



HOUSE OF LORDS

European Union Committee

7th Report of Session 2016–17

Brexit: future UK-EU security and police cooperation

Ordered to be printed 6 December 2016 and published 16 December 2016

Published by the Authority of the House of Lords

The European Union Committee

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Q in footnotes refers to a question in oral evidence.

SUMMARY

Maintaining the strong security cooperation the UK currently has with the EU will be one of the Government's top four overarching objectives in the forthcoming negotiations on the UK's exit from, and future relationship with, the European Union.

Only two years ago, many of the EU measures the UK is now due to leave were deemed vital by the then Home Secretary in order to "stop foreign criminals from coming to Britain, deal with European fighters coming back from Syria, stop British criminals evading justice abroad, prevent foreign criminals evading justice by hiding here, and get foreign criminals out of our prisons".

In this report, we examine the main tools and institutions that currently underpin police and security cooperation between the United Kingdom and the European Union and explore the options available to the Government for retaining or replacing them when the UK leaves the EU.

We conclude that there is considerable consensus among UK law enforcement agencies on the EU tools and capabilities they would like to see retained or adequately replaced. Europol, Eurojust, the Second Generation Schengen Information System (SIS II), the European Arrest Warrant (EAW), the European Criminal Records Information System (ECRIS), the Prüm Decisions and Passenger Name Records (PNR) were consistently listed as top priorities by witnesses.

Our analysis suggests that in some cases there are precedents for securing access to these tools or to credible substitutes from outside the EU. For example, the EU has bilateral agreements with third countries including the USA on the transfer of PNR data. There are precedents for third-country agreements with Eurojust that could meet some of the UK's needs. Norway and Iceland have concluded an extradition agreement with the EU whose provisions approximate those of the EAW. These precedents, however, offer no quick fix. Some of the bilateral agreements in question have taken many years to negotiate, and in some cases are still not in force.

In other cases, and especially with regard to what are likely to emerge as the UK's top objectives in this area, there is either no precedent for the EU permitting access to its tools by non-EU or non-Schengen members, for example in relation to ECRIS or SIS II, or the precedents that do exist would not be sufficient to meet the UK's operational needs, for example in the case of third-country agreements with Europol.

We nonetheless accept the Government's view that the precedents set by other third countries in negotiating with the EU may fail to capture the full range of options that could be available to the UK, because of the UK's pre-existing relationship with the EU-27 and the data and expertise it can offer.

The UK and the EU-27 share a strong mutual interest in ensuring that there is no diminution in the level of safety and security afforded to their citizens after the UK leaves the EU. We caution, however, against assuming that because there is a shared interest in a positive outcome, negotiations will unfold smoothly. Even with the utmost good will on both sides, it seems inevitable that there will be practical limits to how closely the UK and the EU-27 can work together on police and security matters if they are no longer accountable to, and subject

to oversight and adjudication by, the same supranational institutions, notably the Court of Justice of the European Union. There is, therefore, a risk that any new arrangements that the Government and the EU-27 put in place by way of replacement when the UK leaves the EU will be sub-optimal relative to present arrangements, possibly leaving the people of the UK—and their European neighbours—less safe.

The UK has a long and deep track record of shaping the development of EU agencies, policies and practice in this area. Major components of the landscape, from Europol to the Passenger Name Record Directive, reflect the UK's influence. In leaving the EU the UK will lose the platform from which it has been able to exert this sort of influence, with an attendant risk to the UK's ability to protect its security interests in future. Therefore, as well as seeking to retain or replace specific tools, the Government will also need to examine what structures and channels it should remain part of or find substitutes for in order to influence the EU security agenda, which will inevitably have implications for the UK's own security, in future.

Brexit: future UK–EU security and police cooperation

CHAPTER 1: INTRODUCTION

Background

The purpose of this inquiry

1. The Secretary of State for Exiting the European Union has identified “maintaining the strong security co-operation we have with the EU” as one of the Government’s top four overarching objectives in the forthcoming negotiations on the UK’s exit from, and future relationship with, the European Union.¹ This must be right: protecting the lives of its citizens is the first duty of Government, and in fulfilling this duty the UK Government currently benefits greatly from close and interdependent police and security cooperation with EU institutions and member states. The common threats facing the UK and its neighbours require the closest possible police and security cooperation to be sustained into the future, after the UK leaves the EU. We therefore expect this to form an essential part of negotiations on the UK’s future relationship with the European Union, with the UK and the EU-27 sharing an interest in ensuring that there is no diminution in the level of safety and security afforded to their citizens.²
2. In this report, we examine the most significant tools that currently facilitate police and security cooperation between the United Kingdom and the European Union and explore the options available to the Government for retaining or replacing them when the UK leaves the EU. We present our witnesses’ views on the level of priority they attach to the retention or replacement of particular tools and capabilities; offer our own conclusions and recommendations with regard to the UK’s negotiating objectives in this area; and signpost some of the challenges that lie ahead.
3. In view of the importance that the Government now rightly attaches to this aspect of the UK’s withdrawal from the EU, it is striking that this subject did not attract a commensurate level of attention in the referendum campaign, from either side. We hope that our report will help draw attention to the issues at stake, as well as making a constructive contribution to the development of the UK’s negotiating position.
4. **We make this report to the House for debate.**

The EU Committee’s work

5. Following the referendum on 23 June 2016, the European Union Committee and its six sub-committees launched a coordinated series of short inquiries, addressing the most important cross-cutting issues that will arise in the course

1 HC Deb, 12 October 2016, [col 328](#)

2 See also European Union Committee, *Brexit: parliamentary scrutiny* (4th Report, Session 2016–17, HL Paper 50), in particular paragraphs 20–22, outlining the four phases of withdrawal and the scope of formal negotiations under Article 50, covering a) a withdrawal treaty, and b) the framework of a future relationship.

of negotiations on Brexit.³ The pace of events means that these inquiries will be short, but within this constraint, we are seeking to outline the major opportunities and risks that Brexit presents to the United Kingdom.

6. Our inquiries will run in parallel with the work currently being undertaken across Government, where departments are engaging with interested parties, with a view to drawing up negotiating guidelines. But while much of the Government's work is being conducted in private, our aim is to stimulate informed debate, in the House and beyond, on the many areas of vital national interest that will be covered in the negotiations. As far as possible we aim to complete this work before March 2017.

The evolution of UK-EU cooperation on Justice and Home Affairs

7. The UK currently enjoys what the Government has described as a “special status” in relation to EU cooperation on Justice and Home Affairs (JHA) matters.⁴ Specifically, it has negotiated the right to “opt in” to EU measures in this area, allowing the Government to decide, on a case-by-case basis, whether it is in the national interest to participate. When the UK does not choose to opt in, it is not bound by the EU measure in question.⁵
8. The practical implication of this is that cooperation on police and security matters between the UK and the EU is already limited to those measures that successive UK Governments have assessed to be in the national interest, rather than extending to the full spectrum of EU activity in those areas.⁶
9. The starting point for this inquiry is therefore different from that in other policy areas. Each police and criminal justice measure that the UK participates in was, by definition, the subject of a positive decision and assessment when the UK first joined it (or re-joined it in the case of measures pre-dating the Lisbon Treaty⁷).⁸ Accordingly, there is a higher probability that continuing participation or an adequate replacement will remain in the UK's national interest post-Brexit.
10. In the sections that follow, we briefly recap the trajectory of UK-EU cooperation on Justice and Home Affairs policy, in order to set the scene for the choices now facing the Government.

TREVI and the Treaty of Maastricht

11. Cooperation on Justice and Home Affairs (JHA) first became a formal part of EU activity with the entry into force of the Treaty of Maastricht in 1993. Until then, European ministers of justice and the interior had cooperated

3 See European Union Committee, *Scrutinising Brexit: the role of Parliament* (1st Report, Session 2016–17, HL Paper 33)

4 HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues* (9 May 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521926/The_UK_s_cooperation_with_the_EU_on_justice_and_home_affairs_and_on_foreign_policy_and_security_issues.pdf [accessed 1 December 2016]

5 In the case of measures building on those parts of the Schengen *acquis* in which the UK already participates, it has the right to opt out rather than the right to opt in.

6 This is also true of other aspects of Justice and Home Affairs cooperation, such as immigration and asylum policy.

7 See paragraphs 10 to 21.

8 Or in the case of Schengen-building measures, when it chose not to exercise its right to opt out.

under the auspices of the TREVI group,⁹ an intergovernmental forum that met and deliberated outside the formal framework of the European Economic Community (EEC). Cooperation on JHA matters under the Maastricht Treaty was subject to decision-making by unanimity in the Council of Ministers, with a limited role for the supranational institutions (the European Commission, the Court of Justice of the European Union, and the European Parliament).

The Schengen Area

12. In a separate development in 1985, five of the then 10 EEC Member States, not including the UK or Ireland, signed the Schengen Agreement, which provided for the gradual abolition of internal border controls and a common visa policy.¹⁰ A borderless Schengen Area was created in 1995, based on the Schengen Implementing Convention agreed in 1990. The aim was to provide greater freedom from border controls for movements of goods, persons and services, alongside compensating measures to enhance customs and police cooperation.

The Treaty of Amsterdam

13. The Treaty of Amsterdam, which entered into force in 1999, created the concept of an Area of Freedom Security and Justice (AFSJ). Policy-making on AFSJ measures was to include a greater role for the supranational institutions and the option to adopt measures by Qualified Majority in the Council of Ministers.
14. The UK and Ireland negotiated a Protocol to the Amsterdam Treaty that allowed them to control their level of participation in AFSJ measures by choosing, on a case-by-case basis, whether to opt into measures proposed by the European Commission in the area of immigration and asylum, border controls, and civil and family law.¹¹ Police and judicial cooperation in criminal matters remained subject to decision-making by unanimity in the Council of Ministers with a limited role for the supranational institutions, obviating the need for an opt-in arrangement.
15. The Amsterdam Treaty also included a separate Protocol integrating the Schengen *acquis* (body of law) into the EU Treaty framework.¹² When that Protocol was agreed, the UK and Ireland did not participate in any aspect of the Schengen *acquis*. Accordingly, the Protocol confirmed that the UK and Ireland were not bound by the Schengen *acquis*, but they were given the right to request to take part in some or all of the provisions of the *acquis*, as well as the right to apply to join measures deemed ‘Schengen-building’.

9 The TREVI group was established following the Rome European Council in December 1975, and provided a forum for Home Affairs and/or Justice Ministers to meet. It was initially focused on combating terrorism, but its remit was later extended to include police cooperation, organised crime and illegal immigration.

10 The original five were Germany, France, Belgium, Luxembourg and the Netherlands. Today there are 26 members of the Schengen Area, including all of the EU member states except the UK and Ireland, and four non-EU countries: Iceland, Liechtenstein, Norway and Switzerland. Bulgaria, Romania, Croatia and Cyprus have yet to be admitted as full members of the Schengen Area.

11 Protocol No 4, Treaty on European Union, on the position of the United Kingdom and Ireland, [OJ C 340](#) (10 November 1997). The Common Travel Area (CTA) between the UK and the Republic of Ireland dates back to the establishment of the Irish Free State in 1922, and permits nationals of CTA countries to travel freely within the CTA without being subject to passport controls.

12 Protocol No 2, Treaty on European Union, integrating the Schengen *acquis* into the framework of the European Union, [OJ C 340](#) (10 November 1997)

16. Following the entry into force of the Treaty of Amsterdam, the Council of Ministers approved a request from the UK to participate in some aspects of the Schengen *acquis*, leading to the adoption of two Council Decisions accepting and implementing the request.¹³ The UK now participates in the policing and criminal justice aspects of the Schengen *acquis*, but not in the immigration aspects.

The Treaty of Lisbon

17. The Treaty of Lisbon, which entered into force in December 2009, merged police and judicial cooperation in criminal matters into the main EU structures for cooperation on Justice and Home Affairs, creating Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU).
18. New, post-Lisbon Title V measures are agreed through the so-called Ordinary Legislative Procedure. This means they are adopted by Qualified Majority Voting (QMV) in the Council of Ministers and the European Parliament must also agree each proposal.¹⁴ The other supranational institutions also have full powers in respect of JHA measures under Title V: the Court of Justice of the European Union (CJEU) has jurisdiction over such measures, and the European Commission has the power to initiate infringement proceedings (under Article 258 TFEU). Special transitional provision was made, however, for the approximately 130 police and criminal justice measures adopted prior to the entry into force of the Lisbon Treaty. The infringement powers of the Commission under Article 258 TFEU and the usual powers of CJEU would not apply to these measures until a transitional period of five years had elapsed, i.e. until 1 December 2014.
19. As with the Amsterdam Treaty, the Lisbon Treaty included a dedicated Protocol on the position of the UK and Ireland. That Protocol extended the UK's right to opt in to measures on a case-by-case basis to all Title V measures, including new, post-Lisbon proposals relating to police and criminal justice cooperation.¹⁵ In a separate Protocol, the UK also secured the right to decide, by 31 May 2014, whether or not the UK should continue to be bound by the approximately 130 pre-Lisbon police and criminal justice measures—in other words, it had the option of exercising a 'block opt-out'. Should it choose to continue to be bound by the measures, the UK would be accepting a bigger role for the CJEU and the European Commission than was envisaged when the measures in question were first agreed under the pre-Lisbon framework.¹⁶

13 Council Decision 2000/365/EC, 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, [OJ C 430/1](#) (1 December 2014) and Council Decision 2004/926/EC, 22 December 2004 on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland, [OJ C 430/6](#) (1 December 2014)

14 There are some exceptions: measures concerning operational police cooperation and the establishment of a European Public Prosecutor's Office (EPP) were made subject to a Special Legislative Procedure, which continues to require unanimity in the Council of Ministers and provides a lesser role for the European Parliament.

15 Protocol No 21, [Treaty on the Functioning of the European Union](#)

16 Protocol No 36, Article 10, Treaty on European Union, on transitional provisions, [OJ C 115](#) (consolidated version of 9 May 2008)

Recent Developments

20. In July 2013, following debates and votes in both Houses of Parliament,¹⁷ the UK Government notified the Council of Ministers that the UK had decided to exercise the block opt-out from the pre-Lisbon police and criminal justice measures with effect from 1 December 2014. At the same time, it indicated that the UK would seek to re-join 35 of those same measures, accepting that the enforcement powers of the European Commission and full CJEU jurisdiction would apply in respect of those 35 measures from 1 December 2014.¹⁸
21. On 1 December 2014 the UK re-joined 35 pre-Lisbon police and criminal justice measures, following a second round of debates and decisions in both Houses of Parliament.¹⁹ The timings were designed to avoid an operational gap between the date on which the block opt-out took effect and the point at which the UK re-joined the smaller sub-set of measures.²⁰
22. Further details on these recent developments can be found in a series of contemporaneous reports published by this Committee.²¹

What is at stake

23. The sequence of events described above means that when the UK leaves the European Union, it will in principle also leave the 35 pre-Lisbon police and criminal justice measures that two years ago were deemed “vital” by the then Home Secretary, now the Prime Minister, in order to “stop foreign criminals from coming to Britain, deal with European fighters coming back from Syria, stop British criminals evading justice abroad, prevent foreign criminals evading justice by hiding here, and get foreign criminals out of our prisons”.²² In November 2014 she warned the House of Commons that failure to re-join those 35 measures “would risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe”.²³
24. When it leaves the EU, the UK will in principle also be poised to leave the police and criminal justice measures that it has chosen to opt into since

17 The House of Lords debate took place on 23 July 2013. See HL Deb, 23 July 2013, [col 1233](#). The House of Commons debate took place on 15 July 2013. See HC Deb, 15 July 2013, [col 770](#)

18 The 35 measures the Government would seek to re-join were listed in Home Office, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8671 July 2013, pp 9–12: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [accessed 6 December 2016]

19 Command paper 8897 set out an updated list of the 35 measures the UK would re-join, slightly amended from the original list Home Office, *Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union*, Cm 8897, July 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf [accessed 16 December 2016]. The House of Commons debate took place on 10 November 2014. See HC Deb, 10 November 2014, [col 1233](#). The House of Lords debate took place on 17 November 2014. See HL Deb 17 November 2014, [col 327](#)

20 HL Deb, 8 May 2014, [col 1622](#)

21 Further details can be found in: EU Select Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159) and EU Select Committee, *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision* (5th Report, Session 2013–14, HL Paper 69)

22 Rt Hon Theresa May MP, ‘Fight Europe by all means, but not over this Arrest Warrant’ *The Daily Telegraph* (9 November 2014): <http://www.telegraph.co.uk/news/politics/conservative/11216589/Theresa-May-Fight-Europe-by-all-means-but-not-over-this-Arrest-Warrant.html> [accessed 6 December 2016]

23 HC Deb, 10 November 2014, [cols 1224, 1228, 1229](#)

the Lisbon Treaty entered into force in December 2009. These number around 30²⁴ and include measures such as the 2016 Passenger Name Record Directive, the Prüm Decisions, and the European Investigation Order.²⁵

25. Among the witnesses from whom we took evidence for this inquiry, we found considerable consensus about the EU tools and capabilities that should in their view be retained or adequately replaced. Europol, Eurojust, the Second Generation Schengen Information System, the European Arrest Warrant, the European Criminal Records Information System, the Prüm Decisions and Passenger Name Records were consistently listed among our witnesses' top priorities. In the chapters that follow, we review these and selected other measures underpinning police and security cooperation within the European Union and examine the options and precedents for securing access by the UK to those tools and institutions from outside the EU.
26. In light of the evidence we have heard over the course of our inquiry, we make three crucial observations.
27. First, our witnesses emphasised time and again that the UK has been a leading protagonist in driving and shaping the nature and direction of cooperation on police and security matters under the auspices of the European Union.²⁶ The infrastructure that exists in this area, from Europol to the Passenger Name Record Directive—as well as that which does not (as yet) exist, such as the European Public Prosecutor—in part reflect the UK's significant influence and agenda-setting. The same can be said of the overall balance struck between security and other policy ends (for example in relation to data protection and privacy).
28. One of the challenges for the future, therefore, is whether, and if so how, the UK can retain that sort of influence among its European neighbours and allies when it is no longer a full member of the EU structures in which the strategic direction of travel is set. The National Crime Agency observed that “there are a number of countries within the EU that show real leadership in this area and the UK is one of them. We may lose some of that influence”.²⁷ Bill Hughes, former Director-General of the Serious Organised Crime Agency (2006–2010), also warned us that “the UK is seen as a major and leading partner. That will change”.²⁸
29. How effectively that challenge is met may in turn have a consequential effect on the UK's standing in other fora, for example among the ‘Five Eyes’.²⁹ The National Crime Agency told us that “one of issues of concern for our ‘Five

24 At the time of writing, there were 30 measures in this category, not including the Prüm Decisions, or 34 including measures that the UK considered to have content engaging its JHA opt-in, again excluding the Prüm Decisions.

25 For a full list of UK opt-in decisions taken between December 2009 and October 2015, see: Home Office, *Decisions taken: JHA (Title V) opt-in and Schengen opt-out decisions*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515125/2016-optin-webpage-update.pdf [accessed 6 December 2016]

26 [Q 11](#), [Q 20](#), [Q 23](#), [Q 26](#), [Q 28](#). In oral evidence on the Security Union, 15 November 2016 (Session 2016–17), [Q 11](#), Sir Julian King, Commissioner for the Security Union, told us that the UK had “a long and deep track record of engagement” and that last year, the UK was “in the top four in introducing new cases into the Europol system”, “in the top five in its use of the Europol-based systems, the top four in its engagement in the terrorist finance tracking system, and the top three in using the Europol information systems, particularly the law enforcement data network, where in fact, it was top in 2015.”

27 [Q 17](#)

28 [Q 20](#)

29 An intelligence-sharing alliance between the UK, USA, Canada, Australia and New Zealand.

Eyes’ partners, for instance, is that the lack of the UK at Europol will impact on their relationships too, because sometimes they can use us as a proxy for getting work done if we are doing joint work together”.³⁰

30. A second theme running through much of the evidence we received was what our witnesses perceived as a mutual interest in sustaining police and security co-operation between the UK and the EU. Helen Ball, the Metropolitan Police Service’s Senior National Coordinator for Counter-Terrorism Policing, told us that she was “absolutely clear that police forces throughout Europe, their Governments and their security and intelligence agencies understand the threat and the way we need to work together to mitigate it”.³¹ Sir Julian King, European Commissioner for the Security Union, told us that there was “a new shared awareness of the nature of the threat” among EU member states, citing as an example Estonia, “which would not normally imagine that its nationals would be caught up in extremist Islamic terrorism”, but which had two citizens killed in the attack on the promenade in Nice on 14 July 2016.³² He observed that “Daesh does not make a distinction between one country and another on whether they are in or out of Schengen, or indeed whether they are in or out of the European Union”.³³ The Government was confident that the UK had “great expertise in these areas and we must assume that they would want to continue co-operation on areas such as this where, frankly, there is no economic downside from the point of view of the EU and where, if anything, there is every advantage to continue with, if not exactly the same arrangements, then those that would move towards the current arrangements”.³⁴
31. We anticipate that even with the utmost good will on both sides, and a recognition of the mutual interest at stake, there may be practical constraints on how closely the UK and the EU-27 can work together in future if they are no longer bound by the same rules, enforced by the same supranational institutions. From the perspective of the EU-27, institutions such as the CJEU and the European Parliament—from which the UK would be seeking to remove itself—provide oversight and the checks and balances around many of the measures underpinning police and security cooperation.
32. Lord Kirkhope of Harrogate observed that “if we were not in the EU and the ECJ’s [CJEU’s] competences are not removed from Europol or any other agency, we would have to find a way in which to try to absent ourselves from the ultimate determinations of the ECJ”.³⁵ The Government emphasised that in future, laws would be made at Westminster, not in Brussels, and those laws would be interpreted “not by the European Court of Justice but by the British courts”.³⁶ They concluded that “therefore any new arrangements that have to be put in place or which may be put in place after we withdraw have to be the subject of bespoke adjudication arrangements”.³⁷ Whether the EU-27 are likely to be willing to devise that kind of arrangement in order to facilitate cooperation with the UK is open to question. We also observe

30 [Q 13](#)

31 [Q 48](#). See also [Q 23](#)

32 Oral evidence on The Security Union, 15 November 2016 (Session 2016–17), [Q 5](#) (Sir Julian King).

33 Oral evidence on The Security Union, 15 November 2016 (Session 2016–17), [Q 2](#) (Sir Julian King).

34 [Q 29](#)

35 [Q 20](#)

36 In related evidence, Professor Peers noted that the CJEU would still have jurisdiction to interpret the treaties which the EU signs with non-EU states, which could in practice have an impact on the UK ([Q 10](#)).

37 [Q 31](#)

that any international treaty underpinning future cooperation between the UK and EU in this area would in principle remain open to interpretation by the CJEU, as the CJEU has jurisdiction to interpret the treaties that the EU signs with third countries.³⁸

33. A third theme to emerge in the course of our inquiry is the importance of ‘equivalence’, especially in relation to data protection. Any kind of data-sharing between the UK and EU will probably require the UK to maintain data protection and privacy laws that can be deemed equivalent to those in force in the EU.³⁹ Although the UK is currently bound by EU standards, and is therefore likely to comply with them comfortably at the point when it leaves the EU, this could pose a problem in future as EU policy continues to develop and rules are updated while the UK is no longer at the table to influence the pace and direction of change.
34. Our witnesses pointed out that this concern could also be said to apply more generally, in respect of any EU measures to which the UK negotiates continued access. Tony Bunyan, of Statewatch noted that “every year there is a whole package of measures going through” the EU in this area. If the UK is “not part of that decision-making, you have to go along with things in time, and it is all right now when it is recent, but in time you will not want to be part of some of these things”.⁴⁰ UK negotiators will therefore also need to consider future-proofing any arrangements made at the point of exit, in order to help mitigate that risk.
35. Finally, although the short time-frame for our inquiry has prevented us from exploring the cost implications of different options for future arrangements, we note that the UK has incurred considerable sunk costs in setting up some of the existing arrangements. For example, the IT costs of implementing the Prüm Decisions are expected to be £13 million. We also note that in at least one instance—the European Arrest Warrant—the cost of replicating that capability outside the EU is expected substantially to exceed (by a factor of four) the cost of operating the EU measure.⁴¹ Some of these cost considerations were rehearsed in the Command Papers published by the Government ahead of the UK re-joining 35 police and criminal justice measures in December 2014.⁴²

Conclusions

36. **We welcome the statement by the Secretary of State for Exiting the European Union that “maintaining the strong security co-operation we have with the EU” is one of the Government’s top four overarching objectives in the forthcoming negotiations on the UK’s exit from, and future relationship with, the European Union. The arrangements currently in place to facilitate police and security cooperation**

38 Although a Court of Justice of the EU ruling on a future EU treaty with the UK would not be directly binding on the UK, it could still have an indirect effect on the UK to the extent that the EU-27 are bound by that ruling. On this point, see also [Q 10](#).

39 [Q 7](#)

40 [Q 8](#)

41 [Q 55](#)

42 Foreign and Commonwealth Office, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8671, July 2013 : https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf: [accessed 6 December 2016] and Home Office, *Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union*, Cm 8897, July 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326699/41670_Cm_8897_Print_Ready.pdf [accessed 6 December 2016]

between the United Kingdom and other members of the European Union are mission-critical for the UK's law enforcement agencies. The evidence we have heard over the course of this inquiry points to a real risk that any new arrangements the Government and EU-27 put in place by way of replacement when the UK leaves the EU will be sub-optimal relative to present arrangements, leaving the people of the United Kingdom less safe.

37. The UK has been a leading protagonist in shaping the nature of cooperation on police and security matters under the auspices of the European Union, as reflected in EU agencies, policy and practice in this area. Upon ceasing to be a member of the EU, the UK will lose the platform from which it has been able to exert that influence and help set an EU-wide agenda. This could have the effect of tilting the balance in intra-EU debates—for example in debates on the appropriate balance between security and privacy in relation to data protection—in a way detrimental to the UK's interests. Although our report focuses on the individual tools and capabilities the UK should retain or replace upon leaving the EU, we judge that the Government will also need to consider how it can attempt to influence the EU security agenda—which inevitably will have implications for the UK's own security—in future. This may mean trying to remain part of certain channels and structures, or finding adequate substitutes.
38. The UK and the EU-27 share a strong mutual interest in sustaining police and security cooperation after the UK leaves the EU. In contrast to other policy areas, all parties stand to gain from a positive outcome to this aspect of the Brexit negotiations. This could, however, lead to a false sense of optimism about how the negotiations will unfold. For example, it seems inevitable that there will in practice be limits to how closely the UK and EU-27 can work together if they are no longer accountable to, and subject to oversight and adjudication by, the same supranational EU institutions, notably the CJEU.
39. There must be some doubt as to whether the EU-27 will be willing to establish the 'bespoke' adjudication arrangements envisaged by the Government, and indeed over whether such arrangements can adequately substitute for the role of the supranational institutions from the perspective of the EU-27. We anticipate that this issue may pose a particular hurdle for negotiations on the UK's future relationship with EU agencies such as Europol, and also affect the prospects for maintaining mutual recognition of judicial decisions in criminal matters. It seems conceivable, therefore, that the Government will encounter a tension between two of its four overarching objectives in the negotiation—bringing back control of laws to Westminster and maintaining strong security cooperation with the EU. In our view, the safety of the people of the UK should be the overriding consideration in attempting to resolve that tension, and we urge the Government to ensure that this is the case.
40. The need to meet EU data protection standards in order to exchange data for law enforcement purposes means that after leaving the EU, the UK can expect to have to meet standards that it no longer has a role in framing. More generally, the police and criminal justice measures that the UK currently participates in and may continue

to have a stake in are liable to be amended and updated with the passage of time, when the UK is no longer at the table to influence the pace and direction of change. In preparing for negotiations, the UK Government will therefore need to explore from the outset how any agreement struck with the EU-27 at the point of exit can address this prospect, and the attendant risk to the UK.

CHAPTER 2: EUROPOL AND EUROJUST

Europol

41. Europol is the EU agency that supports the law enforcement agencies of the EU Member States by providing a forum within which Member States can cooperate and share information. It does not have executive or coercive powers to conduct investigations or make arrests in Member States. Instead, it supports the work of Member States' law enforcement agencies by gathering, analysing and sharing information and coordinating operations. Sir Julian King, Commissioner for the Security Union, cited what became known as *Opération Fraternité* as an example:

“After the Brussels and Paris attacks, the French and Belgian authorities came to Europol—in practice, to the counterterrorism cell—shared information with it and asked it to work through that information to see whether it could provide any extra context or leads. It did that work. In particular, through its network of international contacts, including with the United States, on terrorist finance tracking, it was able to generate literally hundreds of new leads, which were fed back to the Belgian and French authorities and contributed to the progress they made in tracking down the perpetrators of those attacks.”⁴³
42. Europol's headquarters are in The Hague, in The Netherlands, where seconded Europol Liaison Officers from all 28 EU Member States and certain third countries are co-located and work alongside Europol's own staff. Rob Wainwright, a UK national, has been Director of Europol since 2009. According to the Government, “the UK uses Europol more than almost any other country”.⁴⁴
43. Europol was originally established as an intergovernmental body in 1995, and became operational in 1999. It currently operates on the basis of a Council Decision adopted in 2009, which re-established Europol as an EU agency funded through the EU budget.⁴⁵ That Council Decision was one of the 35 pre-Lisbon police and criminal justice measures that the UK chose to re-join in December 2014.
44. The arguments for UK membership of Europol were rehearsed and tested in detail at the time of the 2014 decision, including in reports from this Committee and in the Impact Assessments published in the Government's July 2013 and July 2014 Command Papers.⁴⁶

43 Oral evidence on The Security Union, 15 November 2016 (Session 2016–17), [Q 6](#), (Sir Julian King).

44 HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.16

45 Council Decision 2009/371/JHA, 6 April 2009, establishing the European Police Office (Europol), [OJ L 121/37](#) (15 May 2009)

46 European Union Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159); European Union Committee, *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision* (5th Report, Session 2013–14, HL Paper 69); HM Government, *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, Cm 8671, July 2013: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [accessed 1 December 2016]; HM Government, *Decision pursuant to Article 10(5) of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8897, July 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [accessed 1 December 2016]

The new Europol Regulation

45. Earlier this year, a new Europol Regulation was adopted.⁴⁷ The new Regulation will supersede the previous Council Decision, and is due to come into force in May 2017. This Committee produced a report on the new draft Europol Regulation shortly after it was published, recommending that the Government should opt in.⁴⁸ The Government chose not to opt in to the new Regulation prior to its adoption, but is entitled to apply to opt in post-adoption. On 14 November 2016 the Government announced that it intended to opt into the new Regulation.⁴⁹
46. The Government suggested in its Memorandum that much of the content of the new Regulation “is about putting existing practice on a firm legal footing”.⁵⁰ However, the Regulation does make changes to the governance of Europol—for example by including a Commission representative on the Management Board—and to the mechanisms through which Europol is held accountable, for example by creating a Joint Parliamentary Scrutiny Group through which national parliaments and the European Parliament may scrutinise Europol’s activities.
47. The Government argued in its Memorandum that opting in would enable the UK to:
- “... maintain our current access to law enforcement intelligence from other EU Member States which is held in Europol, and to the analysis and links made by Europol in cross-border cases for the remaining time that we are in the EU. We would also maintain a seat on the Management Board, which would help us steer the direction of Europol and help protect the UK’s interests during this period.”⁵¹
48. The National Crime Agency (NCA) made a similar point in evidence to our inquiry, suggesting that “if we do not sign up to it by Christmas, we will be out of Europol on 1 May 2017. If we do sign it, that in effect will give us the period of the Article 50 negotiations to work out how we conduct our work in the European context going forward.”⁵² In their view, the UK would also be in stronger position to negotiate on other priorities—such as the EAW or SIS II—“if we are still members of Europol”.⁵³
49. For its part, the European Commission has indicated that it very much welcomes the Government’s announcement that the United Kingdom would

47 Regulation 2016/794, 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, [OJ L 135/53](#) (24 May 2016)

48 European Union Committee, *The UK opt-in to the Europol Regulation* (2nd Report of Session 2013–14, HL Paper 16)

49 Letter from Brandon Lewis MP, Minister of State for Policing and the Fire Service to Lord Boswell of Aynho, Chairman of the European Union Select Committee, House of Lords, 14 November 2016: <http://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/Europol-Opt-in%20-14-nov-letter.pdf>

50 Cabinet Office, Explanatory Memorandum on the UK Government’s intention to opt in to Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (November 2016), para 17: http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/11/EM_Europol_Opt_in.pdf [accessed 7 December 2016]

51 *Ibid.* para 19

52 [Q 11](#)

53 [Q 18](#)

look to exercise its opt-in.⁵⁴ Sir Julian King, Commissioner for the Security Union, added that “the UK’s continued engagement in Europol as an agency in all its facets and its information systems is, I believe, good for the UK and good for everybody engaged”.⁵⁵

50. **We welcome the Government’s decision to opt into the new Europol Regulation. In addition to the substantive reasons we gave in our 2013 report for recommending that the Government should opt into the draft Europol Regulation, the UK’s forthcoming exit from the EU means there is now an additional, strategic value in remaining a full member of Europol and its Management Board during a period when the modalities of the UK’s future partnership with the EU on police and security matters are under negotiation.**

The UK’s future relationship with Europol

51. The UK law enforcement community continues to attach a very high priority to UK membership of Europol. The National Crime Agency (NCA), who are leading on Brexit for UK law enforcement, listed a UK opt-in to the new Europol Regulation as their most immediate priority—“the alligator nearest the boat”.⁵⁶ They also identified “membership of Europol or an alternative arrangement” as their most important priority among all the JHA measures that the UK would be poised to leave behind upon exiting the EU.⁵⁷ The Metropolitan Police Service’s National Coordinator for Counter-Terrorism Policing, Helen Ball, told us that “if we were to exit Europol without replacing it with at least as good a system for information and intelligence sharing and working together as currently exists, it would be a risk I would be concerned about”.⁵⁸
52. In May 2016, the Government noted⁵⁹ that although certain non-EU countries such as the US, Norway and Albania have agreements with Europol to allow them to work together, the process to conclude such agreements “is lengthy” and “measured in years, not months”. It also highlighted a number of “important differences” between what Europol provides to third country operational cooperation partners with which it has agreements, and what it provides to full EU members.⁶⁰
53. Sir Julian King noted that after the new Europol Regulation comes into effect in 2017, there will be a shift in how Europol’s relationships with third countries work, and that future agreements between Europol and third countries will be formal international agreements, negotiated, from the EU side, on the basis of the powers in Article 218 TFEU.⁶¹
54. Bill Hughes, former Director-General of the Serious Organised Crime Agency (SOCA), explained that Europol had two types of non-EU partners: “One is strategic co-operation partners, which include Russia, Turkey and Ukraine. There is no transmission of personal data, for obvious reasons,

54 Oral evidence on The Security Union, 15 November 2016 (Session 2016–17), [Q 6](#), (Sir Julian King).

55 *Ibid.*

56 [Q 18](#). See also [Q 11](#)

57 [Q 11](#)

58 [Q 48](#)

59 HM Government, *The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.17

60 *Ibid.*

61 Oral evidence on The Security Union, 15 November 2016 (Session 2016–17), [Q 7](#) and [Q 10](#), (Sir Julian King).

and there are limits and constraints around that.” The second category was operational co-operation partners, including the United States, Australia, Canada, Colombia, Norway, Switzerland, and most countries in the western Balkans: “Operational co-operation partners are part of the club but they are not in the top tier. They get certain access to information and intelligence and the ability to share that, but they are not on the management board and have no say.”⁶²

55. The NCA took the view that the types of arrangements that have thus far been made to allow third countries to cooperate with Europol from outside the EU would not be sufficient to meet the UK’s needs. David Armond, Deputy Director-General, told us: “I do not think that we can look at the arrangements for Norway, Iceland or other partners and say that would do for us”.⁶³
56. The NCA emphasised that if the UK opted for an operational partnership with Europol, it would lose access to the Europol Information System.⁶⁴ The Europol Information System (EIS) pools information on suspected and convicted criminals and terrorists from across the EU. In the absence of access to the EIS, the NCA told us: “All our inquiries would have to be made on a law enforcement to law enforcement basis through liaison, rather than us having direct access to the system. That would be a major issue.” They also warned that operational partners like the United States “do not have any influence in terms of what Europol does or how it does it.”⁶⁵
57. Dr Paul Swallow agreed that non-EU members were “definitely a second-league tier”, while Lord Kirkhope of Harrogate told us that “at the end of the day, those third-country agreements do not provide for the same level of co-operation or access”.⁶⁶
58. Lord Kirkhope drew our attention to the length of time it might take to agree a new framework for the UK’s future relationship with Europol: “It has taken five to seven years to negotiate any Europol co-operation agreements ... it takes even longer when we are dealing with the exchange of data—the actual specifics—where nine to 12 years is an average”.⁶⁷
59. He also highlighted the position of Denmark, which by virtue of its block opt-out does not participate in the adoption or application of any post-Lisbon JHA legislation, including Europol: “A short time later it is asking, ‘Please can we come back to the Europol arrangements?’ The Commission’s latest comment to Denmark is that a third-country co-operation agreement will not be on the table for it for the foreseeable future.”⁶⁸ The Government told us that they would be “looking at what happens with Denmark with great interest”.⁶⁹

62 [Q 20](#)

63 [Q 13](#)

64 [Q 11](#)

65 *Ibid.*

66 [Q 2](#), [Q 20](#)

67 [Q 20](#)

68 *Ibid.* As this report went to press, there were reports that the Commission had put forward a proposal for consideration by the Danish Government, ‘EU offers Denmark backdoor to Europol’, *EU Observer* (8 December 2016): <https://euobserver.com/justice/136200> [accessed 9 December 2016]

69 [Q 28](#)

60. The NCA proposed that the UK “should not look at precedent; we should look at something more than that”. As this would be the first time that a Member State had left the European Union, the UK “should be aiming for access and a partnership that is different from and closer than currently exists for any other non-member state”.⁷⁰
61. The Government seemed willing to entertain this proposition, emphasising that, as the UK leaves, it will be “a known partner, and a known commodity to our partners in Europol and we have a relationship with them that has been built up through our years of being full members of Europol and the EU”. In the Government’s view, this meant that the UK had a different starting point from which to open negotiations. As a result, “it is very right, and very possible, for us to have a bespoke solution”.⁷¹
62. Other witnesses, however, pointed to the practical impediments to devising something close to full membership of Europol for the UK after it leaves the EU. Lord Kirkhope warned that the “big problem” would be that Europol was accountable to EU institutions, “including acceptance of the competence—in interpretation terms at least—of the ECJ”. At the same time, “in many people’s minds, one of the great advantages of getting out of the EU is that we get rid of the ECJ and its competence and control over us”.⁷² He questioned whether it would be “feasible or practical” to think that the other side in the negotiation would be prepared to discard the accountability and the controls that they were obliged to have now—to the Commission, the CJEU and the Parliament: “Are they going to abandon those to do a deal with us which allows us full access and confidence within the organisations and fully to serve within them?”
63. Professor Steve Peers, of the University of Essex, drew our attention to a second practical constraint, namely that the UK’s data protection framework would have to be assessed if the UK wished to participate in Europol as a third country. The UK would have to make sure that its data protection standards were “roughly equivalent” to European Union standards—a requirement that the EU “cannot easily negotiate away”, given that high levels of data protection are enshrined in the EU’s Charter of Fundamental Rights.⁷³ This constraint would continue to apply in the future, as EU law was amended, even if the UK were no longer at the table to discuss such changes.⁷⁴ Sir Julian King, Commissioner for the Security Union, also told us that in order to secure an operational agreement with Europol in future, “the Commission will have to certify that the third country has the right levels of data protection”.⁷⁵
64. On the other side of the equation, witnesses identified two main factors that were likely to count in the UK’s favour in any negotiation, namely the contribution that the UK has made and continues to make to Europol, and the changing nature of the threat from terrorism and organised crime.
65. Bill Hughes, former Director-General of SOCA, suggested that the EU side in any negotiation would be aware of “how much information the UK

70 [Q 11](#)

71 [Q 28](#)

72 [Q 21](#)

73 [Q 2](#)

74 [Q 8](#), [Q 10](#)

75 Oral evidence on The Security Union, 15 November 2016 (Session 2016–17), [Q 7](#), (Sir Julian King)

contributes, and how valuable that is”.⁷⁶ He noted that the UK was using as much as 40% of the capacity of the Secure Information Exchange Network Application (SIENA)—the main conduit for all operational information passing to and through Europol.⁷⁷ The NCA pointed out that the UK was also “the second-largest contributor in Europe” to the Europol Information System, and that it led on “four or five” of the 13 EMPACT⁷⁸ projects, which coordinate actions by Member States and EU organisations against threats identified by Europol in its Serious and Organised Crime Threat Assessment.⁷⁹

66. Bill Hughes was also hopeful that decision-makers in Europe would be mindful of the changing nature of the threat:

“Crime will continue and it is getting worse. Cybercrime is becoming a major issue; human trafficking and slavery are terrible issues. Many of them start beyond our borders but impact on the UK. They also start beyond the EU’s borders but impact on the EU.”⁸⁰

67. Helen Ball, the Metropolitan Police Service’s Senior National Coordinator for Counter-Terrorism Policing, told us that the direction of travel had been towards more cooperation rather than less: “As we saw attacks come closer to home in Europe, we were already working to increase our relationships with European police forces, to work more jointly together and share more information”.⁸¹

Conclusions and recommendations

68. **Our witnesses were unequivocal in identifying the UK’s future relationship with Europol as a critical priority. They also made clear that an operational agreement with Europol akin to those that other third countries have negotiated would not be sufficient to meet the UK’s needs. The Government will therefore need to devise and secure agreement for an arrangement that protects the capabilities upon which UK law enforcement has come to rely, and which goes further than the operational agreements with Europol that other third countries have been able to reach thus far.**
69. **Bearing in mind the contribution the UK makes to Europol, and the mutual benefit to be derived from a pragmatic solution, we regard this as a legitimate objective for the UK to pursue in negotiations with the EU-27. Achieving it, however, may be problematic: there seems likely to be a tension with other policy goals on both sides, notably in regard to the role of the supranational EU institutions. To the extent that Europol remains accountable to these institutions—and we note that the direction of travel in the new Regulation is towards enhancing that accountability—this could present a significant practical hurdle to sustaining the level of cooperation that might otherwise be advantageous to both sides. In 2014, the Government said it would “never put politics before the protection of the British**

76 [Q 22](#)

77 [Q 19](#)

78 European Multidisciplinary Platform against Criminal Threats.

79 [Q 11](#)

80 [Q 23](#)

81 [Q 38](#)

public.”⁸² In our view, that calculation has not changed, and we urge the Government to work towards a pragmatic solution that protects the safety of the people of the United Kingdom.

Eurojust

70. Eurojust is an EU agency tasked with supporting and strengthening co-ordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States. This can involve facilitating requests for mutual legal assistance (MLA), facilitating the execution of European Arrest Warrants, bringing together national authorities in co-ordination meetings to agree an approach to specific cases, and providing legal, technical and financial support to Joint Investigation Teams (JITs).⁸³
71. Eurojust’s headquarters are in The Hague, in The Netherlands, where 28 seconded National Members (one from each Member State) form the College of Eurojust, which is responsible for the organisation and operation of the agency. The College elects a President, currently the National Member for Belgium. Eurojust operates through National Desks, which are small teams of representatives from each Member State, headed by the National Member. National Desks function as single points of contact between the 28 Member States to facilitate multilateral cooperation.
72. Eurojust was established by a 2002 Council Decision, which was amended in 2003 and 2009.⁸⁴ All three Council Decisions were among the 35 pre-Lisbon police and criminal justice measures that the UK re-joined in December 2014. The arguments for UK membership of Eurojust were rehearsed and tested in detail at the time of the 2014 decision, including in reports from this Committee and in the Impact Assessments published in the Government’s July 2013 and July 2014 Command Papers.⁸⁵
73. In July 2013 the European Commission published a proposal for a new Regulation concerning Eurojust, which would repeal and replace the existing Eurojust Council Decisions.⁸⁶ It also published proposals for the establishment of a European Public Prosecutor’s Office (EPPO) tasked with

82 HC Deb, 10 November 2014, [col 1224](#)

83 Joint Investigation Teams are a tool in their own right, and consist of judicial and police authorities from at least two Member States, who conduct a specific cross-border criminal investigation for a limited period. Council Framework Decision 2002/465/JHA on Joint Investigation Teams was also among the 35 pre-Lisbon police and criminal justice measures that the UK re-joined in December 2014.

84 Council Decision 2002/187/JHA, 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [OJ L 063](#) (6 March 2002) and Council Decision 2009/426/JHA, 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, [OJ L 138/14](#) (4 June 2009). See also Council Decision 2003/659/JHA, 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, [OJ L 245](#) (29 September 2003)

85 European Union Committee, *EU police and criminal justice measures: The UK’s 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159); European Union Committee, *Follow-up report on EU police and criminal justice measures: The UK’s 2014 opt-out decision* (5th Report, Session 2013–14, HL Paper 69); HM Government, *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, Cm 8671, July 2013: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [01 December 2016]; HM Government, *Decision pursuant to Article 10(5) of Protocol 36 to the Treaty on the Functioning of the European Union*, July 2014, Cm 8897: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [accessed 1 December 2016]

86 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), [COM \(2013\) 535](#)

prosecuting crimes against the EU's financial interests.⁸⁷ Against the advice of this Committee, the UK did not opt into the proposal reforming Eurojust.⁸⁸ The UK also did not opt into the proposed EPPO.⁸⁹ Neither proposal has yet been adopted by the remaining Member States.

The UK's future relationship with Eurojust

74. The Crown Prosecution Service (CPS) told us they were heavy users of Eurojust, listing it among their top priorities for any forthcoming negotiation on Brexit.⁹⁰ Alison Saunders, the Director of Public Prosecutions, highlighted the ability to do things in real time, and to work multilaterally rather than bilaterally, as the most useful features of the agency: "It means that we can deal with cases in real time and decide who has what evidence, how we will work together, whether we have a Joint Investigation Team, and who takes priority in the investigation." She added that being in a neutral space, with translation, provided "real-time flexibility and the ability to talk to a number of member states immediately rather than doing it bilaterally".⁹¹ Her comments were endorsed by the Crown Office and Procurator Fiscal Service (COPFS), which highlighted Eurojust's role in convening problem-solving or operationally thematic seminars.⁹² Stephen Rodhouse, representing the National Police Chiefs' Council and the Metropolitan Police Service, also described Eurojust as a "hugely valuable facility for bringing member states together on high profile investigations where facilities such as translation and the access to legal advice were hugely significant".⁹³
75. The CPS and National Crime Agency both emphasised the significance of Joint Investigation Teams (JITs) to the UK. The Director of Public Prosecutions explained that the UK currently participated in 31 JITs—making the UK one of the biggest users of the facility—and told us that the CPS considered them "absolutely vital".⁹⁴ David Armond, Deputy Director-General of the National Crime Agency, described JITs as "immensely important and successful", explaining that a JIT might be pulled together "specifically for an investigation on an organised crime group which is committing crimes that affect seven jurisdictions ... the best outcome might be the prosecution of one element in Spain and some arrests and prosecutions in the UK, and maybe some in America". He noted that the UK had also established JITs for thematic reasons, in order to increase the impetus and level of work against a new crime threat.⁹⁵
76. Eurojust has co-operation agreements with a number of third countries, and Liaison Prosecutors from the United States of America, Switzerland and Norway. Alison Saunders told us that Liaison Prosecutors were "able to engage in many instances in much the same way." She noted, however, that Liaison Prosecutors were not part of the Eurojust management board,

87 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, [COM \(2013\) 534](#)

88 European Union Select Committee, *The Eurojust Regulation: Should the UK Opt-in?* (4th Report, Session 2013–14, HL Paper 66)

89 By virtue of Section 6(5)(c) of the EU Act 2011, the UK's participation in the EPPO would require a referendum and an Act of Parliament.

90 [Q 50](#)

91 [Q 51](#)

92 Written evidence from the Crown Office and Procurator Fiscal Service ([FSP0003](#)), p 3

93 [Q 14](#)

94 [QQ 50–51](#)

95 [Q 14](#)

and therefore could not influence the strategic direction of the agency. More importantly from the CPS' perspective, they do not have access to the Eurojust case management system, which currently allows the CPS "to cross-check any cases or investigations that we have against the Eurojust database" in order to establish whether to engage other Member States.⁹⁶ Stephen Rodhouse also warned that a future bilateral or *ad hoc* arrangement would probably be "suboptimal to the arrangement we have in place".⁹⁷

77. Lord Kirkhope drew our attention to what it might mean in practice to lose influence on the strategic direction of policy in this area, noting that the UK had "consistently opposed" the establishment of a European Public Prosecutor, with considerable success. He anticipated that "if we are not members of the EU and not subject to Eurojust in any way, we will have no power over what is put in place".⁹⁸ The Crown Office and Procurator Fiscal Service warned that if the UK is no longer at the decision-making table of institutions such as Eurojust and so involved in the framing of EU justice legislation, "new instruments are likely over time to reflect the civilian systems of mainland Europe so that even if UK participation in a particular arrangement is legally or politically possible, there may be an absence of 'fit' with the UK's adversarial systems".⁹⁹
78. The Government told us that it was "exploring all the options for Eurojust once we leave the EU." It highlighted the Norwegian, Swiss and American precedents for posting Liaison Prosecutors to Eurojust without being members of the EU, noting that "these kinds of arrangements can be put in place". It also emphasised that a lot of work "goes on at bilateral level", and that Eurojust, though important and useful, "is not the only thing going on in this area".¹⁰⁰
79. The Director of Public Prosecutions was less sanguine, noting that although under bilateral arrangements, the UK had liaison prosecutors in a number of European countries, "they do not do what Eurojust does, which is to facilitate the multi-national co-ordination that is so important".¹⁰¹ She also emphasised that the UK had prosecutors in some European countries but not all: "Nor could we because there would be a cost issue in putting a prosecutor in each of the 27 Member States and it would be quite difficult".¹⁰²
80. The Director of Public Prosecutions also expressed concern about the length of time it might take to reach an agreement similar to that from which Switzerland or the United States now benefit. She told us that Switzerland had started negotiations in 2008, but "put in a prosecutor only last year: 2015". Even third countries without liaison prosecutors had experienced protracted discussions—Liechtenstein and Moldova took five and six years respectively to negotiate their bilateral agreements with Eurojust. The DPP acknowledged that "all of them were in a different position from us, because they started out as non-Eurojust members", but emphasised that it was unclear how long a future negotiation with the UK might take.¹⁰³

96 [Q 51](#)

97 [Q 14](#)

98 [Q 20](#)

99 Written evidence from the Crown Office and Procurator Fiscal Service ([FSP0003](#)), pp 3–4

100 [Q 28](#)

101 [Q 53](#)

102 [Q 62](#)

103 [QQ 51–52](#)

81. The Director of Public Prosecutions was less concerned about future access to JITs, noting that “you do not necessarily have to be member of Eurojust to have Joint Investigation Teams”, and that although there might be a need to review and adapt domestic legislation and revisit funding, “it could be done”.¹⁰⁴ The NCA also anticipated that the UK would be able to continue working in Joint Investigation Teams as a third country, even if it were “slightly more complicated” than at present.¹⁰⁵ Professor Peers told us that there was a framework already for Norway, Iceland and Switzerland, and that it would not be “particularly surprising or outrageous” to suggest the UK could participate on a similar basis.¹⁰⁶

Conclusions and recommendations

82. **The timeliness and effectiveness of the work of the Crown Prosecution Service rely on the ability to work multilaterally and in real time with partners in the EU—a capability currently provided by the UK’s membership of Eurojust. A continuing close partnership with Eurojust is therefore likely to be essential.**
83. **A third-country agreement with Eurojust involving a Liaison Prosecutor, for which precedents already exist, may come closer to meeting the UK’s needs than the equivalent precedents for third country-agreements with Europol. This may therefore be a fruitful avenue for the Government to explore in the forthcoming negotiation. Ideally any such agreement would provide for closer cooperation than has thus far been available to other third countries—for example by providing access to the Eurojust Case Management System. As with Europol, however, the role of the supranational EU institutions in providing accountability and oversight for Eurojust’s activities may present a political obstacle to forging the sort of partnership that would best meet the UK’s operational needs.**
84. **We share the Director of Public Prosecution’s concerns regarding the length of time it could take to negotiate an agreement with Eurojust, and the importance of avoiding an operational gap.**
85. **Our witnesses were optimistic about the prospect of retaining access to Joint Investigation Teams, based on the model that already exists for certain third countries to participate in JITs with the agreement of all other participants. We recommend that the Government explores the practical steps that would be needed to allow the UK to benefit from a similar arrangement, with a view to pursuing that objective in a future negotiation.**

104 [Q 54](#)

105 [Q 14](#)

106 [Q 4](#)

CHAPTER 3: DATA-SHARING FOR LAW ENFORCEMENT PURPOSES

Data-sharing mechanisms

86. The UK currently has, or shortly expects to have, access to the most significant EU databases and agreements facilitating data-sharing among EU law enforcement agencies. Our witnesses emphasised that access to the information and intelligence currently sourced through those channels was vital for UK law enforcement. We were told that it was “mission-critical in protecting both the citizens of the UK and the citizens of Europe that the UK policing effort is able to access that information”.¹⁰⁷ In the sections that follow, we examine the data-sharing tools that witnesses identified as particular priorities.

Second Generation Schengen Information System

87. The Second Generation Schengen Information System (SIS II) is a database of ‘real-time’ alerts about individuals and objects of interest to EU law enforcement agencies. SIS II contains information on 35,000 people wanted under a European Arrest Warrant, as well as alerts on suspected foreign fighters, missing people, and alerts on people and objects of interest to EU law enforcement agencies.¹⁰⁸ By allowing participating countries to share and receive law enforcement alerts in real time, SIS II helps facilitate cooperation for law enforcement and border control purposes. Each country participating in SIS II has a so-called SIRENE (Supplementary Information Request at the National Entry) Bureau, to provide supplementary information on alerts and coordinate activities in relation to SIS II alerts.
88. The UK connected to SIS II in April 2015. Between then and 31 March 2016, over 6,400 alerts issued by other participating countries received hits in the UK, allowing UK law enforcement agencies to take appropriate action, and over 6,600 UK-issued alerts received hits in other participating countries. In March 2016, 809 people were flagged on SIS II to the UK—including 192 wanted people, 96 missing people, and 358 people believed to be involved in serious organised crime. SIS II also helps participating countries tackle the terror threat from foreign fighters from across the EU returning from Syria and Iraq, tracking them as they travel around Europe. In April 2016 the UK received 25 hits on alerts issued by other participating countries in relation to individuals who could pose a risk to national security.¹⁰⁹
89. Our witnesses were emphatic about the operational significance of access to SIS II. The National Crime Agency identified it as one of their top three priorities for the forthcoming negotiations on the UK’s exit from the EU, describing it as “an absolute game-changer for the UK”.¹¹⁰ The NCA’s Deputy Director-General David Armond explained that SIS II was directly accessible by police officers on the street: “It is linked to the Police National Computer so that officers can stop a car with French plates and Hungarian

107 Helen Ball, Senior National Coordinator for Counter Terrorism Policing, Metropolitan Police Service, [Q 39](#)

108 HM Government, *The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues*

109 *Ibid.*

110 [Q 11](#)

nationals in it, undertake checks and find details of stolen property, wanted people, alerts and the like.”¹¹¹

90. The National Police Chiefs’ Council (NPCC) agreed that access to SIS II was “essential for mainstream policing”, noting that “the ability to understand whether somebody is wanted in another country, whether they are missing, whether the vehicle they are driving is stolen and so on” was critical in allowing officers on the street to make decisions (for instance in relation to custody) to safeguard the welfare of people across the country.¹¹²
91. Both the NCA and the NPCC also drew our attention to the link between SIS II and the European Arrest Warrant (EAW). SIS II was said to have “increased exponentially” the number of EAWs for subjects wanted in the UK, leading to a 25% increase in the number of EAWs executed and people arrested in the year since it became available.¹¹³ Alison Saunders, Director of Public Prosecutions, highlighted cases when the Crown Prosecution Service “did not really know exactly which country an individual was in “where SIS II enabled them to “put out a European Arrest Warrant, find somebody and bring them back very quickly”.¹¹⁴ She cited the case of the murder of an elderly couple, in which the suspect’s car was found by the ferry terminal at Dover, and the suspect was therefore believed to be going to France: “Because we put the EAW out on the SIS II database, we found out days later that he was in Luxembourg. There was no intelligence to tell us he was there.” Ms Saunders suggested that the CPS “might have missed that had we not had the availability of both the EAW and the SIS II database”.¹¹⁵ The Crown Office and Procurator Fiscal Service endorsed her comments, describing SIS II as an “important tool, not only from the requesting state’s point of view in having an accused or convicted person returned to them to face justice, but also because it reduces the likelihood of significant and possibly dangerous criminals slipping through the fingers of law enforcement”.¹¹⁶
92. The NCA emphasised that the intelligence agencies “are as concerned about the loss of SIS II as we are”, explaining that “there is a facility known as Article 36(3) which allows us to put on discreet alerts in relation to our CT [counter-terrorism] suspects”. SIS II was therefore said to play an important part in tracking people under surveillance by intelligence agencies—people who might be seeking to cause significant harm by means of terrorist attacks.¹¹⁷
93. Lord Kirkhope also described SIS II as “absolutely crucial” to intelligence-sharing, and warned of the risk that without it “we will end up being a little island off the continent with no access to information and intelligence about who is likely to come to us and, more importantly, about what happens to our criminals when they go across to the continent”.¹¹⁸

European Criminal Records Information System

94. The European Criminal Records Information System (ECRIS) has been in operation since April 2012, and provides a secure electronic system for the

111 [Q 11](#)

112 [Q 15](#)

113 [Q 11](#), [Q 15](#)

114 [Q 50](#)

115 [Q 55](#)

116 Written evidence from the Crown Office and Procurator Fiscal Service ([ESP0003](#)), p 2

117 [Q 15](#)

118 [Q 19](#)

exchange of information on convictions between EU Member States. When a Member State convicts a national of another Member State, it is obliged to inform that country through ECRIS. Member States are also required to respond to requests for previous convictions for criminal proceedings. Criminal records information obtained through ECRIS means that when UK courts are making sentencing decisions, they can take into account previous offending behaviour in other EU Member States. ECRIS may also be used for other purposes such as employment vetting and immigration matters.¹¹⁹ No non-EU country currently has access to ECRIS.

95. Speaking on behalf of the National Police Chiefs' Council (NPCC) and the Metropolitan Police Service, Deputy Assistant Commissioner Stephen Rodhouse described access to criminal records data from across the EU as "critical to volume policing", and suggested that while all EU police and criminal justice measures were important, he "would prioritise the criminal exchange data as hugely significant". He explained that ECRIS "can give very speedy returns when we inquire into the criminal background of somebody that we have in custody", which in turn allowed "effective decisions to be taken about the risk that they pose and the opportunity of an immigration solution to having a risky offender in the UK". He noted that in 2015, UK requests for overseas criminal convictions data revealed 178 cases of a conviction for rape abroad and 177 for murder. This allowed that information "to be put on the Police National Computer and to be at the fingertips of officers all over the country". He warned that in cases where that information was not available, "it presents an ongoing risk to the UK".¹²⁰
96. The Crown Office and Procurator Fiscal Service emphasised that being in receipt of criminal history data at the point of considering a case "is essential to ensure that the case is properly prosecuted in the public interest", and can also inform risk assessments around bail.¹²¹
97. The NCA ranked ECRIS fourth among their priorities, describing it as "a very important tool", and warning that the UK would lose access to that information immediately if it left Europol. The NCA also drew our attention to the fact that ECRIS was "important not only in terms of people who have been arrested or who we have been making inquiries about but in identifying people who might be offered work with children in the UK".¹²²

Passenger Name Records

98. Advance Passenger Information (API) data are the data contained in the machine-readable zone of a travel document, such as the name of the passenger, their date of birth, nationality and passport number. In the United Kingdom, the UK Border Agency screens API data against watch-lists to allow early identification of persons of known interest for security, immigration, customs or law enforcement purposes. The obligation of carriers to transmit API data to border agencies is regulated by EU law under a 2004 Directive.¹²³

119 HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.30

120 [Q 11](#)

121 Written evidence from the Crown Office and Procurator Fiscal Service ([FSP0003](#)), p 2

122 [Q 11](#)

123 Council Directive 2004/82/EC, 29 April 2004 on the obligation of carriers to communicate passenger data, [OJ L 261/24](#) (6 August 2004)

99. Passenger Name Record (PNR) data include other information held by the carrier or collected by the carrier when a passenger makes a booking, for example how travel was booked and for whom, contact details, and travel itinerary. In April 2016 the European Union adopted a Directive obliging air carriers to provide Member States' authorities with PNR data for flights entering or departing the EU, and also including provisions on selected intra-EU flights.¹²⁴ All EU Member States who participate in the measure¹²⁵ have indicated that they will make full use of the provisions relating to intra-EU flights. Countries outside the EU will normally require either a direct agreement with the EU or bilateral agreements with individual Member States in order to acquire PNR for flights originating there.
100. The UK Government said in May 2016 that it had made "consistent calls" for PNR legislation to be adopted by the EU, noting that in the absence of this EU agreement, it would have been possible for certain Member States to choose not to develop a capability to process PNR. This would have meant international investigations running into difficulties every time an individual assessed to pose a threat to public security travelled on from (or arrived from) that Member State. The Government observed: "This could have made their true destination or origin untraceable."¹²⁶
101. Helen Ball, the Metropolitan Police Service's Senior National Coordinator for Counter-Terrorism Policing, identified PNR data as "very valuable for protecting people", and therefore of particular interest to CT policing.¹²⁷ The information contained in Passenger Name Records, combined with the powers of various agencies at UK borders, was "powerful in preventing the travel of people who are would-be terrorists, in spotting people who might be returning and might be a threat and, crucially, in protecting vulnerable and manipulated people".¹²⁸
102. The NCA also listed Passenger Name Record data among their priorities, describing it as "incredibly important for the security of our border". David Armond, Deputy Director-General, explained that, while the UK had already been accessing PNR data from key partners around the world for border security purposes, "until this measure, some European nations were not providing us with this data—Germany being a case in point". He added that PNR data were important for the NCA's work at the border and at the National Border Targeting Centre, providing not just the details of the subject but addresses, bank details, telephone numbers, "and a whole host of other data that can be really important when we are checking against criminal records and profiling those people who might be a threat to the UK".¹²⁹

124 Directive (EU) 2016/681, 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, [OJ L 119/132](#) (4 May 2016). See also the European Union Home Affairs Sub-Committee's report on the UK opt-in decision in respect of that Directive: European Union Committee, *The United Kingdom opt-in to the Passenger Name Record Directive* (11th Report, Session 2010–12, HL Paper 113)

125 Denmark does not participate in the measure.

126 HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, paras 1.19–1.20

127 [Q 38](#)

128 [Q 42](#)

129 [Q 11](#)

Prüm

103. The Prüm Treaty was signed by Austria, Belgium, France, Germany Luxembourg, the Netherlands and Spain in May 2005. The aim of the Treaty was to improve “cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration”. It sought to achieve this by improving exchange of information, particularly through reciprocal access to national databases containing DNA profiles, fingerprints and vehicle registration data.
104. In 2008 the Council of Ministers adopted two Decisions (the Prüm Decisions) incorporating most of the Prüm Treaty’s provisions into EU law.¹³⁰ The Prüm Decisions require Member States to allow the reciprocal searching of each others’ databases for DNA profiles (required in 15 minutes), Vehicle Registration Data (required in 10 seconds) and fingerprints (required in 24 hours). Searches of DNA profiles and fingerprints are on a ‘hit/no hit’ basis; a hit can be followed by a request for the personal details of the person concerned. In 2010, two non-EU countries—Norway and Iceland—concluded agreements with the EU to access Prüm, but neither agreement has yet entered into force.
105. The Prüm Decisions were not included in the list of 35 pre-Lisbon police and criminal justice measures that the Government indicated it would seek to re-join after exercising the UK’s block opt-out under Protocol 36 to the Lisbon Treaty.¹³¹ The Prüm Decisions therefore ceased to apply to the UK on 1 December 2014, the date on which the UK’s block opt-out took effect. This approach was reflected in a transitional Council Decision adopted in November 2014.¹³² The Government did, however, indicate at that time that it would “undertake a full business and implementation case in order to assess the merits and practical benefits of the United Kingdom re-joining the Prüm Decisions”.
106. The Government published a Command Paper on 26 November 2015 analysing the options open to the United Kingdom (to maintain the status quo; to re-join the Prüm Decisions; or to develop some alternative mechanism for police cooperation and data sharing) and recommended that the UK re-join the Prüm Decisions.¹³³ We published a report endorsing the Government’s recommendation on 7 December, and later that month both Houses of Parliament passed motions supporting the Government’s intention

130 Council Decision 2008/615/JHA, 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, [OJ L 210/1](#) (6 August 2008) and Council Decision 2008/616/JHA, 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, [OJ L 210/12](#) (6 August 2008)

131 This was because the UK did not have the technical capability at the time, and did not wish to risk infringement proceedings, rather than because the Government objected in principle—see para 16 of this Committee’s 5th Report, Session 2015–16, *The United Kingdom’s participation in Prüm* December 2015.

132 Council Decision 2014/836/EU, 27 November 2014 determining certain consequential and transitional arrangements concerning the cessation of the participation of the United Kingdom of Great Britain and Northern Ireland in certain acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon, [OJ L 343/11](#) (28 November 2014)

133 HM Government, *Prüm Business and Implementation Case*, Cm 9149, November 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480129/prum_business_and_implementation_case.pdf

to re-join the Prüm Decisions.¹³⁴ The European Commission adopted a Decision confirming UK participation in May 2016.¹³⁵

107. The Government's Command Paper envisaged that Prüm would be phased in gradually, starting with a small-scale pilot in 2015 exchanging police DNA profiles with four other Member States, connecting to Prüm in 2017, and establishing a full connection by 2020. The Government has recently confirmed that it is continuing with implementation of Prüm, and is confident that data exchange will start to take place in 2017.¹³⁶
108. In May 2016, the Government indicated that "the ability to check speedily other countries' databases helps EU law enforcement agencies to connect crimes committed in different countries, and provides them with crucial information, for example on the identity of a person who left DNA at a crime scene". It suggested that it was "thanks to Prüm—and other co-operation and data exchange tools available to European countries" that the French and Belgian authorities were quickly able to identify Salah Abdeslam following the terrorist attacks in Paris in November 2015.¹³⁷ The Government also highlighted the small-scale pilot in 2015, from which the UK obtained 118 matches (from around 2,500 DNA profiles) covering offences such as rape, sexual assault, arson and burglary.¹³⁸
109. The National Crime Agency told us that they had not yet seen the full effect from Prüm, but that the pilot had sped up their ability to share hits from UK DNA datasets and fingerprint hits with other Member States: "That has made us feel that we should continue with it and get the whole of Europe involved because that would be very effective. If not, we have to fall back on an arrangement which exists through Interpol that is time-consuming, bureaucratic and nowhere near as effective for protecting the public."¹³⁹ Helen Ball, the Metropolitan Police Service's Senior National Coordinator for Counter-Terrorism Policing, also told us that police forces would want to continue to share biometric data, "and indeed increase our sharing, through Prüm".¹⁴⁰

Precedents for access from outside the EU

110. All countries with access to SIS II are either full EU Member States or are members of the Schengen border-free area (Norway, Iceland, Switzerland, and Liechtenstein). Noting that there were no precedents for a non-Schengen, non-EU country to be a member of SIS II, the NCA acknowledged that "if we are to continue to be a member of SIS, that will be a very different deal

134 European Union Select Committee, *The United Kingdom's participation in Prüm* (5th Report, Session 2015–16, HL Paper 66). The House of Commons debate and vote took place on 8 December 2015, see HC Deb 8 December 2015, [col 914](#). The House of Lords debate took place on 9 December 2015, see HL Deb, 9 December 2015, [col 1637](#).

135 Commission Decision (EU) 2016/809, 20 May 2016 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in certain acts of the Union in the field of police cooperation adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen acquis, [OJ L 132/105](#) (21 May 2016).

136 Letter from Brandon Lewis MP, Minister of State for Policing and Fire Services, to Lord Boswell of Aynho, Chairman of the House of Lords European Union Select Committee, 19 October 2016: <http://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/Implementation-of-Prum-19-Oct.pdf>

137 HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.22

138 *Ibid.* para 1.23

139 [Q 15](#)

140 [Q 47](#)

from one that anyone else has”.¹⁴¹ Professor Peers also pointed out that were the UK to seek continued access to SIS II, it would be “asking for something which is not normally given since we will not be joining Schengen”. He added that “you can ask for it, but it might be difficult”.¹⁴²

111. ECRIS is even more exclusive, since no non-EU country, including the Schengen countries, currently has access. In May 2016 the Government pointed out that the Schengen countries instead use the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters or informal Interpol channels, in order to exchange data on international criminal convictions. The Government warned that “this is more time-consuming, complex and expensive than the ECRIS procedure”, adding that “neither the UK’s existing bilateral agreements nor the Interpol channels require countries (by law) to supply data within specified timeframes—as they are required to do under ECRIS”.¹⁴³
112. Passenger Name Records are “slightly simpler”, according to Lord Kirkhope, because the EU already has agreements with other countries such as the United States and Canada. He nonetheless warned that “it may not be possible in future to access all the data, including specifically the intra-EU data for PNR”. Lord Kirkhope emphasised the importance of the intra-EU provisions, “because most people aiming to do us harm do not fly, for the sake of argument, from Istanbul to Heathrow; they would fly from Istanbul to Madrid and from Madrid to Stockholm, from Stockholm to Berlin and from Berlin to London”. He also drew our attention to the fact that the EU-Canada PNR agreement “has run into some obstacles; our old friend the ECJ has deliberated negatively on this”.¹⁴⁴
113. The Prüm Decisions fall somewhere in between: the only two non-EU countries to have secured access in principle are Norway and Iceland, both Schengen members. The Government has been at pains to emphasise, however, that while the Council Decision on the signature of the bilateral agreement makes reference to Norway and Iceland’s participation in the Schengen *acquis*, the agreement does not itself form part of the Schengen *acquis*. Rather, the EU has reached the agreement with Norway and Iceland through its power to enter into international agreements under Article 216 TFEU. The Government concludes that it has “no reason to believe that such an international agreement could not be reached with the UK after the UK leaves the EU”.¹⁴⁵ Professor Peers appeared to concur, observing that although Norway and Iceland are Schengen members, in the case of Prüm there was not the direct link with Schengen that applied in the case of the Schengen Information System. In his view, this meant that “the fact we are not in Schengen should not count against us in access to Prüm”.¹⁴⁶
114. Our witnesses also pointed out that there was a mutual interest in finding a way forward. Professor Peers suggested that if the UK found itself asking for

141 [Q 13](#)

142 [Q 5](#)

143 HM Government, *The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.33

144 [Q 22](#)

145 Letter from Rt Hon Brandon Lewis MP, Minister of State for Policing and the Fire Service to Sir William Cash MP, Chairman of the House of Commons European Scrutiny Committee, 20 October 2016: <http://www.parliament.uk/documents/commons-committees/european-scrutiny/MinCor%202016-17.pdf>

146 [Q 7](#)

something unprecedented, it could emphasise that there was an advantage to the EU-27 from the UK having access to, for instance, SIS II: “where they are sending us a lot of European Arrest Warrants ... it clearly makes it easier to find people, and there is a risk that we will be the kind of Brazil of Europe if we do not have access to these European databases”. He suggested that a similar argument could be made in respect of ECRIS, namely that “the usefulness of them having information on British criminal records, as well as the other way round, justifies access to the ECRIS system”.¹⁴⁷

115. Tony Bunyan made a similar point in respect of Prüm, observing that “it works both ways”:

“There will be some British nationals who are suspected of crimes on the continent, or people who have a prior history in Britain whom we have data on, and it is useful for them to be able to make the request to us; plus we have a huge DNA database which I am sure is very attractive to other Member States.”¹⁴⁸

116. The Government highlighted two further factors that could count in the UK’s favour in any negotiation, namely the UK’s status as a “known commodity” to the other Member States, and the UK’s track record of leadership in this area. The Minister of State for Police and the Fire Service, Rt Hon Brandon Lewis MP, emphasised that the UK would not be “coming to this as a completely fresh partner with whom the EU countries have no background and need to build a new relationship. We are a known commodity.” He noted that the UK had “led the way” on PNR, and was “acknowledged to have a highly developed system”. It also had “significant expertise for example on fingerprints” and was “very effective” in how it used both biometric information and fingerprints and DNA more generally: “we know that Member States value that”.¹⁴⁹
117. The Government therefore believed that the UK brought “an awful lot to the table in terms of our expertise and knowledge”, and that it would be able to draw on “a relationship that none of the others who have negotiated deals has had before and a known back record which is positive”. For these reasons, Mr Lewis argued, “the off-the-shelf presumptions around looking at what any other country has done are a false representation”. The UK should instead be looking for a “bespoke deal that is right for us and covers these things”.¹⁵⁰

Data protection

118. Compliance with EU data protection standards is likely to be a necessary pre-condition for exchanging data for law enforcement purposes. Professor Peers warned that the UK “will not have access to these databases unless we have equivalent laws to the European Union on data protection”. He suggested that the UK would “always, practically speaking, be required to maintain the same level of protection as the EU. After all, it is not just things like fingerprints and the rest of it; it is the entire online economy every time you buy something by credit card over the internet, so there is a real necessity for us to keep our rules at the same level.”¹⁵¹ Lord Kirkhope

147 [Q 5](#)

148 [Q 7](#)

149 [Q 29](#)

150 *Ibid.*

151 [Q 5](#) and [Q 7](#)

raised the same issue, suggesting that there could be mileage in “leveraging the collective influence of the non-EU third countries to co-operate, such as the United States and Canada, to make sure that we have equivalent levels of data protection and redress in the use of data”.¹⁵²

Conclusions and Recommendations

119. As recently as 2014 and 2015, the Government and Parliament judged that it would be in the national interest for the UK to participate in flagship EU data-sharing platforms such as the Second Generation Schengen Information System, the European Criminal Records Information System and the Prüm Decisions. We see no reason to change that assessment, not least as the threat from terrorism in particular has escalated further—and the EU has responded, for example by adopting the Passenger Name Record Directive earlier this year.
120. Access to EU law enforcement databases and data-sharing platforms is integral to day-to-day policing up and down the country. Were the UK to lose access to them upon leaving the EU, information that can currently be sourced in seconds or hours could take days or weeks to retrieve, delivering an abrupt shock to UK policing and posing a risk to the safety of the public. The UK therefore has a vital national interest in finding a way to sustain data-sharing for law enforcement purposes with the EU-27.
121. The starting point for the UK in seeking to negotiate access to these tools is different from that of any other third country, both because of the UK’s pre-existing relationship with the EU-27 and because of the value it can add through the data it has to offer. We therefore accept the Government’s view that the precedents for access to EU data-sharing tools by non-EU and non-Schengen members may fail to capture the range of options that could be available to the UK. With that in mind, we believe there is a strong case for the Government to pursue a bespoke solution and seek access to the full suite of data-sharing tools on which the UK currently relies, as well as those it is still planning for.
122. At the same time, we recognise that the two data-sharing tools that witnesses identified as the top priorities for the UK—SIS II and ECRIS—are also those for which there is no precedent for access by non-EU (ECRIS) or non-Schengen (SIS II) countries. The price of accessing these databases has thus far been membership of the EU and/or Schengen. Therefore a UK negotiating objective of seeking continued access to these vital tools would be particularly ambitious.
123. With regard to Passenger Name Records, the Government should explore the precedents for EU agreements with third countries. We note, however, that losing access to intra-EU PNR data would be a serious handicap, and that the CJEU’s ruling on the EU-Canada PNR agreement does not bode well for the EU’s ability to conclude similar agreements promptly and reliably in future.

152 [Q 22](#)

CHAPTER 4: CRIMINAL JUSTICE TOOLS

European Arrest Warrant

124. The European Arrest Warrant (EAW) facilitates the extradition of individuals between EU Member States to face prosecution for a crime of which they are accused, or to serve a prison sentence for an existing conviction.¹⁵³ Like a number of other EU criminal justice tools, it is based on the principle of ‘mutual recognition’ of judicial decisions between Member States, meaning that the receiving Member State recognises the decision of the authorities in the issuing Member State, avoiding the need to litigate through the domestic court system of the receiving Member State. The EAW was one of the 35 police and criminal justice measures that the UK re-joined in December 2014, following the exercise of the Protocol 36 block opt-out.
125. The arguments for and against the UK retaining the European Arrest Warrant were rehearsed in detail at the time of the 2014 decision, including in reports from this Committee and in the Impact Assessments published in the Government’s July 2013 and July 2014 Command Papers.¹⁵⁴ They were also addressed in the 2015 report of the *ad hoc* Extradition Law Committee.¹⁵⁵ This included consideration of the alternatives to the European Arrest Warrant, notably the prospect of reverting to the 1957 Council of Europe Convention on Extradition, which had been relied upon before the EAW came into existence. The then Home Secretary, Rt Hon Theresa May MP, argued in November 2014 that the Convention had “one crucial aspect that would cause us problems”, namely the length of time that extradition procedures would take, which “could undermine public safety”.¹⁵⁶ She also told the House of Commons that without the EAW, 22 Member States of the EU, including France, Germany and Spain, could refuse to extradite their own nationals to the UK, another “problematic” aspect of opting to revert to the Convention.¹⁵⁷
126. The Crown Prosecution Service still regarded the EAW as “absolutely vital”.¹⁵⁸ The National Crime Agency also listed the EAW among their top three priorities for the forthcoming negotiations on UK withdrawal from the EU.¹⁵⁹ Helen Ball, the Metropolitan Police Service’s Senior National Coordinator for Counter-Terrorism Policing, told us that on a scale of 1 to 10, she would currently rate the EAW “about an 8” in terms of its importance to CT policing: “it is an extremely valuable power to have”.¹⁶⁰

153 Council Framework Decision 2002/584/JHA, 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, [OJ L 190](#) (18 July 2002)

154 European Union Committee, [EU police and criminal justice measures: The UK’s 2014 opt-out decision](#) (13th Report, Session 2012–13, HL Paper 159); European Union Committee, [Follow-up report on EU police and criminal justice measures: The UK’s 2014 opt-out decision](#) (5th Report, Session 2013–14, HL Paper 69); HM Government, *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, Cm 8671, July 2013: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [accessed 01 December 2016]; HM Government, *Decision pursuant to Article 10(5) of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8897, July 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf [accessed 1 December 2016]

155 Select Committee on Extradition Law, [The European Arrest Warrant Opt-in](#) (1st Report, Session 2014–15, HL Paper 63)

156 HC Deb, 10 November 2014, [cols 1236–1237](#)

157 *Ibid.*

158 [Q 50](#)

159 [Q 11](#)

160 [Q 41](#)

127. Ms Ball also said that, looking to the future, she “would take it to 10”.¹⁶¹ The reason the EAW might increase in importance “relates to the way people might have left our local communities and travelled, and might return or go back to a European country. We would want to bring them to justice in the UK using our extraterritorial powers”. More generally, she emphasised that the UK “must not be in a position where a terrorist can think, ‘Okay, there is a safe haven where it is going to take a very long time for me to be extradited and come to justice’”. If the European Arrest Warrant were no longer available, “we would want something that meant that we could bring people to justice swiftly”.¹⁶²
128. The Crown Office and Procurator Fiscal Service told us there was “clear evidence that EAWs allow suspects to be surrendered far more speedily than traditional extradition processes”, and emphasised that this “benefits the public purse but more importantly is an important element in delivering justice and upholding the rights of both victims of crime and accused persons”. They warned that leaving the EAW and falling back on pre-existing arrangements “would be both retrograde and uncertain”.¹⁶³ The Law Society of Scotland suggested that the original reasons for opting into the EAW were “still sound”, and the UK Government should therefore “give careful consideration to an approach which avoids disengagement from the European Arrest Warrant process”.¹⁶⁴

Alternatives to the European Arrest Warrant: Norway and Iceland

129. Norway and Iceland, neither of whom is a member of the European Union, began negotiating an extradition agreement with the EU in 2001. The agreement was concluded in 2014, but has yet to enter into force.¹⁶⁵ The terms of that agreement are similar to the EAW, but it includes the option for Norway and Iceland on the one hand, and the EU on the other, to refuse to extradite their own nationals.¹⁶⁶ Helen Malcolm QC, of the Bar Council, noted that the EU’s agreement with Norway and Iceland contained a further discretionary reason for non-return, namely a political offence exception in addition to the discretion not to surrender own nationals, but that “other than that, word for word, it is the same as the EAW and the form at the end of it is worded identically to the EAW form”.¹⁶⁷
130. In May 2016 the Government suggested that “Norway and Iceland’s Schengen membership was key to securing even this level of agreement”, and that “there is no guarantee that the UK could secure a similar agreement outside the EU given that we are not a member of the Schengen border-free area”.¹⁶⁸
131. A number of our witnesses stressed the benefit of signing a single extradition treaty with the EU, as Norway and Iceland have done, were the UK to replace

¹⁶¹ [Q 41](#)

¹⁶² *Ibid.*

¹⁶³ Written Evidence from the Crown Office and Procurator Fiscal Service ([FSP0003](#)), p 2

¹⁶⁴ Written Evidence from Law Society of Scotland ([FSP0001](#)), p 9

¹⁶⁵ Council Decision 2014/835/EU, 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, [OJ L 343/1](#) (28 November 2014). Denmark is not party to this agreement.

¹⁶⁶ The CJEU’s September 2016 ruling in the Petruhhin case (Case C-182/15) is also relevant.

¹⁶⁷ [Q 8](#)

¹⁶⁸ HM Government, *The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.12

the EAW. The National Crime Agency told us that “it would seem to be optimal—second-order optimal—to have a treaty with the EU as opposed to going around and negotiating with 27 Member States”.¹⁶⁹ Helen Malcolm took the same view, for reasons of speed and simplicity.¹⁷⁰

132. Both Helen Malcolm and Professor Peers warned, however, that any negotiation process could be protracted.¹⁷¹ Professor Peers suggested that if the UK were “simply going to copy things”, negotiations could be relatively straightforward, but if it were to seek some exceptions from EU laws, “which Norway and Iceland did with extradition and the European Arrest Warrant and which we might want to do as well, it adds to the negotiation”.¹⁷²
133. The Crown Office and Procurator Fiscal Service also noted that while non-EU states had negotiated arrangements very similar to the EAW with the EU, “we see formidable obstacles to a similar arrangement being in place for the UK by 2019/20”. They also warned that on their understanding, “a necessary condition of these arrangements is that the non-EU states submit to the jurisdiction of the CJEU to adjudicate upon their operation”.¹⁷³

Alternatives to the European Arrest Warrant: the 1957 Council of Europe Convention

134. The Law Society of Scotland drew our attention to three main differences between the European Arrest Warrant and the 1957 Council of Europe Convention on Extradition (the 1957 Convention), which predates the EAW and which the UK could potentially fall back on:
 - The EAW can be described as a transaction between judicial authorities where the role of the executive is removed. By contrast, applications under the 1957 Convention would need to be made via diplomatic channels, with Secretary of State approval required at a number of points in the process.
 - The EAW framework imposes strict time limits at each stage of the process. The 1957 Convention does not impose the same time limits.
 - Article 6 of the 1957 Convention provides that states can refuse an extradition request for one of their own nationals. The EAW framework abolished the own nationals exception based on the concept of EU citizenship.¹⁷⁴
135. The Law Society of Scotland argued that reverting to the 1957 Convention would be likely to result in an increased burden for all agencies of the criminal justice system, who would have to “operate on a more cumbersome extradition process resulting in a high probability of delay and the possibility of less [sic] applications being made and processed”.¹⁷⁵ Professor Peers concurred: “It will mean not only transitional challenges, which we are getting already, but significantly fewer people extradited, taking significantly longer and quite possibly more expensive in each case.”¹⁷⁶

169 [Q 17](#)

170 [Q 8](#)

171 *Ibid.*

172 *Ibid.*

173 Written evidence from the Crown Office and Procurator Fiscal Service ([FSP0003](#)), p 2

174 Written evidence from Law Society of Scotland ([FSP0001](#)), p 8

175 Written evidence from Law Society of Scotland ([FSP0001](#)), p 7

176 [Q 8](#)

136. Alison Saunders, the Director of Public Prosecutions (DPP), described the EAW as “three times faster and four times less expensive” than the alternatives, and drew our attention to four main problems with operating under the 1957 Convention rather than the EAW: first, that a number of EU Member States had rescinded the domestic legislation underpinning the Convention when they adopted the EAW; second, the own nationals exemption; third, the increased cost; and fourth, the potential for delays.
137. On the first point, the National Crime Agency and Helen Malcolm QC pointed out that many countries that were part of the EAW had repealed legislation that allowed them to have an extradition arrangement with another Member State.¹⁷⁷ The Law Society of Scotland highlighted the Republic of Ireland, which had “repealed all pre-existing extradition arrangements with the UK prior to the adoption of the European Arrest Warrant”, and as a result would have to amend its domestic law to give effect to any new arrangement.¹⁷⁸
138. On the issue of own nationals, the DPP explained that the UK extradited around 1,000 people per year from the UK, fewer than 5 per cent of whom were UK nationals. It also sought the extradition of other EU Member States’ own nationals—the DPP cited around 150 cases where the EAW allowed EU citizens to be extradited to the UK from their home countries.¹⁷⁹ In November 2014 the then Home Secretary illustrated the significance of the own nationals exemption in the 1957 Convention by citing the case of a sexual assault on a 16-year-old girl in Hampshire in 2007, by a Greek national who then fled to Greece. A European Arrest Warrant was used to return him to the UK, and she told the House of Commons that “Without the arrest warrant, the individual who committed that crime would still be in Greece today.” She also noted that before the EAW came into force, Greece did not surrender its own nationals, having entered a reservation to that effect to the 1957 Convention.¹⁸⁰
139. As for delays, the DPP expressed concern that extraditions that currently take “days” under the EAW could take “months or years” under alternative arrangements.¹⁸¹ In May 2016, the Government pointed out that prior to 2004, fewer than 60 individuals a year were extradited from the UK,¹⁸² whereas since 2004 the EAW had enabled the UK to extradite over 7,000 individuals accused or convicted of a criminal offence to other EU Member States. Over 95% of these were extraditions of foreign nationals. Over the same period, the EAW had been used to extradite over 1,000 individuals to the UK.¹⁸³
140. The Law Society of Scotland pointed out that more prolonged extradition proceedings also incurred higher costs, especially in custody cases—costs that would fall on other EU Member States as well as the UK.¹⁸⁴

177 [Q 9](#) and [Q 17](#)

178 Written Evidence from Law Society of Scotland ([FSP0001](#)), p 9

179 [Q 55](#)

180 HC Deb, 10 November 2014, [col 1237](#)

181 [Q 55](#)

182 The figure of 60 includes all countries, not just EU Member States.

183 HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, para 1.11

184 Written Evidence from law Society of Scotland ([FSP0001](#)), p 7

Conclusions and Recommendations

141. **The European Arrest Warrant is a critical component of the UK’s law enforcement capabilities. We see no reason to revise our assessment—and that of the Government in 2014—that the 1957 Council of Europe Convention on Extradition cannot adequately substitute for the European Arrest Warrant. Accordingly, the most promising avenue for the Government to pursue may be to follow the precedent set by Norway and Iceland and seek a bilateral extradition agreement with the EU that mirrors the EAW’s provisions as far as possible. The length of time it has taken to implement that agreement—which was signed a decade ago but is still not in force—is, however, a cause for concern. An operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk.**
142. **Although the EU’s agreement with Norway and Iceland contains the option of applying the nationality exception in Article 7, it is not self-evident that the UK should seek to negotiate an equivalent provision in any future extradition agreement with the EU, bearing in mind the loophole that such an exemption can create. At the same time, it is conceivable that the EU-27 may not be willing to waive the right to refuse to extradite their own nationals outside the framework of the EAW and without the concept of EU citizenship that underpins it.**

Other criminal justice tools

143. In view of the accelerated timetable for producing our report, the scope of our inquiry has been limited to flagship measures facilitating police and security cooperation. There are nonetheless a small number of other, less well-known measures that our witnesses highlighted as worthy of inclusion among the UK’s priorities in any forthcoming negotiation. We list them below.
144. An overarching point made to us was that the 2014 process demonstrated that the 35 police and criminal justice measures the UK re-joined “could not be compartmentalised”, and were instead “part of a very complex network of arrangements, agreements, understandings and controls”. Lord Kirkhope described it as a “spider’s web”, and warned that “if you start to dismantle even some of the more minor things, you run the risk of affecting others which are actually more important”.¹⁸⁵ We agree, and note this is consistent with the nature of the measures we list below, which could be considered complementary to some of the higher-profile EU tools.
145. Professor Peers made a related point, arguing that in any future relationship with the EU, the UK should look to “strike a balance between effective investigations and prosecutions, which the EU instruments obviously point us towards, and sometimes facilitate, and human rights and civil liberties protection, which is built into some of them but could be stronger in others”.¹⁸⁶
146. On a similar note, the Law Society of Scotland drew our attention to the “roadmap” on procedural rights of suspects and accused persons adopted by the Council of Ministers in 2009, which sets out a legislative timetable for the adoption of measures to safeguard the right to a fair trial across

185 [Q 19](#), [Q 23](#)

186 [Q 1](#)

the European Union.¹⁸⁷ They pointed out that the UK had made “positive decisions” to opt into two of the five legislative measures proposed in that roadmap—the Directive on the Right to Interpretation and Translation in Criminal Proceedings and the Directive on Right to Information in Criminal Proceedings.¹⁸⁸ They therefore argued that the Government should avoid any “reversal or erosion” of those opt-in decisions, which could diminish the rights of the individual.¹⁸⁹

Mutual recognition of asset freezing and confiscation orders

147. The Framework Decision providing for mutual recognition of confiscation orders is one of the 35 pre-Lisbon police and criminal justice measures that the UK re-joined in December 2014.¹⁹⁰ The DPP, Alison Saunders, listed mutual recognition for proceeds of crime among the Crown Prosecution Service’s top four priorities in any forthcoming negotiation on a UK exit from the EU.¹⁹¹
148. She explained that although it was a fairly new measure, the CPS saw it as a “very important package” that allowed them to ask other EU member states to recognise UK orders and enforce them abroad, and *vice versa*. For example:

“If we have a confiscation order here and we know that the assets are in Spain, and our courts say that you can confiscate those assets and enforce it by forcing the sale of the property, it means that Spain will do that. Spain does not question our order.”¹⁹²
149. The CPS had already seen an increased number of requests from European countries asking them to freeze assets here, including from countries that had never made requests before, which Ms Saunders suggested might be linked to the process being “much simpler, much easier, and much quicker”.¹⁹³ She also highlighted that in cases where more than £10,000 was being recovered, the proceeds that were recovered were split 50/50, so that there was a slight financial incentive to co-operation.¹⁹⁴
150. Helen Ball, the Metropolitan Police Service’s Senior National Coordinator for Counter-Terrorism Policing, also told us she would prioritise “the ability to work together to freeze and seize people’s financial assets”. Helen Malcolm also identified this as a priority.¹⁹⁵

187 Resolution of the Council, 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [OJ C 295/1](#) (4 December 2009)

188 Directive 2010/64/EU, 20 October 2010 on the right to interpretation and translation in criminal proceedings, [OJ L 280/1](#) (26 October 2010), and Directive 2012/13/EU, 22 May 2012, on the right to information in criminal proceedings, [OJ L 142/1](#) (1 June 2012)

189 Written evidence from Law Society of Scotland ([FSP0001](#)), p 10

190 Council Framework Decision 2006/783/JHA, 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, [OJ L 328/59](#) (24 November 2006)

191 [Q 50](#)

192 [Q 59](#)

193 [Q 58](#)

194 *Ibid.*

195 [Q 38](#), [Q 1](#)

European Investigation Order

151. The National Crime Agency listed the European Investigation Order (EIO)—due to come into effect in May 2017—among its priorities.¹⁹⁶ The EIO is designed to replace a series of existing measures—including the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and the 2000 EU Convention on Mutual Assistance in Criminal Matters—with a single instrument intended to make cross-border investigations faster and more efficient.
152. Mutual Legal Assistance (MLA) is used to seek and provide assistance in gathering evidence for use in criminal cases. It is generally used to obtain material that cannot be obtained on a police cooperation basis, for example where a judicial order or other compulsory measure must be used to source the desired information or evidence. The EIO will enable the judicial authorities of one Member State to request that evidence be obtained in another Member State (the issuing Member State) for the purposes of a criminal investigation. In keeping with the principle of mutual recognition, a request under the EIO must in principle be accepted and acted upon by the receiving Member State without further formality, subject to a limited number of exceptions. The UK has opted into the EIO, which was adopted after the entry into force of the Lisbon Treaty.
153. David Armond, Deputy Director-General of the NCA, told us that the EIO would “make it much easier for our country to work with European neighbours on live investigations and on developing cross-jurisdictional prosecutions”.¹⁹⁷ Professor Peers also highlighted it as one of several post-Lisbon measures that the UK “might want to consider staying part of, perhaps in some amended form”. He suggested that the UK had opted into the measure because it would become the main means of transferring evidence between Member States, so if the UK were not party to it, “there was a risk that we would be at the back of the queue because it has deadlines in it to transfer evidence”. He added that the then Home Secretary may have been “thinking of the French or the Germans, or whoever, who would always answer each other’s requests and leave ours sitting in the back of the drawer somewhere”. Professor Peers took the view that this would “still be a risk”, and concluded that it would “still be useful to participate in that in some form”.¹⁹⁸

European Supervision Order

154. The European Supervision Order (ESO) is one of the pre-Lisbon police and criminal justice measures that the UK re-joined in December 2014.¹⁹⁹ In certain circumstances, the ESO allows a person accused of a crime in another EU Member State to return to their home Member State and be supervised there until their trial takes place in the Member State where the offence took place. It is designed to increase the likelihood that non-residents who are prosecuted in a different EU Member State will be granted bail rather than remanded in custody, both to avoid the prosecuting Member State bearing

196 Directive 2014/41/EU, 3 April 2014, regarding the European Investigation Order in criminal matters, [OJ L 130/1](#) (1 May 2014)

197 [Q 11](#)

198 [Q 1](#). The Law Society of Scotland also highlighted the EIO to us in their written evidence ([FSP0001](#)), p 10

199 Council Framework Decision 2009/829/JHA, 23 October 2009, on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, [OJ L 294/20](#) (11 November 2009)

the financial cost of the detention, but also to avoid other adverse impacts of pre-trial detention on individuals with no ties to the Member State in which they are to be tried.

155. The ESO may therefore be seen as complementary to the European Arrest Warrant, a point made by Helen Malcolm QC, who emphasised her wish to see the ESO (also known as Eurobail) maintained. She noted that “it mitigates some of the problems with the European Arrest Warrant”.²⁰⁰ Professor Peers also highlighted the ESO, noting that “there is no Council of Europe fall-back at all” for the measure. This meant the UK would have to negotiate an alternative arrangement “from scratch” were it to relinquish participation upon leaving the EU.²⁰¹

Conclusions and Recommendations

156. **The scope of our inquiry has necessarily been limited to the most significant measures facilitating police and security cooperation. We note, however, that measures in this area are part of a complex and interconnected network of agreements and arrangements that can be difficult to compartmentalise. For example, high-profile measures such as the European Arrest Warrant may work more satisfactorily alongside complementary measures such as the European Supervision Order. It follows that the Government’s approach to negotiations will need to take account of the risk that relinquishing less well-known measures could undermine the effectiveness of tools that are higher up the list of priorities.**

200 [Q 1](#)

201 [Q 8](#)

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

1. We welcome the statement by the Secretary of State for Exiting the European Union that “maintaining the strong security co-operation we have with the EU” is one of the Government’s top four overarching objectives in the forthcoming negotiations on the UK’s exit from, and future relationship with, the European Union. The arrangements currently in place to facilitate police and security cooperation between the United Kingdom and other members of the European Union are mission-critical for the UK’s law enforcement agencies. The evidence we have heard over the course of this inquiry points to a real risk that any new arrangements the Government and EU-27 put in place by way of replacement when the UK leaves the EU will be sub-optimal relative to present arrangements, leaving the people of the United Kingdom less safe. (Paragraph 36)
2. The UK has been a leading protagonist in shaping the nature of cooperation on police and security matters under the auspices of the European Union, as reflected in EU agencies, policy and practice in this area. Upon ceasing to be a member of the EU, the UK will lose the platform from which it has been able to exert that influence and help set an EU-wide agenda. This could have the effect of tilting the balance in intra-EU debates—for example in debates on the appropriate balance between security and privacy in relation to data protection—in a way detrimental to the UK’s interests. Although our report focuses on the individual tools and capabilities the UK should retain or replace upon leaving the EU, we judge that the Government will also need to consider how it can attempt to influence the EU security agenda—which inevitably will have implications for the UK’s own security—in future. This may mean trying to remain part of certain channels and structures, or finding adequate substitutes. (Paragraph 37)
3. The UK and the EU-27 share a strong mutual interest in sustaining police and security cooperation after the UK leaves the EU. In contrast to other policy areas, all parties stand to gain from a positive outcome to this aspect of the Brexit negotiations. This could, however, lead to a false sense of optimism about how the negotiations will unfold. For example, it seems inevitable that there will in practice be limits to how closely the UK and EU-27 can work together if they are no longer accountable to, and subject to oversight and adjudication by, the same supranational EU institutions, notably the CJEU. (Paragraph 38)
4. There must be some doubt as to whether the EU-27 will be willing to establish the ‘bespoke’ adjudication arrangements envisaged by the Government, and indeed over whether such arrangements can adequately substitute for the role of the supranational institutions from the perspective of the EU-27. We anticipate that this issue may pose a particular hurdle for negotiations on the UK’s future relationship with EU agencies such as Europol, and also affect the prospects for maintaining mutual recognition of judicial decisions in criminal matters. It seems conceivable, therefore, that the Government will encounter a tension between two of its four overarching objectives in the negotiation—bringing back control of laws to Westminster and maintaining strong security cooperation with the EU. In our view, the safety of the people of the UK should be the overriding consideration in attempting to resolve that tension, and we urge the Government to ensure that this is the case. (Paragraph 39)

5. The need to meet EU data protection standards in order to exchange data for law enforcement purposes means that after leaving the EU, the UK can expect to have to meet standards that it no longer has a role in framing. More generally, the police and criminal justice measures that the UK currently participates in and may continue to have a stake in are liable to be amended and updated with the passage of time, when the UK is no longer at the table to influence the pace and direction of change. In preparing for negotiations, the UK Government will therefore need to explore from the outset how any agreement struck with the EU-27 at the point of exit can address this prospect, and the attendant risk to the UK. (Paragraph 40)

Europol and Eurojust

6. We welcome the Government's decision to opt into the new Europol Regulation. In addition to the substantive reasons we gave in our 2013 report for recommending that the Government should opt into the draft Europol Regulation, the UK's forthcoming exit from the EU means there is now an additional, strategic value in remaining a full member of Europol and its Management Board during a period when the modalities of the UK's future partnership with the EU on police and security matters are under negotiation. (Paragraph 50)
7. Our witnesses were unequivocal in identifying the UK's future relationship with Europol as a critical priority. They also made clear that an operational agreement with Europol akin to those that other third countries have negotiated would not be sufficient to meet the UK's needs. The Government will therefore need to devise and secure agreement for an arrangement that protects the capabilities upon which UK law enforcement has come to rely, and which goes further than the operational agreements with Europol that other third countries have been able to reach thus far. (Paragraph 68)
8. Bearing in mind the contribution the UK makes to Europol, and the mutual benefit to be derived from a pragmatic solution, we regard this as a legitimate objective for the UK to pursue in negotiations with the EU-27. Achieving it, however, may be problematic: there seems likely to be a tension with other policy goals on both sides, notably in regard to the role of the supranational EU institutions. To the extent that Europol remains accountable to these institutions—and we note that the direction of travel in the new Regulation is towards enhancing that accountability—this could present a significant practical hurdle to sustaining the level of cooperation that might otherwise be advantageous to both sides. In 2014, the Government said it would “never put politics before the protection of the British public.” In our view, that calculation has not changed, and we urge the Government to work towards a pragmatic solution that protects the safety of the people of the United Kingdom. (Paragraph 69)
9. The timeliness and effectiveness of the work of the Crown Prosecution Service rely on the ability to work multilaterally and in real time with partners in the EU—a capability currently provided by the UK's membership of Eurojust. A continuing close partnership with Eurojust is therefore likely to be essential. (Paragraph 82)
10. A third-country agreement with Eurojust involving a Liaison Prosecutor, for which precedents already exist, may come closer to meeting the UK's needs than the equivalent precedents for third country-agreements with Europol. This may therefore be a fruitful avenue for the Government to explore in

the forthcoming negotiation. Ideally any such agreement would provide for closer cooperation than has thus far been available to other third countries—for example by providing access to the Eurojust Case Management System. As with Europol, however, the role of the supranational EU institutions in providing accountability and oversight for Eurojust’s activities may present a political obstacle to forging the sort of partnership that would best meet the UK’s operational needs. (Paragraph 83)

11. We share the Director of Public Prosecution’s concerns regarding the length of time it could take to negotiate an agreement with Eurojust, and the importance of avoiding an operational gap. (Paragraph 84)
12. Our witnesses were optimistic about the prospect of retaining access to Joint Investigation Teams, based on the model that already exists for certain third countries to participate in JITs with the agreement of all other participants. We recommend that the Government explores the practical steps that would be needed to allow the UK to benefit from a similar arrangement, with a view to pursuing that objective in a future negotiation. (Paragraph 85)

Data Sharing for Law Enforcement Purposes

13. As recently as 2014 and 2015, the Government and Parliament judged that it would be in the national interest for the UK to participate in flagship EU data-sharing platforms such as the Second Generation Schengen Information System, the European Criminal Records Information System and the Prüm Decisions. We see no reason to change that assessment, not least as the threat from terrorism in particular has escalated further—and the EU has responded, for example by adopting the Passenger Name Record Directive earlier this year. (Paragraph 119)
14. Access to EU law enforcement databases and data-sharing platforms is integral to day-to-day policing up and down the country. Were the UK to lose access to them upon leaving the EU, information that can currently be sourced in seconds or hours could take days or weeks to retrieve, delivering an abrupt shock to UK policing and posing a risk to the safety of the public. The UK therefore has a vital national interest in finding a way to sustain data-sharing for law enforcement purposes with the EU-27. (Paragraph 120)
15. The starting point for the UK in seeking to negotiate access to these tools is different from that of any other third country, both because of the UK’s pre-existing relationship with the EU-27 and because of the value it can add through the data it has to offer. We therefore accept the Government’s view that the precedents for access to EU data-sharing tools by non-EU and non-Schengen members may fail to capture the range of options that could be available to the UK. With that in mind, we believe there is a strong case for the Government to pursue a bespoke solution and seek access to the full suite of data-sharing tools on which the UK currently relies, as well as those it is still planning for. (Paragraph 121)
16. At the same time, we recognise that the two data-sharing tools that witnesses identified as the top priorities for the UK—SIS II and ECRIS—are also those for which there is no precedent for access by non-EU (ECRIS) or non-Schengen (SIS II) countries. The price of accessing these databases has thus far been membership of the EU and/or Schengen. Therefore a UK negotiating objective of seeking continued access to these vital tools would be particularly ambitious. (Paragraph 122)

17. With regard to Passenger Name Records, the Government should explore the precedents for EU agreements with third countries. We note, however, that losing access to intra-EU PNR data would be a serious handicap, and that the CJEU's ruling on the EU-Canada PNR agreement does not bode well for the EU's ability to conclude similar agreements promptly and reliably in future. (Paragraph 123)

Criminal Justice Tools

18. The European Arrest Warrant is a critical component of the UK's law enforcement capabilities. We see no reason to revise our assessment—and that of the Government in 2014—that the 1957 Council of Europe Convention on Extradition cannot adequately substitute for the European Arrest Warrant. Accordingly, the most promising avenue for the Government to pursue may be to follow the precedent set by Norway and Iceland and seek a bilateral extradition agreement with the EU that mirrors the EAW's provisions as far as possible. The length of time it has taken to implement that agreement—which was signed a decade ago but is still not in force—is, however, a cause for concern. An operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk. (Paragraph 141)
19. Although the EU's agreement with Norway and Iceland contains the option of applying the nationality exception in Article 7, it is not self-evident that the UK should seek to negotiate an equivalent provision in any future extradition agreement with the EU, bearing in mind the loophole that such an exemption can create. At the same time, it is conceivable that the EU-27 may not be willing to waive the right to refuse to extradite their own nationals outside the framework of the EAW and without the concept of EU citizenship that underpins it. (Paragraph 142)
20. The scope of our inquiry has necessarily been limited to the most significant measures facilitating police and security cooperation. We note, however, that measures in this area are part of a complex and interconnected network of agreements and arrangements that can be difficult to compartmentalise. For example, high-profile measures such as the European Arrest Warrant may work more satisfactorily alongside complementary measures such as the European Supervision Order. It follows that the Government's approach to negotiations will need to take account of the risk that relinquishing less well-known measures could undermine the effectiveness of tools that are higher up the list of priorities. (Paragraph 156)

APPENDIX 1: LIST OF MEMBERS AND DECLARATION OF INTERESTS

Members

Baroness Browning
 Lord Condon
 Lord Cormack
 Baroness Janke
 Lord Jay of Ewelme
 Baroness Massey of Darwen
 Lord O'Neill of Clackmannan
 Baroness Pinnock
 Baroness Prashar (Chairman)
 Lord Ribeiro
 Lord Soley
 Lord Watts

Declarations of interest

Baroness Browning
Former Home Office Minister
Chair of the Advisory Committee on Business Appointments
 Lord Condon
Served as Metropolitan Police Commissioner from 1993–2000.
 Lord Cormack
No relevant interest declared
 Baroness Janke
No relevant interest declared
 Lord Jay of Ewelme
Member, Advisory Council, European Policy Forum
Member, Senior European Experts Group
Patron, Fair Trials International
 Baroness Massey of Darwen
No relevant interests declared
 Baroness Pinnock
No relevant interests declared
 Baroness Prashar (Chairman)
No relevant interests declared
 Lord Ribeiro
No relevant interests declared
 Lord Soley
No relevant interests declared
 Lord Watts
No relevant interests declared

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top
 Baroness Browning
 Lord Boswell of Aynho (Chairman)
 Baroness Falkner of Margravine
 Lord Green of Hurstpierpoint

Lord Jay of Ewelme
Earl of Kinnoul
Baroness Prashar
Lord Selkirk of Douglas
Baroness Suttie
Lord Teverson
Baroness Verma
Lord Whitty
Baroness Wilcox

During consideration of the report the following Members declared an interest:

Lord Green of Hurstpierpoint

*Diversified investment portfolio in McInroy & Wood investment fund,
managed by third party*

A full list of Members' interests can be found in the Register of Lords' Interests:
[http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/
register-of-lords-interests/](http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/)

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/brexit-security-police-cooperation> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and alphabetical order. Those witnesses marked with ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

- | | | |
|---|---|---------------------------------|
| * | Dr Paul Swallow, Senior Lecturer, School of Law, Criminal Justice and Computing, Canterbury Christ Church University | <u>QQ 1–10</u> |
| * | Professor Steve Peers, Professor of Law, University of Essex | |
| * | Tony Bunyan, Director, Statewatch | |
| * | Helen Malcolm QC, The Bar Council | |
| * | Stephen Rodhouse, Deputy Assistant Commissioner, Metropolitan Police Service and National Police Chiefs' Council | <u>QQ 11–18</u> |
| * | David Armond, Deputy Director-General, National Crime Agency | |
| * | Lord Kirkhope of Harrogate, former MEP for Yorkshire and The Humber | <u>QQ 19–25</u> |
| * | Bill Hughes QPM CBE, former Director General (2006–2010), Serious Organised Crime Agency | |
| * | Rt Hon. Brandon Lewis MP, Minister of State for Policing and the Fire Service, Home Office | <u>QQ 26–37</u> |
| * | Rt Hon. David Jones MP, Minister of State, Department for Exiting the European Union | |
| * | Helen Ball, Deputy Assistant Commissioner and Senior National Coordinator for Counter-Terrorism Policing, Metropolitan Police Service | <u>QQ 38–49</u> |
| * | Alison Saunders, Director of Public Prosecutions, Crown Prosecution Service | <u>QQ 50–62</u> |

Alphabetical list of all witnesses

- | | | |
|---|--|--------------------------------|
| | Crown Office and Procurator Fiscal Service | <u>FSP0003</u> |
| * | Crown Prosecution Service | |
| * | Bill Hughes QPM CBE, Former Director-General, Serious Organised Crime Agency | |
| * | Rt Hon. David Jones MP, Minister of State, Department for Exiting the European Union | |

- ★ Lord Kirkhope of Harrogate, former MEP for Yorkshire and The Humber
- ★ Law Society of Scotland [FSP0001](#)
- ★ Rt Hon. Brandon Lewis MP, Minister of State for Policing and the Fire Service, Home Office
- ★ Helen Malcolm QC, The Bar Council
- ★ Metropolitan Police Service
- ★ National Crime Agency
- ★ National Police Chiefs' Council
- ★ Northumbria Centre for Evidence and Criminal Justice Studies [FSP0002](#)
- ★ Professor Steve Peers, Professor of Law, University of Essex
- ★ Statewatch
- ★ Dr Paul Swallow, Senior Lecturer, School of Law, Criminal Justice and Computing, Canterbury Christ Church University

The Committee also held a private discussion with Lord Evans of Weardale.