



Select Committee on the European Union

Home Affairs Sub-Committee

Corrected oral evidence: Brexit: the proposed UK-EU security treaty

Wednesday 28 March 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Soley (The Chairman); Lord Crisp; Baroness Janke; Baroness Pinnock; Lord Ribeiro; Lord Watts.

Evidence Session No. 3

Heard in Public

Questions 20 - 29

Witnesses

I: Camino Mortera-Martinez, Research Fellow and Brussels Representative, Centre for European Reform; Dr Marco Stefan, Research Fellow, Justice and Home Affairs Section, Centre for European Policy Studies.

Examination of witnesses

Camino Mortera-Martinez and Dr Marco Stefan.

Q20 The Chairman: Good morning. Thank you for your attendance. First, let me explain the change in chairmanship here. Lord Jay is unwell, so I am chairing the session, but you will be pleased to hear that nothing else will change for you, apart from the questions maybe—who knows? This is a public hearing; members of the public are present. It will also be webcast, so what you say is live to the public. Finally, of course, there will be a transcript from Hansard. You will be sent a copy of it so that you may make any factual corrections that you think are necessary. We will then look at it before publication.

Dr Stefan, I understand that you want to focus primarily on the JHA-type organisations. I invite you to make a short statement on this, which might help the Committee to understand where you are coming from, if you would like to do that.

Dr Marco Stefan: Thanks, Lord Chairman, and thank you for inviting me to this oral evidence session. I am extremely honoured to be here.

I work at CEPS, which is an independent think tank, in the justice and home affairs section, where we cover a number of issues related to justice and home affairs. Today, as you have already mentioned, I would like to focus primarily on the future of UK co-operation with EU home affairs agencies: namely, Europol and Eurojust.

The Chairman: Thank you. Would the other witnesses also like to make a short statement? Incidentally, the acoustics in these rooms are dreadful, so you will both need to keep your voices up, and I might remind you of that if they fall. It is very difficult to hear at times. The rooms were not invented for good acoustics.

Camino Mortera-Martinez: I will draw on my theatre experience for that. My name is Camino Mortera-Martinez. I am a research fellow and Brussels representative for the Centre for European Reform, which is also an independent think tank in London and Brussels, where I am based. I lead the work on justice and home affairs and I will focus primarily on higher-level perspectives on these issues: namely, what other member states think about future co-operation. I am also quite knowledgeable about models of co-operation with other countries, both Schengen and non-Schengen, and data protection issues.

Q21 The Chairman: Thank you very much. Let me start with the first question. In an ideal world, what is your idea of the closest co-operation between the EU and the UK on security matters post Brexit? What would be your ideal model?

Dr Marco Stefan: Based on the negotiating position advanced so far by the different parties, the ideal agreement would cover at least three aspects. The first would be continued co-operation between UK and EU justice and home affairs agencies—namely, Europol and Eurojust—

maintaining the status quo of existing co-operation between the UK and these agencies.

Secondly, this agreement would cover the possibility of the UK accessing EU justice and home affairs-related databases: namely, the second-generation Schengen Information System, ACRIS, the Prüm convention and the Europol Information System.

Thirdly, if this ideal agreement was ever to be achieved, it would allow the UK to participate in mutual recognition instruments, in particular the European arrest warrant.

Those are the three main elements that an ideal agreement could cover. Of course, a number of obstacles stand in the way of achieving this agreement, and I can speak about those during this session.

The Chairman: You used the phrase “status quo”. Do you mean that in your ideal world there would be no change in the existing situation?

Dr Marco Stefan: I referred to the status quo with particular reference to the UK’s current status in Europol and Eurojust. This entails the possibility of participating in the Europol management board, still being part of the Eurojust college and having direct access to the intelligence services and the products of these agencies. That would basically maintain the status quo.

The Chairman: In my discussions with a number of people both in the EU and here, they make the point that you do not just need a treaty; you need some form of institution to make the system work. Do you agree?

Dr Marco Stefan: Are you referring to an oversight body monitoring the implementation or having a say in the interpretation?

The Chairman: An institution would be required to make it work on a day-by-day basis. You cannot just keep referring back to the treaty, particularly as you might feel that the treaty needs changing in order for institutions’ enabled systems to work. I just wonder if you have given any thought to that. You may not have done, but it is a point that has been made to me, not least by the chief executive of Europol.

Dr Marco Stefan: Any future relationship between the UK, Europol and Eurojust would need to be regulated by operational agreement, which would be subject to the authority of the European Court of Justice, in my opinion.

The Chairman: I have the same question for Ms Mortera-Martinez. What is your ideal position post Brexit?

Camino Mortera-Martinez: The ideal position for me would have been no Brexit, but that is a personal opinion. Ideally, we would maintain the status quo, but that will be very complicated.

I agree with Marco when he says that the treaty should cover at least four essential things. I am saying that not only because of the conversations that I have had in Brussels but because of Prime Minister May's speech at the Munich security conference. She highlighted that the UK would be interested in keeping the European arrest warrant and access to databases and to the Schengen Information System, as Marco was saying, and to Europol. Eurojust was not mentioned. I assume that it will also be on the table, although in my opinion that will be slightly easier. Finally, she also mentioned the European investigation order, which is a mutual recognition instrument.

Those four areas are the main ones to focus negotiations on at this stage. As you can see from the transitional deal, many other directives and regulations will be discussed, but these four things, which I would call police and judicial co-operation in criminal matters, are the essential parts of the future relationship between the UK and the EU.

The Chairman: I will ask you the same question on institutions. Would an institution be necessary to make this work?

Camino Mortera-Martinez: Judicial oversight would be necessary to make this work, whether you want to call it the European Court of Justice or you want to come up with a new judicial body. Particularly in the case of the European arrest warrant, or something akin to it, I do not see how judicial decisions affecting people's fundamental rights in criminal proceedings can be taken without having some sort of institution there. We can perhaps move to that later, but I think that a judicial oversight body will be necessary.

The Chairman: Do you think this will have any effect on Britain's relationship with other countries, such as in sharing information with the United States?

Camino Mortera-Martinez: I do not think so. That question is basically about the problems that the US sometimes has with the European Union when it comes to privacy and data protection. Once the general data protection regulation comes into force in May, European privacy standards will become global privacy standards.

Whether the UK stays within the EU regime—I hope it does, for several reasons that I will come back to afterwards—or decides to set up a new privacy and data protection regime, relations with the US are probably going to be better. That might be very provocative, but I think there will be a better relationship from now on between the US and the EU on privacy.

Whether the UK is part of EU co-operation or outside, I am not sure that that will impact on the special relationship that the UK has with the US, especially on spying and intelligence matters.

The Chairman: You will be aware of the importance of the Five Eyes partnership, as it is called, with New Zealand, Australia, Canada, the US

and the UK. The EU benefits from some of the information contained in that. At the moment, we tend to be seen as moderating. I do not mean reducing but somehow or other making sure the system works, and at the same time protecting the sources, which the US in particular would be worried about. Do you see any problems there?

Camino Mortera-Martinez: At the moment, the majority of intelligence co-operation happens outside European Union structures. It happens a lot on the margins of Europol, as Marco might explain later. It happens a lot in the Five Eyes alliance, which sometimes meets on the margins—at Europol meetings and that sort of thing.

Once the UK leaves the European Union, the US will lose its main ally and its eyes and ears in Brussels, but when you talk to US officials they tell you, “We have other friends who will help us”. On the UK side, it will be important to keep the relationship going with the Five Eyes, because that will give it more information with which to go into European Union meetings.

The Chairman: Dr Stefan, do you have any views about relationships with third countries?

Dr Marco Stefan: Yes. Of course, intelligence co-operation with third countries falls outside the scope of EU law. Any future agreement between the UK and the EU—and more specifically between the agencies, such as Europol, and the UK—can be concluded only if there is an adequacy decision from the Commission.

In order to deliver this adequacy decision, the Commission will also look at aspects that fall outside the scope of EU law, particularly information exchange for intelligence purposes. If the Commission finds that the co-operation between the UK and its external, non-European, partners does not comply with EU data protection standards, this might have an impact on the way that the UK co-operates with third parties such as the US.

Camino Mortera-Martinez: On that point, what the UK Government are seeking goes beyond a mere adequacy decision, which, as Marco was saying, is basically an assessment by the European Commission of whether a country’s privacy laws are compliant with European Union privacy standards. The UK Government are suggesting having a comprehensive, whatever that means, treaty on privacy and data protection standards with the EU.

These issues could be addressed within such a treaty, which might cover not only trade and the transfer of commercial data but, as there is now a European Union directive, data transfers between intelligence agencies and these sorts of things. That could be envisaged if the UK goes down the road of having a comprehensive overarching treaty on data protection.

Q22 **Lord Ribeiro:** Good morning. Since 2009, something like 12,000

European arrest warrants have been made, and as a consequence more than 1,000 people have been sent back to the UK to stand trial. The evidence that we have from Rob Wainwright and others is that it would be a huge loss to the UK if this was not maintained. What impact will the transitional arrangements have on the prospects of agreeing a security treaty between the UK and the EU?

Camino Mortera-Martinez: It will be very difficult, if not impossible, to keep the European arrest warrant, because it has three special features. I will not bore you with two of them, because they are a bit technical and beyond the scope of the question.

The main obstacle that we will find here, and we already find it when we look at the transitional deal, is extraditing own nationals. As you know, many countries in Europe did not extradite their own nationals to other member states until the European arrest warrant came into force. They had to change their constitutions and so on in 2005.

As far as I know, a couple of them, Germany and Slovenia, changed their constitution to say that their nationals can be extradited only to the European Union, whereas other countries, such as my own, say that nationals can be extradited to any country with which they have an international agreement.

Because changing that again would need constitutional change in Germany, which is not going to happen any time soon, the UK is very unlikely to get the European arrest warrant as it is at the moment. That is why there is an article in the transitional deal, article 168, which has the reservation that countries can say they are not going to extradite their own nationals, and then the UK can retaliate and do the same.

Because the UK will be unable to have exactly the same as it has now, it would be wise for the UK—I think the Government understand this already—to look for something similar to what Norway and Iceland have. The problem is that their agreement is more limited in scope because of extraditing own nationals and other political exceptions, such as not extraditing terrorists. It has been negotiated for 13 years and is still not in force. There are also constitutional problems, as I understand it, in Iceland and Italy at the moment.

Then there is the question of this weird body that will oversee the whole system, which is not a court; it is a body. Nobody knows how it will work. The Norwegians have not given it much thought, and nor has the European Union. The only reason why they do not have a court regulating this is because the European Court of Justice has said, "This is against the integrity of EU law, so we are not going to have a court here".

That will have a huge impact on the security treaty. It will be a wake-up call to people that although everybody loves the European arrest warrant and it was a British initiative, it is the first thing that will be impossible to replicate, no matter how keen Governments on both sides of the channel are.

Lord Ribeiro: You mentioned revoking domestic legislation. Do we have a ballpark figure for how many countries have changed their domestic legislation since the EAW came in?

Camino Mortera-Martinez: Yes, I have the numbers here. Before the European arrest warrant came into force, 13 out of the then 25 member states, including Austria, Germany, Italy and Poland, had constitutional restrictions on extraditing their citizens. At least 13 out of the 25 had to change their constitutions.

I would need to do an in-depth constitutional review on this, which I have not done, but many of them changed their constitutions to allow them to extradite own nationals to countries with which they have an international treaty. It would still be possible for them to do that without having to change their constitutions. However, Germany says very clearly in its constitution that the only exception to extraditing own nationals is extraditing them to members of the European Union.

Lord Ribeiro: We will come on to political issues later. Would you like to make any comment on that, Dr Stefan?

Dr Marco Stefan: No.

Lord Ribeiro: You are happy with that. The other thing is that we are outside Schengen, of course. Under the arrangement that you mentioned with Iceland, there would be a restriction. How would our position out of Schengen make it possible to get as good an arrangement as we can, mindful of all the problems that you have just outlined?

Camino Mortera-Martinez: The fact of being outside Schengen will complicate things from a political point of view. One idea for a treaty that I have been reading about is to have something akin to the Schengen association agreement, which is a very good idea. When you float this idea in Brussels, people tell you, "The UK is not in Schengen and we can never offer the UK something similar to what Schengen countries have".

When you talk to the Schengen non-EU countries—Norway, Switzerland and others—they have conflicting views on that. On the one hand, they would like to have the UK getting a good deal so that they can piggyback on what the UK gets. On the other hand, for countries such as Switzerland, which has referendums pretty much every month, it will be very difficult to sell back home why the UK, which is outside Schengen, is getting this amazing deal. "It does not have movement of people, it has border controls. How do we sell this back home?" That will make it very complicated for the UK. When negotiations start in Brussels, everybody knows that the UK is never going to be part of Schengen.

Starting from the point of view of wanting to be similar to a Schengen country is a tactical mistake for the Government. They should depart from this point of view: "We are a third country, a very close one, and we want a special relationship, but something that differs a little from the

Schengen agreement”, because otherwise negotiations will be a bit more complicated from Brussels’ point of view.

Lord Ribeiro: Is it your view that as third-party members we are likely to get only a Norway or Iceland-type agreement, rather than a tailor-made one?

Camino Mortera-Martinez: Yes.

The Chairman: To follow that last question, most in Europe recognise that the British involvement in this area is incredibly important in terms of quantity and quality right across the board, which makes us very different from Norway or Iceland. Is it not very much in the interest of the other parties? When I talk to people over there, I am told they are desperate to make sure it works.

Camino Mortera-Martinez: I agree with you. We are in a win-win situation here, but we do not know how to deal with it from a practical point of view.

As I was saying, it is not enough to want to have good co-operation in this area. As time goes by, and you start taking the treaty and testing things out, you will realise that there are problems that you did not think were there, which you will have to solve. As I was saying, and Marco will probably address this later, some of them are solvable, such as having an associated status to Europol. All these things will be much easier than solving very thorny questions, such as what you do with the constitutional exceptions on arrest warrants.

What do you do about access to databases that have different types of alerts? That is another important point to make. Every European Union law enforcement database has a different legal basis. That means that you will have to be within the instruments that give rise to this database. What happens if you get a Norway or Iceland kind of extradition agreement and then you want to access arrest warrants in the Schengen Information System? How are you going to make that work? That is keeping legal minds very busy in Brussels at the moment: understanding how to square that circle.

One of the main things that would be very welcome at this stage is a clarification from the UK Government on the data protection issue. I know that they are being clearer than they used to be, but it would be good if they could make a clear statement that data protection rules will be respected for years to come. There should also be a very clear position on the role of the European Court of Justice in this. Those are the two things that will be necessary.

The Chairman: The point you are making is that the legal constraints are real and will get more complex outside, and I understand that. The point made by people who say that there needs to be an institutional structure is that that would allow you to address those problems, even if you did not solve them immediately.

Camino Mortera-Martinez: You mean if the UK had some sort of—

The Chairman: Yes, if an institution is set up between the EU and the UK.

Camino Mortera-Martinez: Do you mean as a general thing, a parallel institution such as EFTA?

The Chairman: I mean as part of the treaty.

Camino Mortera-Martinez: Does the UK really want to set up something like EFTA? At the end of the day, institutions, whether we are talking about the Commission or the EFTA supervisory authority, are supranational institutions. That will be a bone of contention in the public debate in this country.

The Chairman: It is complicated, you are right. Some people did not realise that in the first instance. They do now.

Q23 **Lord Watts:** Good morning. On the provision of the draft transitional agreement relating to extradition, which countries do you think are likely to apply that provision? What rules should apply by Brexit day to people who have not been surrendered under the extradition warrants? Could this provision have an impact before Brexit day? I have one more question, but three are enough to start off with.

Camino Mortera-Martinez: On the question of the countries, as I said before, I would need to do a thorough constitutional examination of the different laws around Europe, but Germany for sure will apply this, because it is the country that is more concerned. I will have to look again at the Slovenian case, because the English translation of the Slovenian constitution can be interpreted in different ways.

What rules should apply to people who have not yet been surrendered by Brexit day, which I understand to be March 2019? That is to be agreed when that part of the transitional deal is agreed. At the moment, the part on extradition is in white, which means that the UK has not consented to it. If I remember correctly, the article says that the European arrest warrant should apply where the request to arrest was made before Brexit day.

Lord Watts: The determining factor will be when the application was made, not whether it has been resolved.

Camino Mortera-Martinez: Yes. This is my personal view and I might be wrong, but it would make sense in order for those requests to be made and for the people to be surrendered, arrested, after the cut-off date.

On the cut-off date, you can say, "We have made the request", but these requests need to be decided as of the time when this comes into place. Otherwise, what would you do with these people? How would you deal with them? The problem is that I do not know what will be in place after

the end of the transitional period. That is when the problem will start, because two years is nothing for negotiating an extradition agreement.

I talked to the Swiss a couple of weeks ago and they talked about how they extradite around one person per day, so 365 people per year, and they use the famous 1957 convention. They are happy with it. They reviewed it recently and said, "It works, so we could advise our UK friends to use it". Somebody asked them a very clever question about how much time it takes them to process these requests, and they said that it was six months on average. You can fall back on the convention while this extradition agreement is being negotiated, but that will mean a backlog. One thing the Swiss said, which should be taken into account from a pragmatic point of view, is that during that time you will have to pay for people being in prison in this country.

Lord Watts: What about whether the provision will have an impact before Brexit day? Does the transitional agreement have any impact before that day, other than the one that deals with the issue of the application being the deadline for completion?

Camino Mortera-Martinez: As you probably know, Brexit has already been causing problems when it comes to European arrest warrants, because the Irish High Court has referred a preliminary question to the European Court of Justice.

Obviously, we have a European arrest warrant in the first place, because we have legal systems that are similar or at least compatible, so we trust each other. We say, "I am sending you this person, because I trust that you will treat them in the same way I would". Our systems are similar, because we have spent the past 15 years harmonising our procedures.

Once Britain leaves, because there is no clarity about which laws will be in place, what is Britain going to retain? I am thinking about the right to a lawyer and all these sorts of procedures, which are much more complicated. The Irish courts are already asking the European Court of Justice, "Can we really send this person to Britain when we do not know what will happen after March next year?" This is happening in Ireland and in Poland, and it is likely to happen in other member states, so Brexit is already having an impact on extradition procedures.

Lord Watts: Do you have anything to add to that, Dr Stefan?

Dr Marco Stefan: Not on the European arrest warrant, but I do on the impact that the transitional agreement might have on the future security treaty between the UK and the EU when it comes to future relations with Europol and Eurojust.

The current negotiating position of the EU is that, as of Brexit day, 29 March 2019, the UK will no longer be allowed into the agencies' management structure; it will be out of the Europol management board and the Eurojust college.

This will have an impact when it comes to negotiating a new agreement, as the UK will have to provide arguments and be readmitted into the management system. There are no cases of a third country vis-à-vis the agency being allowed into these structures with a voting right. We have the example of Denmark, which, despite being a member state, is allowed to attend meetings of the Europol management board only as an observer without voting rights. This is the first example of the type of impact that we can already see.

Article 7 in the draft withdrawal agreement refers to the fact that, as of the end of the transitional period, the UK will no longer have access to the EU justice and home affairs databases. This means that in order to ensure continuity of access to these databases the UK will need, first, to obtain an adequacy decision within the transitional period and, secondly, to conclude an operational agreement with the agencies, in a very short amount of time. These are the impacts that I see.

Lord Watts: You have touched already on this, but do any other issues come to mind that might not be covered by this type of transitional agreement?

The Chairman: Did you want to add more to that, Dr Stefan?

Dr Marco Stefan: No.

Lord Watts: Perhaps if you think about them later, after the meeting, you could write to the Committee.

Dr Marco Stefan: Yes.

Lord Watts: There may not be, but I just wondered whether there was.

The Chairman: It is an important question. Thank you.

Q24 **Baroness Pinnock:** On the proposed treaty, can you see any potential delays to the ratification of such a treaty? Would any delays result in us being at a so-called cliff edge, where all of a sudden we are not covered at all? You have touched on that already when answering Lord Ribeiro, but an expansion on that would be lovely.

Dr Marco Stefan: That cliff-edge scenario would happen, especially when it comes to access to EU databases, if there was no adequacy decision before the end of the transitional period and no agreement in place between the UK and the agencies allowing for this exchange of information. In my opinion, there is the possibility of a cliff-edge scenario if, within the transitional period, these elements are not agreed upon. We need to discuss whether it is possible to prolong the transition period, if that is an option.

Baroness Pinnock: Do you mean prolonging the transition period for more than the 21 months?

Dr Marco Stefan: Yes, beyond 31 December 2020.

Baroness Pinnock: That is the only possibility, you think.

Dr Marco Stefan: Yes, unless the UK managed to have an adequacy decision, conclude the security agreement and then enter into an operational agreement with the agencies within the current timeframe.

Baroness Pinnock: You think that is unlikely.

Dr Marco Stefan: That sounds quite challenging.

Camino Mordera-Martinez: To give you a flavour of that, Denmark opted out of Europol in 2015 and concluded a deal to re-associate with Europol last year, so it has taken two years. Once again, we are talking about a Schengen country, so it is a different story.

Your question started from the fact that there might be delays in ratifying the treaty. For that, we need to clarify what the treaty will look like, which I do not think anybody in this room can do because it would be crystal ball reading at this moment. Will it be a mixed treaty, a treaty that will have to be ratified by national Parliaments, or will it be an exclusive EU treaty, which it will be if it is a standalone treaty, because it would touch upon matters that fall under articles 82 to 89 of the treaty of Lisbon on co-decision? That means that article 218 applies, so it is a purely European Union process in which the Commission negotiates and the Parliament approves the agreement. That is not going to be easy, because the European Parliament has a history of bringing down security agreements with third countries, notably the US. That is an important point to remember.

If this treaty is part of the wider Brexit agreement, I am not sure—and there are still discussions from the legal point of view—whether it would be a mixed agreement or an exclusive EU agreement. If you need every parliament of every country ratifying it, and in some countries you have several parliaments, as we know from the Belgian CETA case, it will take much longer than if you have an exclusive EU agreement.

If you have an exclusive EU agreement, you will have the European Parliament, and if you do not start thinking about the European Parliament now you will meet the European Parliament at the end of the process and you will have a problem.

A cliff edge is quite likely in this area, and the UK will have to think of what it can revert to when it comes to extradition, for example. You can use the convention for some time. You can speed things up and try to have an operational agreement with Europol with no perks of any sort. That would be a pity, because the UK has shaped Europol for the past five years. Then you would need to have an adequacy decision or this famous data protection treaty going beyond that. I do not see how anybody thinks that this can be done in 21 months.

The Chairman: A lot of things in politics are impossible. I was at a European Parliament meeting the other week, addressing the question of Denmark, which, as you know, has opted out as a result of a referendum.

The EU is leaning over backwards to involve Denmark as an observer at this stage. Denmark wanted to go further, but that is not attractive to the EU, not least because of the implications for the British position.

I do not think you can rule out the emergence of a structure, because that is what they were discussing: something that would enable the Danes to be almost fully involved but not quite fully involved. You could see something eventually happening for the UK, could you not?

Camino Mortera-Martinez: I have been defending the idea of having a bespoke deal on Europol for the UK, including voting rights on the management board. That has been snubbed by most of the people I have talked to in Brussels and welcomed in London. As we know—and Marco possibly knows this better than me—the negotiations of the Danish case were very unfortunately timed, because they coincided with the Brexit referendum, so it got a worse deal than it could have had otherwise.

I am not sure what legal obstacles there will be to operational co-operation when it comes to voting rights and all that. One of the main issues that the Danes have is that they do not have direct access to the Europol Information System. If they want to have information from Europol, they have to go through their liaison office in The Hague as opposed to what happened before, which was that the police could just search the database.

Last year, I thought, perhaps very naively, that this could be discussed for the UK and that a solution could perhaps be found whereby the UK could access databases directly. I am not sure, to be honest, that there are any really unavoidable legal obstacles to all this, because this is more operational stuff, as long as there is an adequacy decision and privacy rights are respected.

There is a strong sense in Brussels that they cannot give the UK better treatment than they are giving to third countries that are part of Schengen. That is a very important thing, which I did not feel some months ago. It is growing more and more in the debate on these questions in Brussels.

Lord Crisp: I apologise for arriving late to the Committee and to the witnesses for not hearing your opening remarks. I just wanted to come back to Baroness Pinnock's question about the cliff edge. In reply to her you talked about the various things that might happen if we got there. Is anyone planning for that contingency? Are people putting together the sorts of things that you are talking about? You have just said that it may take really rather a long time, so it seems from that that there is some likelihood that we might arrive there.

Camino Mortera-Martinez: The European Union has been planning for a cliff edge or for a non-Brexit for a long time. As I heard the other day, they are masters in making the process that they invented work for them. I am afraid that the UK Government are just coming to terms with some realities in this area.

This was branded as a walk in the park. We and some others have been saying that this is not going to be that easy, because there are things that, no matter how much political will there is, you cannot overcome. You will have to ask the Government, but my feeling is that the other side is better prepared for the possibility of a cliff edge than the UK is at the moment.

Q25 Baroness Pinnock: Moving on to the influence that the UK might have if, in the end, we leave, do you expect the UK's level of influence on security co-operation to change post Brexit? You have referred already to some of these issues, but it would be nice to have them all together. Do you see any opportunities, maybe, to improve on the security relationship that currently exists?

Dr Marco Stefan: From the perspective of the future relationship with the justice and home affairs agencies, the UK's level of influence is only going to diminish, not least because, as was mentioned before, the UK has so far had the opportunity, by participating in the management system of these agencies, to implement its business model. It is well known that it imported the model of intelligence-led policing in Europol.

It also had an opportunity to appoint its officials at the top level of these organisations, who have shaped the strategic direction of the agencies in the past few years. Provided that, as of Brexit day, this will no longer be possible, the influence over the day-to-day running of the operation and the strategic decision-making process will diminish.

If I may, I would like to add something to the point that was raised before on the diversity between the Danish case and the UK. Some legal hurdles were present when Denmark negotiated its agreement with Europol, not least because this was negotiated under the Council's framework decision where now we have European regulations. Therefore, the procedure for concluding the agreement changes. Not only do we have the involvement of the Commission and the Parliament under the new procedure; we also have the possibility of the court being asked to provide scrutiny over the agreement provided for that exchange between the agency and the UK.

It may well be that any agreement or decision in that respect can be struck down, so there are further procedural and legal elements to be considered when taking into account the future negotiation of this type of agreement with the agencies.

Baroness Pinnock: Would you like to add anything to that, Ms Mortera-Martinez?

Camino Mortera-Martinez: I agree with Marco that a lot of influence will be lost, most visibly in Europol, because of the way the UK has been leading police work in Europe. There are some opportunities to keep at least some of the influence going, because everybody appreciates the UK as a security partner.

The UK is leaving the Union, but it is not leaving Europe. We will have shared threats and all these things. As I was saying before, some non-EU partners find it useful to be part of meetings as observers. Even if they do not have a voice or a vote, some of them say that, once they are in the room discussing these issues, their colleagues do not realise they are not a member state.

However, that works, as does Brussels, on the basis of nurturing personal relationships, which means that you need to keep the resources in place to nurture these relationships. That is the advice the Norwegians often give the Brits: "You want to keep as many people here as possible. You want to keep your diplomatic channels open. You want to know who matters and who does not. At the end of the day, once you leave the EU, you will be a lobbyist, like we all are, so the more you know, the more you entertain these relationships, the better it is for you and the more influence you will have in the final game".

Even the US, which is a very strong security partner for the European Union, sometimes finds it difficult to get its message across and understand what the EU is saying. That would be advice for the UK, to keep up its diplomatic work there.

Q26 Lord Watts: I want to pursue the issue about the potential appeals that may follow after Brexit. It seems to me at the moment that an extradition treaty can be appealed in the country of origin up to its highest court, but there is case law and provision in there for dealing with that. Are there likely to be more legal challenges, which will take longer and be more expensive, once we have left than if we had remained as members? Do you have a feel for whether new types of legal challenge will be made following Brexit?

Camino Mortera-Martinez: I think so. It will depend on what type of relationship the UK has with the European Union and how much co-operation on criminal matters and criminal procedures is kept. The more the UK drifts away from European Union rules, the easier it will be for countries to wonder, "Should we send this person to this third country?" This is not the UK's case, but we have all seen the Julian Assange case, with the death penalty in the US and that sort of thing. I am not saying that will happen in this country any time soon, but other things can happen and we never know. That will lead to expensive and long legal challenges.

The European Court of Justice or the European Parliament can also question the validity of an extradition deal between the UK and the EU if the UK changes any underpinning laws. I am once again thinking about the right to a lawyer, interpretation—all the nitty-gritty details of the criminal procedure.

From the beginning to the end, you need to have a procedure that is in line with what the European Union considers to be fair and according to human rights. If the UK decides to pull out of the European Charter of Fundamental Rights, that will pose a problem for the court and for the

Parliament. That means that any extradition deal you are able to make is not going to be static; it will be constantly scrutinised, because the UK will no longer be part of the mutual trust system that allows member states to be so quick in exchanging information, people and so on.

Dr Marco Stefan: On the impact that Brexit might have on the domestic legislative activity of the UK, we need to go back to the requirement that is now embedded in directive 2016/680 on data protection for law enforcement authorities, which requires that transfer from EU member states to third countries, as the UK will become, is possible only once we have an adequacy decision in place.

In order to have this adequacy decision, again, there will need to be scrutiny from the Commission, which is wider and will touch upon pieces of UK legislation that are under discussion or have been approved. I refer in particular to the Investigatory Powers Act or the Data Protection Bill, where some doubt has already been raised as to their compatibility with the EU data protection standard. There will be an impact in that respect.

Q27 **Baroness Janke:** Does the proposal to exclude the Charter of Fundamental Rights from the European Union (Withdrawal) Bill demonstrate, as is envisaged by the Government, the standards of human rights that would be expected by other countries in the EU when looking to use the European arrest warrant?

Camino Mortera-Martinez: It is a huge mistake to withdraw from that charter, because it underpins a lot of the co-operation in this area. The area that we are dealing with is called the area of freedom, security and justice; it is based on the idea that we share systems, but we also share a concept of fundamental rights and human rights, which is enshrined in the charter. That will not only affect the European arrest warrants but will impact on the co-operation that can happen on anything to do with arresting people and putting them in jail. That really impacts the fundamental rights of European citizens, so the European Court of Justice will be quite upset about that. Let us not forget that there is article 8. We have the right to privacy, which will also be important in this case.

Q28 **Lord Crisp:** You have made a very strong point that, even if there is political good will, it is not enough to make this work, and that institutional and legal structures will shape what happens.

A little while ago, you started to talk a bit about relationships and trust. It seems to me that must be pretty fundamental to this. When people work together, they learn to trust each other. They can see around corners, if you know what I mean. They can anticipate what is happening and they can learn together. Is an important part of dealing with this whole area making sure that there are ways of maintaining people working together in whatever way and focusing on the need to build relationships and trust? Is that a fair comment?

Camino Mortera-Martinez: I absolutely agree, and not only in this area but in the whole Brexit process, because you need to keep trust going when it comes to trade. There are a lot of issues. We talk about mutual

trust and mutual recognition, which is a basic principle of this area. That mutual recognition principle started in the area of the internal market, so those issues of trust and recognising each other's markets, legal systems and so on are the basis of the European Union.

Lord Crisp: It is more than just trust.

Camino Mortera-Martinez: Yes. The more you can keep your people there and entertain these relationships, as our American friends know very well, the more you understand what is going on and you understand the European Union, so you do not withdraw your experts from there. You try to keep them there. You try to keep people there who understand what is going on, who do not underestimate the European Parliament or how difficult it will be to negotiate a Europol operational agreement, even if you have been leading Europol for five years, because of the European Court of Justice, as Marco said. The more you keep those relationships in place, the more you keep people in the room, the easier it will be for you to get a good deal.

The Chairman: Dr Stefan, I understand that a lot of your research work was on the relationship of the UK to the JHA institutions such as Europol and Eurojust. Should you feel that there are things we have not addressed and ought to have, or things you have missed out, if you want to write to us after this or say some of them now, that would be useful.

Dr Marco Stefan: I would be happy to integrate my oral evidence with some written input, if possible.

The Chairman: Thank you.

Q29 **Lord Ribeiro:** Do you believe that the land border between the UK and Northern Ireland will pose a challenge for security arrangements post Brexit? In particular, mindful of what you said earlier about the Irish position in terms of extradition, one is very cognisant of the fact that before the European arrest warrant came in quite a lot of British criminals found Spain a good place to go. Are we going to see the same thing happening in Ireland?

Camino Mortera-Martinez: I am not an expert on Ireland, so I always find questions about the Irish dimension of Brexit very tricky. One of the reasons the European arrest warrant was introduced in the first place was to deal with the problem of IRA and ETA terrorists moving around, in our case—I am Spanish, as you know—to France, Belgium and elsewhere, and, in the case of Ireland, even further away. Once you take away all the mutual trust that I mentioned before, which underpins this whole area of freedom, security and justice, it will be much more complicated to make the case for automatic decisions that are purely judicial and nothing else.

We are seeing this now with the case of Mr Puigdemont. A European arrest warrant will be executed by Germany, very swiftly and very soon, which is a purely judicial decision. It is not politicised; the political establishment has nothing to say there. We all know that there are ways

to overcome that, but it is a purely judicial decision. Once you revert back to the convention, you are opening the door to extraditing people on the basis of diplomatic co-operation, and that will depend on the political ups and downs of the moment.

Another reason why it will be more complicated to extradite people such as Mr Puigdemont, who is not a terrorist but is wanted for a political crime—I do not agree with that, but anyway—is that any deal the UK gets on extradition is likely not to contain the political exception that I talked about, which the European arrest warrant has. It says that if you are Spain and you want somebody from the UK, and you are saying that this person is a terrorist, no matter whether the UK considers this person a terrorist it has to surrender this person to you, because you have agreed on the list of offences.

That exception will most probably not be part of a new UK-EU arrangement, as it is not part of the EU, Norway and Iceland arrangement. Politics will come into extradition cases, that is for sure. How that will affect Irish-UK relations I leave for somebody who is an expert on that, but it will make things more complicated, whichever political hot potato you might have at any given moment in Europe.

Baroness Pinnock: I just wonder, because I have no idea, whether the same difficulties will arise over the Gibraltar-Spain border.

Camino Morteira-Martinez: That is another issue on the table now, which the Spanish Government are pushing. Once the UK leaves, if we do not find a solution for the border in Ireland, I do not know see why we would find a solution for the hard border in Gibraltar. That will be highly disruptive, because, as you know, people go in and out all the time. That is why Spain is so keen on reopening this question and saying, "Look, guys, if we got this back, perhaps it would be easier". Any question on a hard border, whether it is in Ireland or Gibraltar, is likely to be a major stumbling block in the negotiations, as we are seeing with Ireland.

The Chairman: Dr Stefan, do you have a comment on Northern Ireland?

Lord Watts: You can solve this.

The Chairman: We expect you to solve it in the next couple of minutes.

Dr Marco Stefan: I would prefer not to say anything.

The Chairman: Okay. On Northern Ireland, the co-operation between the UK and the Republic of Ireland got extremely good in the Troubles, and those institutions and arrangements would continue in or out of the EU, because those agreements are separate, in a way.

There is a long history to the involvement of the UK and Irish security forces, going back to the Second World War, going into a very bad period with the outbreak of the Troubles, and then getting progressively better with a lot of co-operation. That does not mean to say that it is not a problem, and I am certainly not saying that a hard border would not be a

big problem.

There is an economic and psychological problem of the border. The security co-operation between the UK and Ireland has been exceptionally good for quite a number of years now. You might like to take that into consideration in your thinking, because there are two layers to this: there is the European Union layer and there is the UK-Irish layer.

Baroness Janke: There are Northern Ireland-UK relationship issues, which is another key part of the equation.

Baroness Pinnock: It would be interesting to understand whether the evolving justice and security systems within the EU involving Eire, the UK and Northern Ireland, because they have developed over a number of years, override any personal or historical relationships that Eire and the UK have. That is what I would like to understand, if I can. It might not be possible to understand.

The Chairman: You are tempting me. From my old brief on Northern Ireland during the 1980s, when things were pretty dreadful, we have moved in the case of both Ireland and Britain, but we cannot get into that here. If either of you would like to say anything about the layering between the UK and Ireland, and between the UK, EU and Ireland, by all means say so, but I am not sure that we can take it very much further, frankly.

Camino Mortera-Martinez: I just want to make a very short comment. One of the options for the UK to do extradition with other countries after it leaves the Union is to fall back on the convention and then negotiate bilateral extradition agreements with strategic partners. That could be done with Spain, for example, because there is strong co-operation on clearing up the famous costa del crime. It could be done with Poland, because the UK receives an extraordinary number of requests from Poland, as do other countries, because of the Polish criminal court. That is an option, and it could be the case for Ireland. The option is still on the table and could be thought through.

The Chairman: Thank you very much. You have both been very helpful to us. As I said earlier, if you have any more thoughts, ideas or things that you feel we missed out, please feel free to write to us. You will get a transcript of this hearing, as I said, and you can correct factual matters, but please do not hesitate to write to us if you think of anything when you are on your way home or whatever. Thank you very much for your attendance.