Written evidence submitted by Dr Helena Farrand Carrapico Associate Professor in Criminology and International Relations at Northumbria University (FRE0040)

Thank you for your letter of the 5th of June and for the opportunity to respond to the Call for Evidence on the Progress of the Negotiations on the UK's Future Relationship with the EU. Given that my area of expertise focuses on the governance of the European Union's Area of Freedom, Security and Justice, I would like to focus my contribution on the UK-EU future relationship in the field of internal security.

The United Kingdom currently takes part in the European Union (EU)'s Area of Freedom, Security and Justice (AFSJ), the world's most integrated internal security cooperation area. This policy area was created with the aim of ensuring EU citizens and residents' access to effective justice and fundamental rights, as well as providing protection against crime and terrorism. In order to fulfil this aim, the AFSJ is focused on improving all forms of cooperation between law enforcement and judicial authorities, including the exchange of information, the creation of centralised databases and the promotion of joint operations. Since the early 90s, the UK developed a system of opt-ins and opt-outs (Protocols 19, 21 and 36 of the Treaty of Lisbon) that allowed it, on the basis of selective participation, to substantially benefit from and contribute to the development of the AFSJ, at the same time as it has enabled the country to avoid taking part in measures which are perceived as not being aligned with its national interests. Well-known examples of opt-ins include the European Arrest Warrant - aimed at harmonising extradition procedures, the Schengen Information System - a database for the purpose of border management and law enforcement-, and Europol - the EU's law enforcement agency. The result has been a carefully thought through system of cooperation that has allowed the UK to both access a considerable number of instruments, which greatly contribute to the maintenance of its internal security, and to shape the direction of European Justice and Home Affairs. Following the UK's exit from the European Union on the 31st of January 2020, the country's current involvement in the AFSJ has been enabled by the Withdrawal Agreement, which was signed in October 2019.

Among the different areas covered by the Withdrawal Agreement, there are three main elements that relate directly to internal security and which allow the UK to benefit from a level of cooperation similar to what it had as a member of the EU: 'access to network and information systems and databases at the point of Brexit and during the transition (Art. 8, Common Provisions), 'ongoing police and judicial cooperation in criminal matters' (Title V), and 'data and information processed or obtained before the end of the transition period (Title VII). It would be important to highlight that the

level of cooperation is no longer exactly the same, as some crucial instruments are no longer accessible in their current format. This is the case, for example, of the European Arrest Warrant, with EU Member States allowed to refuse the extradition of their own nationals since February this year. This change, in itself, was already a good indicator that the negotiation of the future UK-EU security relationship was going to be more difficult to navigate than the previous opt-in/ opt-out system.

Since the 2016 Referendum, internal security has evolved from a marginal field to a much more central issue for post-Brexit UK-EU relations. In particular, the UK Government has become increasingly aware of the potential that Brexit has of leading to a reduction in UK-EU internal security cooperation. Access to EU agencies, instruments and databases that are widely used by the UK, such as Europol, the European Arrest Warrant and the European Criminal Record System (ECRIS), could be reduced, if not entirely curtailed. As a result of this growing awareness, there was a clear attempt between 2017 and 2019 to refine the UK's negotiation position in the area of internal security, through official documents and public speeches, such as the policy papers 'Security, law Enforcement and Criminal Justice: a Future Partnership' (2017) and 'The Future Relationship between the United Kingdom and the European Union (2018). By early-2019, the UK's priority was to maintain its previous level of cooperation with the EU by negotiating continued access to all the Justice and Home Affairs (JHA) instruments it took part in. On the basis of these priorities, the UK proposed to negotiate a bespoke 'toolkit' designed to support coordination and cooperation between police and judicial authorities that would prioritise: (a) data-driven law-enforcement; (b) practical assistance to operations; and (c) multilateral cooperation through agencies. The following paragraphs explain the rationale behind the choice of these three elements.

Where data-driven law-enforcement is concerned, the UK is one of the largest contributors of data and expertise to EU structures, as well as one of its main beneficiaries. Law enforcement data is mainly accessed through Europol systems and its network of liaison officers, as well as a considerable number of Justice and Home Affairs databases. The UK currently has access to the Schengen Information System, the Prum Decision, Eurodac, the European Criminal Record System (ECRIS), and the Visa Information System among others, enabling law enforcement to more efficiently carry out investigations and make informed decisions. The EU is currently working on the interoperability of its databases in order to ensure that the police is able to search all systems through one single access point. Failure to negotiate a new agreement covering internal security elements implies losing access to all instruments and databases on the 31st of December 2020, in addition to no longer being able to

use any personal data it may have received in the past from the EU. Naturally, policing in the UK will not stop in the event of no deal, but it will be substantially less informed in a world where data is key to solving crime. Furthermore, none of the possible fallback options are able to deliver the same level of cooperation that currently exists. The UK could continue to cooperate internationally through its Interpol membership, by signing new bilateral agreements with EU Member States, and by developing a bespoke agreement with Europol (along the lines of existing strategic and operational arrangements with third countries). None of these options, however, provide the same level of cooperation and functionality (in particular, as some of the databases, such as ECRIS, have no planned access for third countries). In addition, a bespoke agreement might not be available in the short term, judging from the seven years it took for the Europol- Norway agreement to be negotiated.

Regarding practical assistance to operations, the UK currently benefits from cooperation through agencies such as Europol and Eurojust, the Convention on Mutual Legal Assistance in Criminal Matters between the Members of the EU, the European Investigation Order, Joint Investigation Teams, and other instruments that support operations such as the European Arrest Warrant (EAW). Similarly to the access to data-driven law-enforcement, the absence of an agreement would lead to the immediate suspension of EU assistance to operations, including on-going operations, with the fallback alternatives provided by international law being much more restrictive. The default option for Mutual Legal Assistance would be the Council of Europe 1959 Convention on Mutual legal Assistance in Criminal Matters, which is a more limited instrument in terms of its scope and number of EU countries involved (Greece, Italy and Luxembourg did not sign all of the Convention's protocols). A bespoke agreement could be created for this area, as well as for the European Investigation order, which could expand the areas of assistance and reduce the bureaucratic processes associated to the Council of Europe Convention. The downsides of this option would, again, a possible requirement to maintain a legal alignment with the Schengen acquis. Furthermore, the UK would no longer be able to set up Joint Investigation Teams through the EU structure (and have them funded by the EU), although there is clear scope for cooperation in this area given that the Council of Europe's 1959 Convention enables countries to set up this type of instrument among its signatory members. Finally, where the European Arrest Warrant is concerned, the UK would need to rely on the 1957 Council of Europe's Convention on Extradition. It would still be able to request for suspected criminals to be sent back to its territory, although it would need to follow a much lengthier (an average of 2 years as opposed to 43 days with the EAW), bureaucratic, politicised and costly process.

This option would also have limitations in terms of who the UK would be able to retrieve, as most EU countries have declared that they do not extradite their own nationals outside of the EAW framework.

The final element that was originally identified as being central to future UK-EU internal security relations is multilateral cooperation through agencies. Currently, the UK takes part in most EU Justice and Home Affairs agencies, with Frontex and CEPOL being the exceptions. Their work is complemented by a large number of other EU agencies that indirectly shape the field of internal security, as is the case of the EU Agency for Cybersecurity and of the EU Intellectual property Office. Justice and Home Affairs agencies are not regulatory but rather serve as cooperation platforms that help member states coordinate their counter terrorism and counter criminality efforts through the sharing of expertise and resources. The lack of an agreement in place for the 1st of January 2021 would automatically exclude the UK from taking part in their work, although most agencies foresee the possibility of agreements with third countries. These agreements vary considerably according to the agency and the EU's relationship with the third country. The United States' agreement with Eurojust, for instance, allows it to have a posted liaison prosecutor, who is invited to take part in strategic and operational meetings. As another example, the US-Europol agreement includes the posting of liaison officers from six different US agencies at Europol and the oversight of the EU-US Terrorist Finance Tracking Programme. None of the agencies, however, provide direct third country access to their internal databases, which would prevent the UK from using the Europol Analysis System or the Eurojust Case Management System directly.

The end of 2019 represented, however, an important shift away from the bespoke 'toolkit' approach in favour of a looser approach to negotiations in this area, including 1) changes in priority areas and 2) a reduction in ambition regarding the scope and depth of the future agreement. As clarified in the Government Statement on the proposed approach to the negotiations with the EU (3rd February 2020), which noticeably lists Internal Security Cooperation at the end of the document, the priority for the current negotiations is outlined in vague terms as a pragmatic agreement characterised by strong operational capabilities. coupled with an important red line, namely that the CJEU and the EU legal order must not constrain the autonomy of the UK's legal system in any way. The more detailed UK Government paper 'The Future Relationship with the EU- the UK's Approach to Negotiations' (February 2020) reflects well the changes in priority areas, as well as the reduction in ambition. The document highlights that although data exchange for law enforcement purposes and operational cooperation remain important priorities, multilateral cooperation through agencies does not (paragraph 28). The reduction in ambition for the future agreement is also visible in the proposal of a thinner agreement

covering fewer essential areas (the exchange of criminal records, DNA, fingerprints, vehicle registration, and Passenger Name Record data, the access to real-time alerts on missing/ wanted persons, operational cooperation with Europol and Eurojust, extradition, mutual legal assistance, and cooperation regarding asylum and illegal migration), as well as in the clear shift from wishing to take part in a large array of EU instruments and agencies, to focus on achieving similar levels of cooperation outside of these instruments.

These changes are reflected both in the UK's 'Draft Working Text for an Agreement on Law Enforcement and Judicial Cooperation in Criminal Matters' and in the European Commission's 'Draft Agreement on the New Partnership with the UK' (Part 3, Title 1). Although the priority areas covered are similar, there are however important differences that should be underlined. This call for evidence response outlines five main points.

1- The most important would be the role of EU law and its relation to UK sovereignty. Framed by Mr David Frost in his letter of the 19th of May 2020 as 'exceptional and intrusive', the law enforcement measures proposed by the European Commission clearly imply an important level of EU oversight over UK legislation and procedures. The Commission considers that the future agreement will need to respect the general principles of EU law and its case law, which the Court of Justice of the European Union (CJEU) is the main arbiter of. Where this specific policy area is concerned, this would mean, for example, that the data exchanged between the UK and the EU regarding DNA, licence plates, passengers, or any data regarding criminal investigation would need to comply with EU data protection rules. Even if the future agreement were to have an independent arbitration body (Joint Committee), the EU would still need to continue to comply with CJEU case law. In fact, it would be entirely feasible for the agreement to have an independent arbiter, given that the EU has agreements with third countries that are not subject to CJEU jurisdiction (see for instance the Europol agreements with Norway and with Switzerland). However, it would not be possible for an agreement that fails to comply with that body of legislation to be ratified and implemented. As such, the desire to avoid Court of Justice of the European Union jurisdiction, which was already one of the main elements at the origin of the UK's opt-in and opt-out system, continues to be the most controversial issue for internal security negotiations.

2- Related to the possibility of failure to comply with EU law and the subsequent

invalidation/ interruption of the agreement, the UK and the EU also have diverging approaches regarding whether to have a comprehensive agreement or a series of sectoral agreements. As can be seen from the published Drafts, the EU favours a wider agreement, whereas the UK prefers sperate legal texts. In a comprehensive agreement, the dispute mechanism would be cross-cutting, resulting in an interdependence between the different fields. If there is a lack of compliance in one area, the entire relationship might be put at risk. The option of independent agreements allows for some areas of cooperation to continue, at least in theory, even if others have come to a halt. It is important, however, to underline that internal security cooperation is to a great extent

dependent on privacy and data protection rules, which will be settled within trade-related negotiations.

3- Another equally important divergence, which is related to the role of EU law, lies in both sides' approaches to Human Rights and, in particular to the European Convention of Human Rights. The EU considers that a sizeable number of police and judicial cooperation instruments within the future agreement, in particular those involving data sharing, are depend on the EU's commitment to remaining a member of the European Convention on Human Rights. The UK's reluctance to commit to this instrument and to include it as a principle within its Draft has contributed to an erosion of trust relations between the two sides.

4- Finally, another important difference is the requested degree of access to EU information on the part of the UK, which is not acknowledged in the EU Draft text. This is namely the case of access to the European Criminal Record Information System (ECRIS), which is included in the UK's Draft (Art. Criminal Records 7, paragraph 1), and not in the EU one (Art. Law EXINF 126: channel of Communication). Whereas the UK text directly states that the EU will provide the UK with access to ECRIS, the EU one only provides for the exchange of criminal record information between the individual Member states and the United Kingdom. The rationale behind the EU's non-inclusion of ECRIS in the text relates to the fact that this instrument does not currently allow third country access. Access to Europol information and analysis is another example, where the UK's Draft includes the possibility of direct exchange of information between Europol and UK law enforcement authorities (Art Europol 5, paragraph 2), while the EU's Draft is more restrictive in the sense that all exchanges will need to take place via the national contact point (Art Law Europol 50:

domestic contact point and liaison officers). As a final example, I would like to mention the inclusion of the access to capabilities similar to the Schengen Information System II database (SISII) in the UK's Draft (Part 10- Real Time Data Exchange) and its absence in the EU's text. Whereas the UK considers it crucial to develop a mechanism that will deliver a similar level of exchange, the EU believes this is not a realistic goal. As in the case of point 3, lack of trust plays an important role in the diverging requests for data access due to past incidents. According to the European Parliament's Justice and Home Affairs Committee, the UK was found to have made unauthorised copies of SIS II data, with that data been at risk of having been passed on to US companies. Furthermore, an ACRO criminal records meeting in 2019 also revealed that the UK failed to inform EU Member States of 75,000 criminal convictions of foreign nationals, which might have put those countries at risk.

5- As a final point it would be important to stress that some less visible elements are yet to be considered in the negotiations. It is the case, for example, of the UK's exclusion from EU external relations agreements that provide a platform to develop internal security cooperation mechanisms and address common global and regional challenges related to transnational organised crime and terrorism (see for example the EU-Japan Strategic Partnership Agreement). These constitute invaluable tools that have been used to expand the UK's political and security influence beyond the EU's borders.

I would like to thank you again for the opportunity to respond to this Call for Evidence on the Progress of the Negotiations on the UK's Future Relationship with the EU. I remain at your disposal for any clarification regarding the above information.

June 2020

Committee on the Future Relationship with the European Union

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05 June 2020

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Northumbria University

Dear Dr Carrapico,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

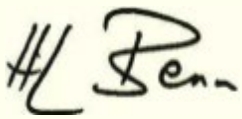
The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our call for evidence, which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- Now that we have seen draft legal texts from both the UK and the EU, what are the main areas of disagreement that risk a future arrangement on law enforcement and judicial cooperation in criminal matters? In which areas does it appear that the two parties are closest to an agreement?
- Which aspects of a possible agreement are at risk due to the negotiating positions of the UK and the EU on the role of the CJEU? How can these risks best be overcome?
- How can the UK and EU positions on the ECHR be resolved without risking the wider law enforcement and judicial cooperation agreement?
- What are the other major obstacles to reaching an agreement on law enforcement and judicial cooperation? And how might these obstacles be overcome?
- The UK will be a non-Member State outside Schengen. What precedents are there in this area on: access to EU databases (such as ECRIS and Prüm), Passenger Name Records, Europol and Eurojust? Is the UK asking the EU to go significantly further than it has in these precedents? Is the EU asking the UK to go significantly further than it has in these precedents?
- The UK has asked for capabilities similar to those delivered by SIS II. What are the main capabilities of the SIS II system that the UK is seeking to replicate? Why might any replacement not fulfil these? Why might the UK be holding back its proposed text on SIS II?
- How would an agreement on extradition similar to those negotiated with the EU by Norway and Iceland differ to the current situation where the UK has access to the European Arrest Warrant? Is there scope for the UK and the EU to negotiate an extradition arrangement that builds on those of Norway and Iceland?
- In which areas of the current law enforcement and judicial cooperation relationship is the UK a net contributor in terms of information flows, expertise and resources? In which areas would security in the EU be most impaired without the UK's involvement?
- The UK aims to receive a comprehensive data adequacy decision from the EU before the end of the Transition Period. What concerns might the EU have that will affect whether to award a data adequacy decision? How important is it to any future UK-EU relationship on law enforcement that the UK secures a data adequacy decision?
- What are your main concerns if, at the end of the Transition Period, the UK and the EU cannot agree a future security relationship? What would that mean for day-to-day operational policing, access to EU criminal justice databases, and the UK's relationship with Europol and Eurojust? In which areas would the loss of operational capability be greatest?

- In which areas are there standard third country arrangements that the UK and EU could fall-back on in the event of no agreement by 1 January 2021? If there are no such fall-back mechanisms, what contingency measures could the UK and the EU put in place, either unilaterally or jointly, to ensure some sort of cooperation on law enforcement and judicial cooperation?
- Is there anything else in the two parties' proposals, for example on prisoner transfer or anti-money laundering, that you wish to bring to the Committee's attention?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freucom@parliament.uk.

Yours sincerely,



Hilary Benn
Chair of the Committee