



HOUSE OF LORDS

# Select Committee on the European Union

## Home Affairs Sub-Committee

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

Wednesday 9 May 2018

10.45 am

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Members present: Lord Ribeiro (Chairman); Baroness Browning; Lord Crisp; Baroness Janke; Lord Kirkhope; Baroness Massey of Darwen; Baroness Pinnock; Lord Ricketts; Lord Soley; Lord Watts.

Evidence Session No. 7

Heard in Public

Questions 71 - 81

### Witnesses

I: Tim Devlin, Criminal Bar Association Executive Member, Criminal Bar Association/Bar Council; Dr Anna Bradshaw, Member of the Law Society's EU Committee, and Partner, Peters & Peters.

## Examination of witnesses

Tim Devlin and Dr Anna Bradshaw.

Q71 **The Chairman:** Good morning. Welcome to our witnesses. Thank you very much for coming along today to give evidence. This is a public meeting; it is webcast and the proceedings are recorded for *Hansard*. There will be a transcript; if there are any corrections or anything you are unhappy about, feel free to make the necessary amendments.

You are very welcome to make an opening statement if you wish, and to identify the organisation you represent.

**Tim Devlin:** I am representing the Criminal Bar Association today and the Bar Council. The Bar Council has submitted a number of papers to the Committee on previous occasions, and given evidence at least three times. We contributed to the Government's balance of competences review. We contributed to the debate on the referendum, with a paper dealing with the pros and cons of leaving and remaining, from the legal point of view. We have contributed to the Committee since, on Brexit and issues relating to law and implementation of the law.

As regards today's proceedings, we very much agree with the objectives set out in the Government's paper on criminal justice, which are to protect the safety and security of citizens of the UK and the EU, to maintain the closest and most co-operative of partnerships and to continue to co-operate with the EU 27 on the basis of shared democratic values and respect for the rule of law. In the Government's paper, they envisage five objectives: prevention of crime, detection of crime, investigation of crime, prosecution and administration of justice.

As a criminal lawyer, I should say that, from the criminal lawyer's point of view, it is best if those things are not as smooth as possible; the more confusion, the more work there is for criminal lawyers. Speaking on behalf of the Bar Council, we are, as we set out in our Brexit paper, very much in favour of negotiating reciprocal measures to replace the European arrest warrant, to seek agreement on the use of joint investigation teams and to find equivalent mechanisms for the European investigation order.

On a practical level, my area of expertise is as a prosecutor of large-scale cases involving multiple defendants, often crossing national boundaries, where the information available as evidence comes predominantly from Spain, Italy and Holland. They use evidence that we do not allow in the UK; for instance, we do not allow telephone intercepts as evidence, but we allow, as admissible evidence, Spanish or Dutch product.

There are difficulties with the disclosure regime. As you probably know, a number of trials have collapsed recently because of lack of disclosure by the prosecution. That becomes particularly difficult when you are relying on a foreign agency, such as the Guardia Civil in Spain. There are massive amounts of material from mobile phones being harvested by law enforcement authorities. Each of you probably carries one, if not two,

computers on which you have decanted vast areas of your life. If a mobile phone is seized, prosecutors have to go through all that material to find relevant material that may assist or undermine the prosecution. Of course, that is more difficult if the agency or the phone is abroad.

The internet is an area of large-scale criminal activity in the United Kingdom. As you know, Amazon is based in Luxembourg, and Yahoo is based in Ireland. Requests for information are currently made through the EPPO. That will disappear after Brexit unless something is negotiated.

The Committee has been very interested in trafficking and terrorism issues. People trafficking into the United Kingdom from eastern European countries is a major issue. Of course, after Brexit there will still be approximately 2 million EU nationals living in the United Kingdom. I can break them down for you: 400,000 French, 413,000 Bulgarians and Romanians, 200,000 Italians, 116,000 Spanish and so on. There are 2 million Britons who live in Spain, another million living in France and half a million who live in Germany.

Criminal networks and criminal undertakings span national borders as never before. As regards customs offences, smuggling offences, narcotics, gun running and so on, we have 2.6 million lorry movements through Dover alone every year. Honda UK, for instance, has 350 lorry movements from the EU every day. Nissan, in the north-east of England, an area I am more familiar with, keeps only half a day's worth of spare parts. British Aerospace does the same.

What will replace the current EU mechanisms when we withdraw? Norway and Iceland participate in the Prüm convention, as you know. Switzerland and Liechtenstein are seeking to join Prüm. It will be a major step back for the UK if we do the same, because Prüm is limited to sharing fingerprints, DNA and vehicle registrations, so generally we feel that the objectives the UK Government are pursuing in seeking a separate treaty on co-operation in criminal justice are a good idea.

**The Chairman:** Thank you very much for that comprehensive introduction.

**Dr Anna Bradshaw:** I am a partner at Peters & Peters. I am a criminal defence solicitor, specialising in economic crime. I am here in my capacity as a representative of the Law Society's EU committee, which will in due course prepare and submit written evidence to supplement my oral evidence today.

**The Chairman:** Thank you very much indeed. May I ask both of you to speak up a bit, as the acoustics in here are pretty poor?

Q72 **Lord Kirkhope of Harrogate:** It is nice to see my old colleague Tim Devlin, who worked with me for 10 years in the House of Commons. I am delighted that you and your colleague are here.

Mr Devlin, you referred to joint investigation teams as a good example of the European co-operation that has been going on. That arrangement

was taken through more than 10 years ago. It has been operational, but a lot of us had greater ambitions for it than were achieved. I am sure you are familiar with the European arrest warrant; we have all the statistics, and the number of uses is well documented.

Apart from that, can you let us have your views on the other EU measures that surround it, where police co-operation has taken place, and where there is mutual recognition, perhaps in relation to ECRIS, the criminal records information system, or the Schengen II system, where information is exchanged that is helpful in dealing with criminals and prosecutions? To what extent does that miscellany of European measures come on to your radar in the practice of the criminal law, and to what extent can it be easily replicated, as appeared to be the ambition of Mr Devlin a moment ago, in any security treaty?

**Tim Devlin:** It comes on to our radar in large-scale cases. The Committee may or may not be aware of a series of trials going on at the moment; the current one is at Wood Green Crown Court in north London. It involves women who were brought from Romania, promised jobs as cleaners and secretarial people, and found themselves pressed into prostitution in the United Kingdom. Their passports and so on were taken away.

There is a similar case in Birmingham at the moment, which involves Polish farm workers and agency workers coming to the UK on the basis that they will be working in legitimate employment and gaining wages that they will be able to remit to Poland. In each case, they are brought in by, effectively, gangmasters, who take away their passports, put them in substandard accommodation, open bank accounts in their name and then pay the money into the bank account and abstract it themselves, and pay the worker a small percentage of what he or she has earned.

Those two series of cases both rely on ECRIS and Schengen II. They have also relied on information provided to the prosecution by way of fingerprint and instant recognition of defendants through mutual exchange of information with the Polish authorities, or with the Romanian authorities. That is very important to us, because, as I said earlier, approximately 2 million EU nationals are living in the UK. They all have friends and relatives. On top of that, we have tourists, so very large numbers of people are coming in and out of the country from other EU countries. The percentages are higher for certain nationalities, but I will not go down that route today.

If a man has allegedly just committed a crime, at the moment the police are able to detain him overnight and by the following morning they will know that he is wanted for murder in Lithuania, for instance. That sort of information is invaluable to the police in this country. If we were to lose that, it would cause great difficulty for the UK policing service.

As far as other measures are concerned, joint investigation teams have been very valuable. The EU is currently saying that, if you want the privileges that go with what will become the remit of the EPPO, you

cannot have them unless you are members of the club, the club being the EU 27, or 28 as it was. We want those things in the future, so how will Britain negotiate its way around that?

It seems to me that perhaps there are two routes whereby you can attack it. The first is financial crime, which is largely operated throughout the EU via the City of London, and fraud. Anna knows much more about that than I do. A lot of investigation of the fraud that goes on in the EU has to be done with the co-operation of the authorities in London, so that is something we can offer. Secondly, most of the really valuable intelligence about terrorism comes from the UK and the Americans. The Europeans do not want to lose that, so that is another big bargaining chip that we can use.

In operating our own society after Brexit, we do not need the co-operation of the EU 27 at the same level as we have it now, but it would be much better if we had it, even more so. We should be negotiating towards that if we possibly can, because joint investigation teams, for instance, will cover conspiracies such as the one involving the Romanians in London or the Poles in Birmingham.

**Dr Anna Bradshaw:** Given the instruments that come across my radar, my perspective is slightly skewed by the fact that firms such as mine, which specialises in extradition law, will see more EAWs than other solicitors across the board. If you look at the published statistics of incoming EAWs, it is quite noticeable that there has been a dramatic increase during the period covered by those statistics. We can certainly confirm that that corresponds with our experience in practice of how many EAWs we see as a proportion of extradition requests generally.

After not even a year of the new European investigation order being operational, it is noticeable that, although the implementation process is patchy across the EU, we are seeing those orders coming through. I predict that there will be a similar dramatic increase in their use, as authorities all over Europe become more familiar with the process and aware of its benefits.

Of the other kinds of, principally, mutual recognition instruments, one I want to highlight is the process for asset recovery, whereby there is recognition of foreign restraint orders freezing property and, subsequent to that, the recognition of confiscation orders made in other member states. Those are incredibly useful tools. I am not aware of any published statistics on how many incoming or outgoing requests there are, but I imagine the CPS might be able to tell you that. Anecdotally, at least from my personal experience, it is something that we certainly come across in practice.

The last category of co-operation, which is far more difficult for us to spot in practice, is the sharing of intelligence. From a defence perspective, we can guess, when we have a case, how the investigation progressed and what sort of information sharing featured in the police co-operation phase, but I am not aware of any published statistics.

**Lord Kirkhope of Harrogate:** A lot of people, who are rather more confident than I am as to the future success of an alternative agreement for the EAW, suggest that it is much more in the interests of the Europeans—the remaining ones—to have an EAW than it is for us, because of the numbers involved. In your practical experience, is that something you think is credible? Do you think it is a legitimate point?

**Tim Devlin:** Is that in terms of how many EAWs are going from Britain to the EU, rather than the number going from the EU to the UK?

**Lord Kirkhope of Harrogate:** Yes.

**Tim Devlin:** Obviously, there are 27 countries and we are only one, so there could be 27 times more requests coming our way than the number of requests going their way. I do not have the figures, but, as we see it, there is a large number of EAWs leaving the UK each year, particularly to Lithuania, Poland, Romania and Bulgaria, and to a lesser extent to Spain. The ones to Spain are mainly for our own citizens, because there is a costa in Spain; it is not to do with coffee—it is a costa of crime. A lot of gentlemen who have made money in this country like to live down there, so we frequently seek to get them back. Furthermore, Spain is the main route for narcotics from South America to find their way into the UK.

I was involved with a case involving a man who was almost incomprehensible on the telephone, so the Spanish police asked the British police if they would provide somebody who could understand what he was saying. A British policeman was sent out, but he could not understand what was being said either, so another British policeman was sent out. Eventually, it turned out that the person on the telephone, who was organising the supply of cocaine into south London, was from Mansfield in Nottinghamshire, and he had a particular Mansfield, Nottinghamshire accent.

**Lord Kirkhope of Harrogate:** Not Glasgow.

**Tim Devlin:** No. An officer from the Mansfield constabulary had to go to Spain, which was a nice job for him, to decipher what that gentleman was saying to his colleagues in Britain.

There is great value to this country in having the European arrest warrant, and one must look at it not just in terms of numbers, but in terms of quality. It depends whether we are serious about tackling crime in the United Kingdom. If we are serious about tackling serious crime in the UK, we need the EAW. If we lost it, there would be lots more work for my colleagues in chambers who do extradition work, so on their behalf I would say please do away with it, but on my behalf, as a prosecutor, I say please keep it.

**Dr Anna Bradshaw:** The EAW has, in a sense, provided us with a nice window to gauge demand for extradition co-operation. Post Brexit, in the absence of an equivalent EAW scheme, if we find that the number of extradition requests decreases dramatically, it will not be an indication of

decreased demand; it will be an indication of cost-benefit analysis on the part of the requesting authorities, as to whether the burdensome process is justified in a particular case.

- Q73 **The Chairman:** Thank you very much. We have focused on the European arrest warrant and we will come back to that. You mentioned other instruments. To what extent do they bring added value to what we have at the moment, and what will the effect be in comparison with the laws that they replace?

**Dr Anna Bradshaw:** The added value of the extradition arrest warrant scheme is well rehearsed. The added value is very similar for newer instruments such as the European investigation order. It has principally reduced time, by virtue of having strict deadlines imposed and reduced costs, necessarily if things are speeded up. Because there are fewer grounds for refusal, it contributes to the overall ease in practice of this type of co-operation. There is also predictability in how requests are made across the EU and how they will be interpreted, and in the types of challenges that you can expect to see. That applies across the board.

Added value also comes if we look ahead at the instruments in the pipeline. Because of the unique type of co-operation that is possible in the EU, which is not obviously replicated anywhere else in the world, we see real capacity for innovation in co-operation in criminal justice matters. In a sense, it functions as a laboratory for future thinking on how best to co-operate in the criminal justice space.

**Tim Devlin:** I agree. There is a great deal of added value that we will need to replicate in some other way. One of the big areas will be pornography and child pornography, which is very much an internet-based crime, where distribution networks range across continents, not just across Europe. The European directives on human trafficking, sexual exploitation and so on map out instruments for investigation that are being developed at the moment, and which Britain would benefit from tremendously in the future.

- Q74 **Baroness Massey of Darwen:** Do you have any human rights-related concerns about the operation of the EAW, or other laws in the area of police and judicial co-operation? For example, you mentioned trafficking issues. Family disputes, pornography and online difficulties come to mind immediately, and there may be others. How might you be affected by any changes to the UK's co-operation with the EU in this area, post Brexit? I know it is a huge question and family law is very complicated, but have a go.

**Tim Devlin:** There are two human rights aspects for the UK. First, what is going to happen to the investigation of crime in other EU countries? The UK has been at the forefront of work to press for better rights for accused people in various European countries. Two years ago, in Reykjavik, there was a conference of the Bar European Group, where we discussed the varying rights on arrest of people from the United Kingdom; for instance, if you landed in Italy or in Romania, what were

your rights on arrest as compared with your rights in the UK? There always have been human rights concerns about what happens to people subject to the European arrest warrant and police and judicial co-operation, who are arrested in some of the eastern European countries. The flip side of that is, how would human rights be affected in the UK by our failure to co-operate with the EU in the future? I do not think that is really a problem we need to worry about.

My Lady, you were asking about family law, which is an altogether different issue. At the moment, if one partner in a split nationality family moves back to an EU country and takes the children with him or her, a judgment given in a family court in the United Kingdom is automatically enforceable in the other EU country, and vice versa. That has not been sorted out. It will have to go into the EU exit treaty, because there are vast numbers of people in families where one partner is from the UK and one partner is from another country. Both Anna and I are, for instance.

What happens if we do not negotiate? We will have to have bilateral treaties with each of the 27 countries, and that would affect people's rights. Some countries are more reluctant to allow their citizens to be extradited from their country to the UK, and, if they are not bound by European rules in respect of somebody in the UK, they might be much more reluctant to enforce an arrest warrant from the UK after Brexit.

**Dr Anna Bradshaw:** We should step back and look at how mutual recognition instruments in particular have developed over the last decade. There has been real awareness on the part of EU institutions of the importance of not only respecting human rights in practice but being seen to do so, and much greater attention is paid to how human rights protections are expressly inserted in new arrangements. The court has been very amenable to human rights-related arguments, in an effort to make it very clear that they are intended to operate in accordance with the charter and with the constitutional traditions of member states. That has been an ongoing theme.

The possibility exists that post Brexit there may be a change of emphasis. It is difficult to predict. I see no reason why there should be, but the key point is that the UK would not be in a position to influence the further direction of human rights considerations in the criminal justice co-operation sphere.

From a defence perspective, if I have a client who is caught up, post Brexit, in an investigation in another EU member state, I will be less helpful to my client, because I will be unfamiliar with the co-operation mechanisms as a result of the UK not participating in them. I would feel particularly uncomfortable if the client was the subject of an investigation and a prosecution by the European Public Prosecutor's Office, which would be totally alien to us here in the UK. From a human rights perspective, when it comes to practical considerations and making sure that in an individual case my client's interests are represented, I will be very reliant on close relationships and co-operation with my lawyer counterparts in the member states.



**Baroness Massey of Darwen:** Thank you. We could go on for hours about this, but we cannot.

Q75 **Lord Watts:** Brexit is seen as an opportunity by the Government, but criminals will also see it as an opportunity to exploit any confusion that exists. The treaty may be a way of dealing with that, but treaties can take a long period of time to negotiate, and possibly this one will. My question is about the immediate likelihood after Brexit. Do you have a view on the proposals outlining what should happen to pending mutual recognition or exchange of information requests at the end of the transition period? Similarly, do you have any view about what should happen to existing EAWs on Brexit day, if a member state refuses to surrender their own nationals to the UK?

**Tim Devlin:** No is the short answer, my Lord. The position will be that we will have a transition period that has been negotiated by the Government. During the transition period, as I understand it, the normal rules will apply. At the end of the transition period, if we do not have some sort of agreement in place, information requests, depending on which country they go to and how good our relationship with that country may be, may be dealt with immediately or may not be dealt with at all. I do not think the Government will have any way of enforcing co-operation if they do not have some arrangement in place.

It may be, of course, that we have some friends in the EU who are friendlier than other of our friends in the EU. Sometimes, we are able to source information from one country that has come from another. For instance, we work very closely with the French and the Germans, and they might be able to access information held by, say, the Czechs or the Slovenians.

As to what would happen to an existing European arrest warrant if a member state refused to surrender its nationals to the UK, we would normally enforce that through the European court. Depending on the arrangements negotiated, we would perhaps be able to do the same in the future, but if we are not a member of the club, perhaps not. The answer would then be that, if a state says it is not going to surrender its own nationals to the UK, there is very little the UK can do about it until such time as we have something it wants that we can trade.

**Dr Anna Bradshaw:** As a general point, it may be possible for the UK to agree formal or informal accommodation of requests that fall on the cliff-edge side of things, but I find it difficult to imagine that it would not be challenged by the subjects of those requests fairly swiftly.

**Lord Watts:** Given the growth in financial crime, if there was a breakdown, potentially, and one or more countries refused to co-operate with us, the City of London could be a major target of organised crime. Is that not correct?

**Tim Devlin:** That is quite possible.

**Dr Anna Bradshaw:** Specifically on EAWs, one thing that occurred to me was that if, at the expiry of the transition period, only requests where the suspect had been arrested could be pursued, it would mean that all the requests that we would normally expect to be flagged on the Schengen information system, and that would, therefore, trigger the border control aspect, would fall away. In theory, people who would otherwise have been flagged on any attempt to enter or leave the UK could move quite freely unless and until those requests were repeated as conventional extradition requests. It would be a matter that was flagged much further down the line than in a comparable EAW.

**Lord Watts:** Germany's constitution does not allow its citizens to be extradited unless it is to part of the European community. What effect do you think that will have?

**Tim Devlin:** Luckily, we do not see many Germans in the courts, not as defendants anyway. There are problems. I am afraid I was not able to dig out any statistics on how many people have been subject to EAWs in the last three years. The last figures available are from about 2014. Speaking anecdotally, we do not see an awful lot of German defendants in the courts, but we see an awful lot from certain other countries.

**Lord Watts:** We have an extradition system in place, so we will not see it. If that is not in place, going back to the earlier point, criminals will see the opportunity that that brings and exploit it.

**Tim Devlin:** Possibly, yes. Unless some future arrangement is put in place, we will be stepping back from a major level of co-operation at the moment. It is one of the issues that we brought out in our paper on the referendum. Unfortunately, the referendum was fought on issues much more visceral than technocratic, and a lot of those sorts of points, which are important, never got to see the light of day, unfortunately.

**The Chairman:** The Law Society takes the view that we should retain the European arrest warrant because the fallback position is the 1957 Council of Europe convention, and not every member state is signed up to that. Close to home, being particularly mindful of what has been said about the Troubles in Northern Ireland, Ireland is not one of the members signed up, so, if we wanted to extradite people who were responsible for crimes committed in the Troubles, we would not be able to do so. Would you like to comment on that?

**Tim Devlin:** Under the Good Friday agreement, we cannot prosecute people in relation to certain things that happened in the Troubles anyway. I do not think the British Government have any inclination at all to upset the Good Friday agreement. In fact, the entire discussion about the no-border border in Northern Ireland is to do with not upsetting the Good Friday agreement, so I do not think we will be seeking to reclaim people who are accused of crimes that happened during the 1960s and 1970s. We might, however, be very interested in hot pursuit over the border between Northern Ireland with the Garda. Generally, co-operation between the British authorities and the Garda is good. Because Britain is

already signed up, and has been since 1923, to the free movement of people between the island of Ireland and the island of Great Britain, we already have an agreement in place that criminal acts committed in the Republic or in Northern Ireland can lead to instant arrest on the other side of the border.

**The Chairman:** Are there any thoughts on the position for other member states that have not signed up?

**Dr Anna Bradshaw:** It is always possible to explore expedited bilateral agreement negotiations. I am not in a position to say how realistic that solution would be.

To add to the earlier discussion about the prospect of member states refusing to extradite their own nationals, we now have to face the possibility, given very recent jurisprudence from the Court of Justice, that that protection could be relied on by non-nationals of the member states in question. I believe the outcome of the court's consideration of a recent challenge based on discrimination grounds was that a non-national of a country, for example, Germany, where there are constitutional protections precluding extradition of nationals, would not be able to invoke that protection. The country would need to give the country of nationality the first right of request, so, in a practical scenario where the UK seeks the extradition of, say, a Spanish national from Germany, it may be that the UK's request would ultimately be unsuccessful, because the Spanish authorities would have the ability to request extradition in preference to the UK.

**The Chairman:** Thank you very much indeed. It seems that the Council of Europe convention is not one that we want to fall back on.

Q76 **Baroness Browning:** From the evidence we have taken so far on the proposed UK-EU security treaty, there seems to be a general direction of travel that the treaty should replicate as closely as possible, across all the disciplines, the arrangements we have at the moment. In the event that there is an opportunity to renegotiate police and judicial co-operation laws, does anything stand out that you would see as a good opportunity to make changes?

**Dr Anna Bradshaw:** I will use this as a good opportunity to return to a point that I made earlier, which I did not want to come across as skating over the real human rights issues that can arise in individual cases. On one view, many of the problems we have seen in the European arrest warrant context could have been avoided by a much more even application of the many instruments that are meant to supplement the European arrest warrant scheme, such as the European supervision order or Eurobail; the various procedural rights directives that would have increased the procedural protections during the process for the individual; and, post extradition, the arrangements for returning an individual to their country of origin to serve their sentence.

**Baroness Browning:** What is the problem with that at the moment?

**Dr Anna Bradshaw:** Because the UK can cherry pick—I dislike the phrase—as a result of the Protocol 21 arrangements, the UK’s existing participation in many of the co-operation instruments is patchy. From a personal perspective, if I could improve one thing, it would be that, so that closer attention was paid, particularly moving forward and looking at future initiatives. If more attention was paid to how they interact and mutually support each other, a decision would not be made to participate in one instrument in isolation without at least acknowledging the fact that the benefit of that closer co-operation might be slightly decreased if it was not supplemented by co-operation and the associated arrangements.

**Baroness Browning:** As things stand at the moment, are you saying that you see the UK, in practical terms, as a reluctant participant in things such as the European arrest warrant?

**Tim Devlin:** It is certainly the case that after Lisbon the UK Government opted out of all the home affairs legislation and then opted back in, so our European neighbours certainly see us as a reluctant participant.

As regards co-operation, the boss of Europol is a British citizen. You have probably had him here.

**Baroness Browning:** Yes, we did.

**Tim Devlin:** He probably told you all about how valuable the work of Europol is.

On what my learned friend was saying, there has been an aspect of British participation in EU measures that has been enthusiastic in places and less enthusiastic in others. Consequently, the reaction on the other side of the channel has been that they too are enthusiastic about some co-operation and less enthusiastic about other aspects.

We are looking at how we negotiate our way out of the EU and come to a workable relationship, with improvements, for the future. There is no doubt at all that the EU will streamline its procedures for investigation of cross-border crime. It will streamline its investigation of computer cybercrime, and streamline and standardise investigation techniques throughout the EU as much as it possibly can.

We have a different tradition in the United Kingdom, and we have a different legal system. The only two common-law jurisdictions left in the EU will be Malta and Ireland. I had to be reminded about Malta last night when I was talking to my colleague. Our traditions, such as presumption of innocence, the adversarial nature of our legal system and so on, are not replicated throughout the EU. The safeguards that we would expect, of reading people their rights and enabling them to have access to lawyers, for instance, are not necessarily uniform throughout the EU.

As we are in such close proximity to the EU, and have such large populations of UK citizens living abroad and EU citizens living in the UK, if we seek to negotiate with the EU 27 as a whole in the future, the UK’s position—in the Bar Council’s submission—will be that we want to

participate as much as possible in the exchange of information and in the exchange of criminal intelligence. We will also expect, or will seek, if we can, to make sure, that any new procedures adopted by the EU at least reflect some of the traditions that we expect in the United Kingdom when people are arrested and when people are investigated as part of a criminal investigation.

**Baroness Browning:** UK legal processes, as they stand at the moment, are things that we should be looking to protect rather than being swept along in some harmonisation.

**Tim Devlin:** Absolutely, yes.

**Baroness Browning:** Earlier, you mentioned the Guardia Civil, which struck a memory with me. When I was an MP, I took up a case on behalf of a constituent where there was suspected murder of a relative living in Spain. It was frustrating, to say the least. Even umpteen visits to the Foreign Office to seek their co-operation did not resolve the matter. It was very difficult.

**Tim Devlin:** Yes. That has been an unfortunate experience for an awful lot of people. For British people involved in, say, property disputes or the investigation of relatively low-level crime in Spain, I understand that the co-operation of the authorities is not always seamless and smooth. What the UK is seeking as it moves out of the EU is a good relationship with the neighbours, as well as an exchange of information that is trouble-free to the greatest extent possible.

**Baroness Janke:** I heard your point about wanting to protect the British legal system. However, you said that the EU would be seeking to streamline its procedures, with only Malta and Ireland with varying systems. Do you feel that we are likely to be influential in that streamlining as a result of Brexit?

**Tim Devlin:** No, probably not now, my Lady, because our position has changed. As we are repeatedly reminded by Mr Barnier on the television, we are no longer members of the club and we do not wish to be members of the club. In its response to the Government's paper on post-Brexit relationships, the EU has set out quite clearly that, if you are no longer a member of the club, you cannot expect to have the same privileges and access to things as you do if you are a member of the club.

You are asking me, a lawyer, how we go about the great task of politics and dealing with diplomatic relations with our neighbours. As I see it, our influence, which has hitherto been considerable in our ability to make changes to EU law and to enforce judgments in the European Court, is going to diminish. That is part and parcel of leaving the EU, and our relationship will move from being one of the club to being interested friend, I suppose.

As an interested friend, of course, we can propose changes to how people do things, but most of continental Europe has been educated in a

Napoleonic system of law that does not recognise precedent and does not adjust in the same way as the common law to changing circumstances. The tradition is that, if you are accused of a crime by the police, you are put in front of an examining magistrate, who is backed up with an investigating officer. Those are concepts we do not pursue in our country.

We have an officer in the case. We have a judge who tries the case between the accused and the accuser, and each starts the trial on an equal footing. Disclosure has to be made by the prosecution to the defence of things that might undermine the prosecution or assist the defence. Things are very different in the EU. In the continental system, the police and the examining magistrate do not tell the accused that they have a telephone message that possibly exonerates him; they are more likely to interrogate him as to why he is not guilty. Hopefully, we will have some influence on the streamlining process, but the police of our European neighbours are used to a different tradition of investigation from the police in the United Kingdom.

**Dr Anna Bradshaw:** It may be helpful to step back and look at the system of co-operation envisaged in the Lisbon treaty. Mutual recognition is one part of it, but it is not the only part. Mutual recognition is, effectively, an agreement to disagree, whereas the more conventional ways of co-operating are often obstructed in practice by differences between criminal laws in how offences are defined and in the penalties envisaged for them. They are similarly obstructed by procedural differences, principally in the admissibility of evidence.

The scope for greater harmonisation within the EU 27, on those two points, is quite considerable. Without the UK's participation in those discussions, the obvious outcome is that any future movement in procedural and substantive harmonisation will take place on inquisitorial traditions as opposed to adversarial ones. To the extent that there is good innovation in future that the UK might wish to participate in, the UK would effectively be closed out, even if there was political will, by the fact that the system may look so alien from an adversarial one.

**Q77 Lord Soley:** I suspect you will have spotted the mistake in the question that was sent to you. It should read, "In its negotiations on the future relationship with the EU", not the UK. I trust we are hoping that the British Government will stay involved in some way with the judicial system here.

In their negotiations on the future relationship with the European Union, should the Government seek to retain or replicate any particular laws or areas of law in the police and judicial co-operation field? Importantly, do you believe that a treaty could adequately replace the existing instruments?

**Tim Devlin:** The answer to the first part of the question is probably yes, and to the second part, probably no. I will deal with the second part first. "Do you believe a treaty could adequately replace the existing instruments?" It could but it probably will not, because it is unlikely that

European law will stand still. It is highly probable that European law on criminal justice and other Home Office-related matters, if I can put it that way, will move forward and converge more, and we will need successive treaties to keep up.

Secondly, I do not believe, in any event, judging by the pronouncements of the Prime Minister in Florence and other places, that the UK has signed up to replacing the entire panoply of co-operation with the EU. As has been said unequivocally, our own courts are going to be supreme and our own ways of doing things are going to re-emerge after Brexit, which is fine.

One of the great misconceptions about the referendum, if I may digress for a second, was that in some ways the British Government were being held back in what they would like to do by European human rights law, which of course is a condition of joining the EU but is not imposed on the UK by the EU. The UK will continue to sign up to and enact the European Convention on Human Rights and its law, and, as the Supreme Court has already said in a couple of judgments, the UK will continue to observe the precepts of European human rights law, so that is not going to change.

In the police and judicial co-operation field, by and large we are very unlikely to adopt particular laws and areas of law that have been brought through as part of the EU. As I understand it, the great reform Bill or whatever it is currently called, the exiting the EU Bill, basically puts in place all the current arrangements for the future, and preserves them until such time as the UK Parliament can go through them and change them back into UK law.

**Lord Soley:** If the treaty cannot replicate those laws, what thought have you given to what will be needed to protect them? In other words, are other institutions or legal changes required if we are to reproduce them?

**Tim Devlin:** In our Brexit paper, the Bar Council says that we would like to secure the speedy arrest of suspects, with minimum bureaucracy, provide for the use of joint investigation teams and secure evidence from overseas, all the things that I have already said were valuable in the prosecution of offences in this country. That will all have to go into a separate Bill if it is not part of the exit arrangements.

**Lord Soley:** Might we need some new institutions?

**Tim Devlin:** We will not need new institutions. As I understand it, from looking at the EU exit Bill before the House of Commons, we will preserve current arrangements as much as possible for the time being, but it is all conditional on the EU agreeing to that in the future.

**Lord Soley:** Can I direct the same question to you, Dr Bradshaw? The Law Society paper on options for a future UK-EU dispute settlement mechanism, which I found very useful, starts off with a very clear statement that we cannot stay involved with the European Court of Justice. You, or the Law Society, deploy some very powerful and

persuasive arguments as to why we cannot stay involved. One of the things you refer to is perhaps signing up to the Lugano convention, whereby signatories are required to pay due regard to court decisions in those countries. Is it the position of the Law Society that that is the way forward, or is there another option?

**Dr Anna Bradshaw:** The Law Society's concern with continuing jurisdiction by the Court of Justice of the EU is based on the fact that there would no longer be any UK input to that body; there would be no UK judges and no UK lawyers with rights of audience. That is where we see the risk.

As an alternative, the Lugano convention is, I suppose, the most obvious solution, and perhaps the one that springs to mind straightaway because of the very close resemblance it bears to the provisions in the Icelandic and Norwegian arrangement with the EU on extradition, which has yet to be tested. Until it comes into force, we do not know how realistic that approach would be—for courts to have mutual regard to each other's jurisprudence. In practical terms, personally I cannot see a better solution. It is very easy to imagine that two courts might reach different views, so it is a matter of making sure that any supplementary political mechanism to resolve disputes is workable.

**Lord Soley:** I may be wrong, and do correct me if I am. I think I am right in saying that the EU is not a signatory to the Lugano convention, but some individual countries are. If that is right, and if we came up with a solution along those lines, presumably either the EU would have to sign up to it as well, or we would have to have an arrangement with each individual EU member country based on it. Is that right?

**Tim Devlin:** Lugano is not signed by the EU; it is signed by individual countries, most of which are members of the EU, but it includes Switzerland. We could do it through that convention, and, in fact, we are signatories of it already, in part.

**Lord Soley:** We are.

**Tim Devlin:** As I understand it, the Government are trying to negotiate one treaty with the EU, rather than 27 treaties with 27 separate countries. The difficulty with going the Lugano route is that you will sign up with about 15, and what we want is an arrangement that covers everybody.

For instance, you may not know that Malta currently pursues the policy that, if you invest a certain amount of money in the Maltese economy, you get a passport. Most Russians living in zone 1 of London are Maltese citizens on that basis, so it is a good route to becoming an EU citizen. Malta is not a signatory to Lugano and, prior to Malta joining the EU, it was often a refuge for people from the United Kingdom seeking to retire in the sunshine with their ill-gotten gains from Birmingham or the East End of London.



**Lord Soley:** I was very struck by the Law Society's argument, so, if you have ideas for alternatives, a lot of people would quite like to hear them. If there is anything you could put in writing to us, I think, Chair, that it might be useful.

**The Chairman:** It would be very helpful.

**Dr Anna Bradshaw:** I rather suspect that it will be easier to suggest alternatives once we have a better idea of what the treaty will cover, because it is very context dependent.

Q78 **Baroness Massey of Darwen:** Chair, may I refer to an issue that will come up in question 10, for which I shall probably not be here? It is about the European Charter of Fundamental Rights. In debates on the withdrawal Bill in the Chamber in the House of Lords, a lot of time was spent on that; for example, it was mentioned when I did the children's rights business. I believe we now have a Government concession, and that we will not be withdrawing from the charter.

**Tim Devlin:** The point of a treaty between the United Kingdom and the EU on home affairs, judicial co-operation and criminal justice is that in order for the EU to sign up to such a treaty it will expect certain minimum standards from the UK. One of those will be the charter of human rights; the other will be protection of data and data security. That has been made clear in the response to the United Kingdom on the treaty.

Fundamental rights and human rights are always matters to be interpreted by the national courts, and I see no difficulty with us signing up to or continuing to be a member of the charter. It is a matter that is subject to interpretation in the UK courts, so that will not be a difficulty. We are all currently implementing the GDPR, so, the framework, or at least the foundation, is there for us to continue to co-operate on justice and home affairs matters with the EU.

**Baroness Massey of Darwen:** I think the Government have recognised that.

**Tim Devlin:** Yes.

**Dr Anna Bradshaw:** The only small point I would make is that, for the UK's ability to continue to influence human rights protections in the EU, it would be helpful for it to comply with the charter, and to be seen to be required to comply with the charter. It would, at least symbolically, improve the UK's credibility in human rights arguments in the eyes of the EU 27.

Q79 **Lord Ricketts:** My colleagues have covered a lot of ground and you covered most of it in your replies, so this is wrapping it up. You have already referred, Mr Devlin, to what the Prime Minister said about the idea of an overall EU-UK security treaty. In Munich, she said that she could see "no legal or operational reason why ... an agreement could not be reached". You have run through quite a number of issues, such as the different natures of our judicial systems and criminal law systems and

some of the underlying issues we have just been talking about, different practices and so on.

To round up what you have been saying, is it fair to say that there are no legal and operational obstacles to such a treaty? A particular thing that worries me is how long it might take to negotiate the treaty. If it is well beyond even the transition period, what will happen in the interim, while we struggle to negotiate a treaty, from the point of view of practitioners?

**Tim Devlin:** My response is that there is no legal reason why we cannot do it. She is absolutely right; there is no legal or operational reason why an agreement on internal security cannot be reached. There are other reasons though, political reasons. We are here as lawyers, not as politicians, but there are, I know, objections in Parliament to being an offshore colony, or a vassal state, as we were called the other day. There are objections to Britain becoming a vassal state, but I do not think it is proposed that we would become a vassal state, although we might be obliged to follow certain aspects of European law.

We have at the moment an entirely one-sided extradition treaty with the United States of America, whereby we are obliged to surrender UK citizens to the American authorities, but the Americans have yet to ratify it in the Senate or to supply a single American citizen to the United Kingdom. We are not entirely unused to one-sided arrangements.

On the Prime Minister's Munich statement, there are no legal reasons why an agreement cannot be reached on policing and co-operation between authorities. There are certainly no operational reasons why an agreement cannot be reached, but we leave the politics to you in this place.

**Lord Ricketts:** What about the timing?

**Tim Devlin:** It may take some time to negotiate. The British Government should remind the EU negotiators that there are, as I said earlier, 400,000 French citizens living in this country. London is now the fifth or sixth largest French city. It casts more votes in French presidential elections than Lyon.

If you want those French citizens to be as safe in London as they are in Paris, there has to be co-operation between the policing authorities on terrorism, and on internet crime and cybercrime if they want their children to be protected from pornography. If you want them protected from narcotics, gun running and all the other things that go on across borders in the UK, there is a strong impetus for the UK and the EU to sign such an agreement. Any delay will only exacerbate the problem. It would accelerate the signing of such a treaty if the two-way street was bricked up, or stopped for a period, because I am sure both sides would see how much it was in their interests for it to continue.

**Dr Anna Bradshaw:** The missing part is a failure to specify the scope of the agreement, so it would be more difficult to say that there is no legal or operational reason why an agreement on security that captures the full extent of our current coverage could be reached.

**Lord Ricketts:** I think that is the idea, the proposal.

**Dr Anna Bradshaw:** I struggle to see how the many obstacles, not least of which are the EU's own red lines, can be easily overcome.

**Lord Crisp:** Right at the beginning, Mr Devlin mentioned the fact that almost all fraud needs to be investigated in some way through the City of London, and that was a bargaining chip we ought to use in this context. I have two questions about bargaining chips. Could you identify others that we ought to be using? Do you think the matters you have described, which are obviously very important and practical issues, are getting enough of a profile in all the wider negotiations? Should they be seen as more crucial in the wider negotiations?

**Tim Devlin:** The two or three big bargaining chips the Brits have are, first, the City, and, secondly, access to Five Eyes security information, which is Australia, New Zealand, the United States and Canada. The security aspect is very strong. Because of Britain's ethnic mix, we have quite a sharp insight into Islamic terrorism too, which is probably something we do not want to play up too much but is certainly available to the UK as of interest to others. Those are three things I can think of, off the top of my head.

**Dr Anna Bradshaw:** The one that occurs to me is that, for as long as London remains a dominant financial centre, asset recovery co-operation will be very attractive for member states seeking to recover assets located in the UK. Conversely, the opposite strikes me as well, because so many recent innovations in UK domestic law are designed to improve the UK's capacity to recover the proceeds of crime. I am thinking in particular about the civil recovery mechanism and unidentified wealth orders. They are heavily dependent on co-operation in enforcing orders on assets overseas.

There are now developments in the EU, principally the proposal for regulation to improve mutual recognition of asset restraint and asset confiscation. We are now for the first time hearing very interesting discussions about the extent to which member states should recognise not just the criminal law orders but the new non-conviction based civil asset recovery orders. For the UK to continue to be part of that would be a great benefit in supporting the domestic asset recovery regime as it stands. Likewise, it is a potential bargaining chip for other member states that might want to follow the UK's lead and adopt similar laws in due course.

Q80 **Baroness Janke:** The Prime Minister said that any agreement must be "respectful of the sovereignty of both the UK and the EU's legal orders". That phrase can be interpreted in many ways. How do you feel it might be defined and how might it be achieved?

**Tim Devlin:** We have different traditions in the continental system and the common law system. To a greater or lesser extent, there has been some input by the British into the law of the EU over the last 44 years.

Our system is more akin to the Australian and the American systems than it is to, say, the French system, so any agreement would have to be respectful of the sovereignty of the UK and the EU's legal orders. If we are not going to be subject to the European court, our own Supreme Court will take the mantle of protecting the rights of the individual in this country and enforcing orders from abroad.

I seem to remember Lord Justice Laws giving a speech last year in which he said that, although we were leaving the EU, there was now a strong corpus of law that had been incorporated from the EU into UK law, and it had enriched UK law and would not be expunged. As I understand it, there will be no writing out of the law. As we have gone through our period of membership of the EU, we have incorporated in UK law concepts such as reasonable expectation, and some of those concepts will remain. Any exit treaty will allow for us to do our thing, and presumably the EU will carry on doing its thing.

**Baroness Janke:** How does that relate to the agencies that we have been talking about today—for example, on cross-border working?

**Tim Devlin:** I do not think we want to change EU agencies. We want to use its agencies and it wants to use ours.

**Baroness Janke:** The phrase “a certain amount of independence” and the whole word “sovereignty”—interpret it how you wish—seems to imply a certain level of isolation.

**Tim Devlin:** Of course, there is. At the moment, if a European arrest warrant is issued in Spain, the UK police just go and execute it. Greater sovereignty would imply that perhaps the UK police would refer it to a magistrates' court in the UK first, before it was operational. I do not know what the Prime Minister has in mind on that.

**Baroness Janke:** There are questions as to what mutual respect might really mean, particularly in operational terms.

**Tim Devlin:** Yes, in operational terms. Whether the UK Government want to put some checks in the way, or whether they want to operate a seamless system is probably what the question is aimed at. If the Prime Minister is saying that we must respect the sovereignty of the UK and the UK's legal orders, it does not sound as though it will be quite so automatic, and we will perhaps be a bit more guarded in our approach to co-operation. I do not know.

**Dr Anna Bradshaw:** I repeat my earlier comment about the Law Society's position on the dispute resolution mechanism. The Law Society's stated position is that it would not want the Court of Justice of the EU to have jurisdiction over the interpretation of the final agreement. The way to preserve the UK's sovereignty in that sense would be the UK's ability to interpret autonomously the terms of its relationship with the EU.

**Tim Devlin:** The EU wants the European Court to be the final arbiter, as I understand it. We do not. The Prime Minister has said, quite clearly,

that the Supreme Court in this country will be supreme in this country, so, in a negotiation between another 27 countries and ourselves, their arbitration process cannot be our arbitration process. In disputes, there would have to be some other mechanism for resolving them.

**Baroness Janke:** Exactly. In the whole issue of the jurisdiction of the European Court of Justice, for the different agencies and so on, between the other 27 and ourselves, the question of arbitration and dispute resolution is still unclear, and we have not yet had suggestions from anybody that might suitably deal with that.

**Tim Devlin:** The arrangement would have to be done by separate treaty. The separate treaty would have to nominate some sort of arbitration process if it is not to be the European court.

**Baroness Janke:** Yes. If we are to have mutual respect, presumably the big question is, what will replace the ECJ?

**Tim Devlin:** The ECJ will continue to have jurisdiction within the European Union.

**Baroness Janke:** But not in the UK.

**Tim Devlin:** The UK would be a third-party country. The ECJ has no jurisdiction over, say, China or the USA. If we move out of the EU, we become a third country in the same way as they are, so anything that is done with the EU 27 must be done by way of a treaty.

**Dr Anna Bradshaw:** Perhaps a more difficult question is the indirect encroachment on sovereignty if we are faced with the prospect of asking to participate in arrangements where the UK has had very little say in their design or development. That is where sovereignty might resurface as a problematic sticking point. The only solution would be to have a totally unique way of developing future co-operation arrangements that has equal input from the EU and the UK, but there is no obvious precedent for that type of co-operation in the design and policy-making phase.

**The Chairman:** The development of a separate disputes system is absolutely key moving forward, if it is to work.

**Tim Devlin:** There will have to be some way of resolving disagreements between the EU 27 and the UK if they are involved in a joint arrangement on swapping investigation information. At the moment there is Prüm, but Prüm deals only with fingerprints, number plates and DNA. I suppose you could have Prüm plus; we could take another treaty, which some people are in, and plus size it a few times and make it a bit bigger. There are other arbitration arrangements such as EFTA, of course.

**The Chairman:** I like the idea of Prüm plus. We might give that further thought.

Q81 **Baroness Pincock:** You probably answered our last question in relation

to the point that Baroness Massey raised, so you might be able to give a very succinct answer. One word would do, probably. You said that in any future security treaty, you would anticipate the inclusion of the Charter of Fundamental Rights and data protection. Is that the case?

**Tim Devlin:** That is right, yes.

**Dr Anna Bradshaw:** Yes. There would need to be some way of ensuring that the UK had a human rights adequacy, as well as a data protection adequacy, stamp of approval, for lack of a better phrase, to bring the EU 27 to the table.

**The Chairman:** Thank you very much indeed for coming to give evidence. As I said earlier, if there is anything in the transcript that you find is not correct, feel free to amend it and send it back.