in principle, first of all, if the Government want us to maintain our existing access to all of these databases, I want to be clear whether you think we still are going to need to meet those adequacy tests before we can get long-term access to those databases agreed or not.

Professor Woods: Bilateral agreements are the other obvious mechanism under both the regulation and the Law Enforcement Directive. They are obviously different from an adequacy arrangement, but they still will need to be subject to some sort of oversight mechanism.

If we look at the EU relationship with the US, there is the umbrella agreement that creates the oversight and the data protection and the rights protection framework, but then you could have individual agreements under that. I am not sure what the benefit would be if you are trying to negotiate anyway. It seems like having another agreement on top of an agreement that way, but it may be that if there was a particular sticking point—and investigatory powers and bulk powers may be a sticking point for adequacy—maybe specific safeguards could be put in place, oversight mechanisms in some sort of oversight agreement that mitigated that. That is the main other form of mechanism. There are derogations, but they tend to be ad hoc, so more on a case basis than an ongoing access and sharing basis.

- Q107 **Chair:** If you needed to do that and to go down that route, would that be a more complicated route that would take longer than simply going through the data adequacy routes, or is it something that could be done more swiftly? I am simply trying to get a sense of timetables for



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conducting—

Professor Woods: I suspect it is probably going to be just as problematic. I am thinking about the amount of time the umbrella agreement with the US took to agree, and that was years.

Q108 **Chair:** How long was that?

Professor Woods: I cannot remember.

Elizabeth Denham: Several years.

Professor Woods: Yes, it was several years. I cannot remember whether it was two or more than two, but it was a while. Obviously, part of that story may have been the Schrems judgment coming right towards the end of that process, which may have upended things a little bit, but it is certainly not a swift solution, I don't think.

Q109 **Chair:** Do you think the Government and the law enforcement authorities here are going to end up having to choose between the existing data retention powers, the framework and access to the EU databases on law enforcement?

Elizabeth Denham: That is a pretty bleak choice, is it not?

Professor Woods: Yes. I would hope that they could find some room to mitigate the concerns, and I suppose the consultation on the Investigatory Powers Act, the new regulations, is a starting point for that.

Elizabeth Denham: It is an opportunity. The consultation on the regulations under the IPA is an opportunity for the Government to address some of these issues. Because the UK is not a signatory to the umbrella agreement between the EU and the US, I also think that Government might look or might be looking at whether or not that also is an important signal. There are safeguards in that agreement that could be helpful to the UK in the environment that we find ourselves in now.

Q110 **Chair:** A final question in terms of what we think the timetables might realistically be. If we assume a transition agreement is reached in some form, given the complexity of some of the issues that you have been talking about, whether it is either going through a data adequacy route or through a bespoke route and so on, realistically, how long do you think it would need to negotiate the arrangements to cover these databases within a security treaty? Do you think it can be done within two years?

Elizabeth Denham: Within two years is really challenging, but it is not my area of competency to understand how long things are going to take and how much resources and all the bodies that need to be involved in it. We do know the complexity. We know how long it takes to come to an agreement in different contexts.



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Privacy Shield. When Safe Harbour was annulled and when the two sides got together, the EU and the US, to come up with a new arrangement that was pretty darn quick. It was about a year.

Steve Wood: I think it was under a year. It was struck down in the October and a new deal was in place perhaps not by February, but there was a previous arrangement in place that was built upon. You can be a bit glass-half-full or half-empty in the way you look at it. We obviously do have lots of the key components in place because we have already adopted all of the EU data protection law, which is one of the key considerations for an adequacy deal or a bespoke arrangement. These pinch-points could take a long time to resolve in terms of the discussions around how much of the focus from the EU side comes on things like the Investigatory Powers Act, which could become very complex and drawn out because of the tensions between those competing interests, which makes it very hard for us to assess. We are not starting with a blank sheet of paper. Obviously, we have a really good track record on data protection in this country, which the EU should take into account, but it is very difficult to say.

Q111 **Chair:** We have an urgent question starting in Parliament shortly that some members may need to get to, so unfortunately we will have to draw this to a close. If we may perhaps follow up with some further written questions that would be very much appreciated.

I will ask you a final question on the timing. If we get a two-year transitional arrangement, which is the kind of period that people are talking about at the moment, and if, out of that two years to get a security treaty in place, there needs to be up to 18 months for ratification or to include scope for a referral to the ECJ for advice and so on, do you think there is any chance of agreeing any of these things in six months?

Elizabeth Denham: It is very challenging.

Q112 **Chair:** You are allowed to say "yes" or "no" to answer.

Professor Woods: I would say unlikely. On the other hand, people are going to be incentivised, are they not?

Elizabeth Denham: On this issue there is so much goodwill and good intention to put something in place for the protection of citizens on both sides. That is the advantage that you have.

Chair: Thank you very much for your evidence. We really appreciate your time this morning. Thank you.