Written evidence submitted by Professor Steve Peers Professor of Law at University of Essex (FRE0042)

1 The following comments answer the questions suggested by the committee in order. I have not answered questions about operational details, as people working in law enforcement agencies are best placed to answer those.

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?

2 These questions are closely linked, and so should be answered together. The main areas of disagreement seem to be structural. First of all, a key issue is whether to include internal security matters (and other matters) within the scope of a single agreement (as the EU desires) or as a separate agreement (as the UK wishes). I note that the EU has traditionally agreed treaties on internal security matters separately from its treaties on other matters, such as trade (cf Norway, Iceland, Canada, Switzerland, Japan, TTIP talks with USA). Furthermore, Article 184 of the withdrawal agreement refers to multiple 'agreements' as regards the future relationship, and para 118 of the political declaration also refers to multiple 'agreements'. While the latter para also refers to 'an overarching institutional framework', it also notes that this remains to be negotiated, and also notes that if agreed, 'the Parties may establish specific governance arrangements in individual areas'. Similarly, para 119 of the political declaration states that that parties 'may also decide that an agreement should sit outside of the overarching institutional framework, and in those cases should provide for appropriate governance arrangements.' The UK's position as regards a separate agreement on internal security, with separate governance arrangements, is therefore consistent not only with prior EU precedent but also with the wording of the withdrawal agreement and political declaration.

3 A second area of structural disagreement is the role of the ECHR in future talks. While this is widely understood and presented as a requirement for the UK to remain party to the ECHR and retain the Human Rights Act, this is a misunderstanding. In fact the EU position is that if the UK denounces the ECHR or rescinds the HRA, the internal security provisions of the agreement cease to apply automatically (Article 136 of Title I of Part Three). This does not as such, prevent the UK from denouncing the ECHR or rescinding the HRA, but rather is a deterrent to doing so. In fact, the treaty could not prevent the UK from denouncing the ECHR or rescinding the HRA even with express provision to that effect, as

long as the treaty itself could be denounced; and Article 8 of Part Six of the EU proposal provides for either party to denounce the treaty.

4 The EU's position on this is unprecedented compared to its other internal security treaties with non-EU countries, which instead provide only for parties to terminate such agreements on general grounds. This is consistent with Article FINAL-7 of the UK proposal for an internal security treaty. It would be open to the EU, in its internal decision concluding the treaty, to provide for automatic suspension of the law enforcement provisions in the event that the UK denounced the ECHR or rescinded the HRA. In any event such actions by the UK would lead to challenges in national courts of EU Member State, perhaps referred to the CJEU, arguing that cooperation under the treaty must be suspended. This would be a reasonable compromise position that simultaneously respects UK autonomy and the EU's legitimate concern about ensuring that its security partner respects the human rights of EU citizens.

5 A third structural issue is the role of the CJEU. First of all, it should be noted that there is a widespread popular misapprehension that cooperation with the EU in this field is only possible if the CJEU has jurisdiction as regards the UK. This is untrue: in practice the EU has never insisted that the CJEU has jurisdiction over how non-EU countries apply its internal security treaties with those countries. Rather, such treaties more often refer to the objective of consistent interpretation, with exchange of case law, taking account of the other party's case law, and discussions in the event of divergent case law. Given that, until the Treaty of Lisbon, the CJEU had limited jurisdiction over measures in this field even within the EU (and this continued for pre-Lisbon measures for five years afterwards), its jurisdiction is not absolutely essential to cooperation on internal security.

6 The common misapprehension also misunderstands the EU's position for a UK/EU treaty, which does not provide for direct CJEU jurisdiction as such for the UK (other than in the area of State aid) but rather via the arbitration process in the event of a dispute over a provision of the agreement. In the case where the dispute concerns a 'concept' or 'provision' of EU law, the arbitrators must request the CJEU for interpretation. This reflects CJEU case law going back to *Opinion 1/91*, where the Court insists that non-EU bodies cannot give an interpretation of EU law which binds the EU. This was agreed in the political declaration, although as noted above, the political declaration left open for discussion whether the same governance arrangements would apply to the entirety of the EU/UK relationship.

7 Applying this to the internal security provisions of the EU proposal, there are very few references to 'provisions' of EU law, and these relate to the EU side only (for instance, Member States' authorities) or are simple definitions (such as the definition of Europol). However, the arbitrators must also refer disputes about 'concepts' of EU law to the CJEU, and that term is not defined in the proposed treaty. It is also relevant to Article 14 of Part One of the Commission proposal, which refers to applying CJEU case law to concepts and

provisions of EU law in the proposed treaty. It might be argued that since much of the text of the internal security treaty is similar to the the text of internal EU legislation, 'concepts' of EU law would be at play.

8 How can this be resolved? A reasonable compromise would be to follow the precedents set by other EU treaties with non-EU countries. While the EU has argued that precedents should not be followed as regards free trade agreements and the 'level playing field' because of the size and proximity of the UK, that argument – whatever one makes of it – is irrelevant to cooperation on security cooperation, since it is based on economic considerations (a quid pro quo for zero tariffs, and the risk of being undercut). The UK could express its willingness to be bound by provisions that other countries have accepted – on the objective of consistent interpretation, exchange of case law, taking account of the other party's case law, and discussions in the event of divergent case law – which are similar to what the UK is already willing to accept if its application to accede to the Lugano Convention on civil jurisdiction and recognition of judgments is accepted. As noted already, this would not be inconsistent with the political declaration, since it recognised that different governance arrangements for different fields of cooperation could be open to discussion.

9 Like other non-EU countries, there is no need for complex dispute settlement provisions, which have been adapted from the rules in treaties relating to international trade disputes, rather than internal security cooperation. And if there is no resort to arbitration in this field, in common with all of the EU's prior internal security treaties with non-EU countries, then the issue of CJEU jurisdiction over 'concepts' or 'provisions' of EU law via the arbitration process will never arise. In addition to political routes to dispute settlement and the possibility of terminating the treaty in the event of unsolved disputes, it could be provided that only part of the treaty could be suspended (which both sides' proposals already provide for), perhaps making express reference to a dispute about divergence that could not be resolved after a certain period of discussion between the parties.

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?

10 There are no non-EU countries with access to ECRIS. There are no non-Schengen countries with access to Prum (which is a process of exchange of national data, not an "EU database"). Several non-EU countries have agreements with the EU on exchange of PNR data. Even more non-EU countries have agreements on cooperation with Europol and

Eurojust, although these fall short of providing the same level of access to the operation of those agencies that Member States have.

11 The EU side's arguments that it should not go beyond existing precedents in this area are weak. There is no 'most favoured nation' rule, as there is in international trade, when it comes to internal security (and anyway, the MFN rule has an exception for free trade agreements, so a parallel exception could apply in this field). It is not unprecedented to have a higher degree of security cooperation with a neighbour (the US and Canada, for instance) than one might have with a country much further away.

12 In any event, the EU position, as noted above, itself breaks with existing precedent in this field as regards dispute settlement, the lack of a separate treaty on internal security, and the provisions on the ECHR. The same is equally true of the EU positions on State aids and fisheries. Perhaps there is a fruit-related or baking-related analogy which applies here.

13 More specifically, the Commission's reported view that UK participation in SIS II is legally impossible is unconvincing. External competence of the EU does not derive only from express provisions of the Treaties. Any limits deriving from EU legislation could be addressed by amending it. CJEU case law on non-Schengen countries' participation in Schengen only relates to the protocol on the UK's position as a Member State, not to non-Member States. Even if that case law does apply by analogy to non-Member States, it only ruled out the UK's partial participation into the immigration-related provisions of the Schengen *acquis*; but the UK is not now seeking such participation.

14 SIS II (aside from its immigration provisions) provides for an exchange of information on wanted persons or objects in the context of criminal proceedings or law enforcement investigations, as further defined. As evidenced in the House of Lords' enquiry into a UK/EU security treaty, it is practically useful for law enforcement bodies, and cannot easily be replicated by other means.

• *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?*

15 The EU proposal is nearly identical to the EU's extradition treaty with Norway and Iceland, while the UK's is broadly similar but has further exceptions. The primary difference between the EU's treaty with those countries and the EAW – apart from the institutional differences such as the lack of CJEU jurisdiction over the non-EU countries, discussed above – is the possibility of refusal to extradite nationals (which already applies as regards the UK during the withdrawal agreement transition period), a political offence exception, and the possible application of dual criminality.

16 It seems that the EU wants to stick to this precedent for the UK, while the UK has tabled further exceptions such as human rights, proportionality, and trial readiness. It is notable that the EU has reportedly objected to a human rights exception as regards extradition, which somewhat undercuts its insistence upon human rights provisions underpinning the entire agreement. In either scenario, neither party seems interested in 'building on' the EU agreement with Norway and Iceland.

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?

17 EU decisions on data adequacy have been challenged (particularly as regards the USA) and so any decision for the UK may be challenged as well. The case law on this issue is based on EU primary law (the EU Charter of Fundamental Rights) so it cannot easily be set aside by amending EU legislation. The EU will likely be concerned about the possibility of future UK divergence from the GDPR and other data protection legislation that now applies to it, including previous and pending case law about whether the UK complies with that data protection law now, and the case law on the adequacy decisions relating to the USA by analogy. A data adequacy decision would be the basis of the exchange of data in the EU proposal for a treaty; it is hard to avoid this approach in light of the case law and EU legislation. Absent a data adequacy decision, exchange of data is still possible on other grounds; the upcoming *Schrems* judgment of the CJEU (due on July 16th) could provide more clarity on what legal constraints may apply to these alternative possibilities.

• *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?*

18 The exchange of data via various routes, and criminal law cooperation particular as regards extradition, would be particularly affected negatively if there is no future security relationship. The UK could seek bilateral arrangements with individual Member States could try to compensate for the loss of this cooperation. In any event, extradition would still take place on the basis of less far-reaching Council of Europe instruments, and data exchange could take place on the basis of existing bilateral arrangements and via Interpol. Law enforcement officials could probably quantify the loss more precisely.

• *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?*

19 The prisoner transfer provisions in the UK proposal, and the money laundering provisions in the EU proposal, are both worthy of further discussion. It would be useful to have more information from law enforcement professionals about how useful such provisions would be in practice. It should be noted that the political declaration committed the parties to discuss money laundering (para 89). There is no parallel provision on prisoner transfer, although the political declaration did refer to further measures on judicial cooperation similar to EU instruments (para 88). One might ask ministers in particular why the UK is apparently not interested in specific treaty commitments relating to money laundering.

June 2020

Committee on the Future Relationship with the European Union

House of Commons, London, SWIA OAA
Email: freucom@parliament.uk Website: www.parliament.uk/freucom

05 June 2020

Steve Peers
Professor of Law
University of Essex

Dear Professor Peers,

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.

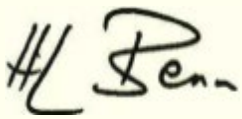
The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our call for evidence, which was published on 4 March. We also hope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