Written evidence submitted by Professor Valsamis Mitsilegas Deputy Dean for Global Engagement Europe at Queen Mary University of London (FRE0041)

Thank you for the invitation to submit evidence to the Committee's inquiry. My comments will focus specifically on the future of the UK-EU relationship in the field of security and criminal justice. The evidence is based and builds upon my commentary on *Post-Brexit Challenges for Criminal Justice Co-operation,* published by the UK in a Changing Europe (https://ukandeu.ac.uk/post-brexit-challenges-for-criminal-justice-co-operation/).

General Remarks

Developing a partnership on security and criminal justice co-operation is a key priority for both the UK and the EU after Brexit. The central role that effective criminal justice co-operation considerations play in the post-Brexit landscape is reflected in the recently published negotiating positions of both the UK [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf] and the EU [https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf].

A reading of the negotiating positions reveals a common ambition of the two Parties to ensure post-Brexit effectiveness in the field of judicial co-operation in criminal matters, with the continuation of speedy co-operation in extradition/surrender, continuing mutual legal assistance (MLA) on the basis of strict deadlines and approximating, according to the EU, not only MLA but criminal records exchange arrangements to the pre-Brexit status quo.

Both the UK and the EU aspire further in maintaining wide-range data exchanges in terms of Passenger Name Records (PNR) data, DNA and fingerprint data (exchanged within the EU under the so-called Prüm framework), and information on missing persons and objects (which take place under the framework of the second generation Schengen Information System- SIS II). Both negotiating positions acknowledge that the UK will be treated as a third state vis-à-vis the key criminal justice agencies Eurojust and Europol after Brexit- with the UK seeking a close relationship in particular in relation to Europol.

Notwithstanding this apparent common ground, the development of UK-EU criminal justice co-operation after Brexit faces a number of institutional, constitutional and legal challenges, which this analysis aims to highlight. Key challenges are as follows:

The Challenge of Human Rights

A key challenge for co-operation can arise from the different approaches the UK and the EU take regarding the parameters of respect for human rights in the post-Brexit legal landscape. For the EU, respect for and safeguarding of human rights, democratic principles and the rule of law, including the UK continued commitment to respect the ECHR constitute essential elements for post-Brexit cooperation (para. 12). The future partnership should provide for automatic termination of the law enforcement cooperation and judicial

cooperation in criminal matters if the UK were to denounce the ECHR, and that it should also provide for automatic suspension if the UK were to abrogate domestic law giving effect to the ECHR. (para. 112).

The UK mandate takes a different approach in stating that the agreement should not specify how the UK or the EU Member States should protect and enforce human rights and the rule of law within their own autonomous legal systems (para. 112). The difference in approaches may have a significant negative impact on post-Brexit criminal justice co-operation of the UK withdraws from the ECHR or repeals the Human Rights Act. The EU has elevated the ECHR as a key benchmark for mutual trust in criminal justice co-operation and adherence to the ECHR and its effective enforcement within the UK as a key pre-condition underpinning any future partnership in criminal matters.

The Challenge of Privacy and Data Protection

A more specific human rights challenge involves the differences in the approach of the UK and the EU on the role and position of data protection post-Brexit. The negotiating positons seem to diverge greatly here. For the EU, data protection- like membership of the ECHR- constitutes a pre-requisite for co-operation. In its mandate, the EU calls for full respect of the Union's personal data protection rules, including the Union's decision-making process as regards adequacy decisions- with the adoption of adequacy decisions being a condition to achieve a high level of ambition on law enforcement and judicial cooperation in criminal matters (para. 13). The security partnership should provide for suspension of the law enforcement and judicial cooperation, if the adequacy decision is repealed or suspended by the Commission or declared invalid by the CJEU (para. 118).

The UK mandate on the other hand attempts to shield and separate data protection from the main body of negotiations by treating it as a technical issue under a separate part (part 3) of the document. The adoption of EU adequacy decisions- which will certify that UK standards are essentially equivalent to those of the EU- is key to the UK having wide access to EU criminal justice and police databases. Current case-law of the CJEU reveals that the determination of adequacy may be a challenge as current UK law on the bulk collection of personal data is contrary to EU data protection law (Cases C-203/15 and C-698/15, *Tele2Sverige and Watson*; Case C-623/17**,** *Privacy International*, Opinion of AG Campos Sanchez-Bordona delivered on 15.1.2019). Moreover, as the CJEU has stated in the context of EU adequacy decisions on the USA, these decisions involve scrutiny which is not one-off, but periodic, regular and in-depth (Case 362/14 *Schrems*)**.**

The Challenge of the UK as a non-Schengen third State

Throughout its negotiating Directives, the UK calls for close criminal justice co-operation with the EU on the basis of precedents of EU relations in third countries, and in particular Norway, Iceland, Switzerland and Liechtenstein. What distinguishes these states from the UK however is that they are Schengen members. It is difficult to see how their privileged

position can be extended to a non-Schengen third state, such as the UK, especially regarding access to Schengen-related measures and databases such as the Schengen Information System.

This differentiation is recognised in the EU mandate, whose underlying principles reflect the UK status as a non-Schengen third country and that a non-member of the Union cannot have the same rights and enjoy the same benefits as a member (para. 10). This differentiation may be crucial in delimiting the level of ambition in- and closeness- of EU-UK co-operation. It is important to note here that Schengen measures can be linked to the effectiveness of broader EU criminal law measures- for instance the effectiveness and speed of the European Arrest Warrant system is linked with access to alerts on suspects in SIS II

It may be a challenge for the UK to be treated on an 'equal footing' with non-EU Member States which follow EU rules, and in particular implement the Schengen *acquis.* The 'special relationship' between a non-EU Member State such as Iceland which is an EFTA member having signed the EEA Agreement and a full Schengen members and the European Union has been confirmed by the Court of Justice in its recent ruling in *I.N.* (Case C-897/19 PPU, judgment of 2 April 2020- see in particular paras. 54-58).

The Challenge of the role of the European Court of Justice

A broader institutional challenge involves the future role of the CJEU. The EU wishes to include criminal justice cooperation within an overall governance framework (para. 7) which includes rules on dispute resolution whereby questions on the interpretation of EU law end up before the ECJ for a binding ruling (para. 160). The UK on the other hand envisages a post-Brexit security treaty as a separate agreement governed by its own rules and with no jurisdiction of the CJEU- citing existing precedents of agreements envisaging political forms of dispute resolution (para. 30).

Whether a separate UK-EU 'security treaty' will be concluded remains to be seen. The CJEU will remain relevant in the post-Brexit landscape whether or not it has a dispute resolution role. The role of the CJEU is key in developing the EU benchmarks for the future relationship. The interpretation by the Court of EU data protection law is a key example in this context, as it forms the benchmark which must be respected by EU institutions when embarking on the adoption of adequacy decisions. Moreover, it is difficult to see how maintaining a closer association with, access to or participation in EU structures such as criminal justice agencies and databases can occur without a degree of scrutiny by the Court of Justice.

The on-going relevance of EU law after Brexit

While there appears to be a recognition of the mutual benefits of close EU-UK criminal justice co-operation after Brexit, the degree and intensity of such co-operation will depend on addressing a number of broader, institutional and constitutional challenges. The question at the heart of the future relationship is the extent to which common ground can be found

while both the UK and the EU can claim that the autonomy of their internal systems has been preserved. For the UK, understanding and taking full account of the importance of upholding human rights standards (including data protection and effective judicial protection) for the EU and the specific constitutional significance of free movement in EU law, are key in this process.

As I have noted in detail elsewhere (V. Mitsilegas, 'European Criminal Law After Brexit' in *Criminal Law Forum,* vol.28, 2017, pp.219-250 https://link.springer.com/article/10.1007/s10609-017-9314-y), EU law and its subsequent development either through legislation or through interpretation by the CJEU, will be relevant in forming the EU benchmark for future co-operation. In the rapidly growing field of criminal justice, where the protection of human rights has become increasingly important in EU law, dynamic alignment with EU standards will be central to close co-operation. It is difficult to see how the EU can accept close co-operation approximating intra-EU co-operation with a third state whose standards fall notably lower than the internal, evolving EU *acquis.*

Moreover, it must be reminded that EU Member States, in their external action and bilateral relations with third states, are bound by EU law and must uphold EU standards. Thus, for example, a French judicial authority receiving a European Arrest Warrant-type request from their UK counter-parts after Brexit will not execute the requests if human rights standards are thought to fall below the EU benchmark.

Therein lies the Brexit paradox: that in order to sustain a close relationship with the European Union, the UK will have to align with EU rules on which it has had no influence. In the field of criminal justice, this will represent a steep change from the pre-Brexit days where the UK, as an EU Member States, was afforded the right to 'opt-out' from legally binding EU law.

June 2020

Committee on the Future Relationship with the European Union

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05 June 2020

Valsamis Mitsilegas
Professor of European Criminal Law
Queen Mary University

Dear Professor Mitsilegas,

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.

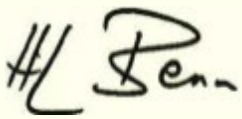
The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our call for evidence, which was published on 4 March. We also hope 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