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Brexit: judicial oversight of the European Arrest Warrant

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SUMMARY

The European Arrest Warrant (EAW) was adopted by the European Union to facilitate the extradition of individuals between Member States to face prosecution for a crime, or to serve a prison sentence for an existing conviction. The Government recognises the importance of the EAW. The Home Secretary, Rt Hon Amber Rudd MP, has called it an "effective tool that is essential to the delivery of effective judgment on … murderers, rapists and paedophiles", and stressed that "it is a priority for [the Government] to ensure that we remain part of the arrangement". It has brought significant benefits to the United Kingdom. Annually, around 1,000 individuals per year are surrendered to other EU Member States under the EAW while, on average, the UK issues over 200 European Arrest Warrants seeking the extradition of individuals to this country. The EAW has brought high-profile criminals back to the UK, such as the fugitive bomber, Hussain Osman, who, along with accomplices, attempted to carry out a terror attack in London on 21 July 2005.

Yet following the referendum on the UK's membership of the EU, the Government has stated that it intends to remove the jurisdiction of the European Court of Justice (CJEU) in the UK. What this will mean has been the subject of much debate and discussion. But it is clear from the evidence that we received that the Government's plans for the CJEU create a tension with the operational necessity to deport serious criminals from the UK quickly and effectively, and to ensure that those who are wanted by the UK answer for their crimes here. We heard, for instance, that if the CJEU is not to be a final arbiter on any instruments of mutual recognition between the UK and EU on future extradition matters, it is unclear how such instruments would operate in practice.

This report outlines the pronouncements that the Government has made regarding the future role of the CJEU. It considers whether the Government's desire to remove completely the jurisdiction of the Court will ever be truly practicable. It explores other options for resolving disagreements between the UK and the EU in the absence of the Court of Justice, looking in particular at the EFTA Court as a potential—if limited—model for such arrangements. But it also questions whether the EU-27 will in fact be willing to establish bespoke arrangements such as a parallel court, solely to accommodate the UK's objectives.

The report asks whether alternatives to the European Arrest Warrant are possible. It looks into fall-back options: the agreement reached between Norway and Iceland and the EU; or returning to political or diplomatic approaches to secure extradition. It examines each option according to whether they represent an efficient replacement for the current system.

We note that the Norway-Iceland agreement's political dispute resolution mechanism would be compatible with the Government's desire to end CJEU jurisdiction. But in considering transitional arrangements, we agree with witnesses who suggested that any such arrangement would likely include accepting, at least in part, the jurisdiction of the CJEU. In particular, this is because any other interim arrangement would itself take time to negotiate and agree—time that is already at a premium in the run-up to March 2019.

We stress, however, that a transitional arrangement that simply extends the status quo in relation to the EAW will be difficult to secure. In leaving the EU,

the UK will no longer be party to other, related EU arrangements, such as the EU Charter of Fundamental Rights, EU data protection laws, and laws on EU citizenship. We therefore remain concerned about the prospect of a "cliff-edge" in our extradition arrangements, and emphasise that a gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk to the safety of the people of the UK.

Brexit: judicial oversight of the European Arrest Warrant

CHAPTER 1: INTRODUCTION

Introduction

1. The European Arrest Warrant (EAW) was adopted by the European Union to facilitate the extradition of individuals between Member States to face prosecution for a crime, or to serve a prison sentence for an existing conviction.[1] In the UK, around 1,000 individuals per year are surrendered to other EU Member States under the EAW while, on average, the UK issues over 200 European Arrest Warrants a year seeking the extradition of individuals to the UK.[2]

2. In our report on *Brexit: UK-EU security and police cooperation*, published in December 2016, we reviewed the options for replacing the EAW when the UK leaves the EU.[3] Subsequently, the Home Secretary described the European Arrest Warrant as an "effective tool that is essential to the delivery of effective judgment on … murderers, rapists and paedophiles", and announced that "it is a priority for [the Government] to ensure that we remain part of the arrangement".[4]

3. The Government has also confirmed—in its White Paper on *The United Kingdom's exit from and new partnership with the European Union*—that it plans to bring to an end the jurisdiction of the Court of Justice of the European Union (CJEU) in the UK, and that it will seek to agree a new approach to interpretation and dispute resolution with the EU.[5]

4. In our report on security and police cooperation between the UK and the EU after Brexit, we warned that there might in practice be limits to how closely the UK and the EU-27 can continue to work together on security and police matters if they are no longer accountable to, and subject to oversight and

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1 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, pp 1–20)

2 National Crime Agency, *Wanted by the UK: European Arrest Warrant Statistics 2009 - May 2016 (Calendar Year)* (July 2016): http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/690-wanted-by-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year [Accessed 19 July 2017] and National Crime Agency, *Wanted from the UK: European Arrest Warrant Statistics 2009 - May 2016 (Calendar Year)* (July 2016): http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics/691-wanted-from-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year [Accessed 19 July 2017]. The most high-profile recent subject of a European Arrest Warrant was Julian Assange, the Australian founder of WikiLeaks, who until recently was facing extradition to Sweden to answer an accusation of rape, but who sought asylum in Ecuador's London embassy.

3 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77)

4 HC Deb, 6 March 2017, col 550

5 Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, paras 2.3 and 2.9: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2 [accessed 3 July 17]

adjudication by, the EU's supranational institutions—notably the CJEU.[6] We highlighted the potential tension between the Government's objectives in relation to the CJEU, and its desire to continue cooperating with the EU in the fight against crime and terrorism in much the same way that it does now.

5. More recently, Sir Julian King, European Commissioner for the Security Union, also linked the role of the CJEU and the level of law enforcement cooperation that the UK and the EU can maintain in future, using the EAW to illustrate his point:

> "The UK has exported 8,000 people under the European Arrest Warrant and imported a thousand, it is an active user, but there you are talking about an element of the *acquis* and legal and criminal proceedings, so you have to have some level of arbitration. The existing level of arbitration is the European Court of Justice, so that is an issue that will have to be worked through in the negotiations."[7]

What this report is about

6. In this report, we examine the practical ramifications that the Government's stance on the CJEU might have for future criminal justice cooperation with the EU, paying particular attention to the European Arrest Warrant. We explore what bringing an end to the jurisdiction in the UK of the CJEU and other EU institutions could mean in practice, and what a 'bespoke' approach to levelling the playing field between the UK and EU and resolving disputes—as desired by the Government[8]—might look like in the area of criminal justice. We also consider the main options for replacing the EAW, and examine how dispute settlement and CJEU case law are dealt with in those alternative approaches.

7. The report is part of the coordinated series of Brexit-themed inquiries launched by the European Union Committee and its six sub-Committees following the referendum on 23 June 2016, which aim to shed light on the main issues likely to arise in negotiations on the UK's exit from, and future partnership with, the European Union. It draws on a series of evidence sessions that the sub-Committee held between 24 March, when the inquiry was launched, and 5 April. The sub-Committee was then stood down with the dissolution of Parliament in advance of the June 2017 general election.

8. **We make this report to the House for debate.**

Background

9. The European Arrest Warrant (EAW) facilitates the extradition of individuals between EU Member States. 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 courts in both countries.

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6 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77) paras 38 and 39

7 'Brexit: UK may have to recognise ECJ court rulings to keep security cooperation', *The Guardian* (30 April 2017): https://www.theguardian.com/uk-news/2017/apr/30/brexit-uk-may-have-to-recognise-ecj-court-rulings-to-keep-security-cooperation [accessed 03/07/2017]

8 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77) para 32

10. As shown in Table 1 and Table 2 below, more EAW subjects are extradited out of than into the UK: in the period 2010—2015, the ratio of individuals surrendered to other EU Member States compared to individuals surrendered to the UK was about 8:1. In terms of arrests in the UK under the EAW, around half of those arrested in any given year in the period 2010–2015 were arrested in response to EAWs issued by Poland. Partly this is due to the fact that until recently, Poland made more requests for extradition under the EAW than any other Member State, often for less serious crimes than other countries.[9] Over the same period, Ireland, Spain and the Netherlands arrested the largest number of individuals in response to EAWs issued by the UK.[10]

Table 1: Wanted from the UK: EAW Statistics 2009 to May 2016

Part 1 EAWs—Calendar Year	2010	2011	2012	2013	2014	2015	Total
Requests[11]	4,369	6,512	6,290	5,522	13,460	12,613	48,766
Arrests[12]	1,307	1,332	1,331	1,775	1,519	2,041	9,305
Surrenders[13]	1,038	1,079	1,025	1,126	1,097	1,149	6,514

Source: National Crime Agency, Wanted from the UK: European Arrest Warrant Statistics 2009–2016 (Calendar Year) (July 2016): http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics/691-wanted-from-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year *[accessed 19 July 2017]*

9 Council of Bars and Law Societies of Europe and European Lawyers Foundation, *EAW-Rights: Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners (January 2017):* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf, p 21 [accessed 19 July 2017]

10 All figures drawn from National Crime Agency, *Wanted by the UK: European Arrest Warrant Statistics 2009—May 2016 (Calendar Year)* (July 2016): http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/690-wanted-by-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year [accessed 19 July 2017] and National Crime Agency, *Wanted from the UK: European Arrest Warrant Statistics 2009 - May 2016 (Calendar Year)* (July 2016): http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics/691-wanted-from-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year [accessed 19 July 2017].

11 The number of requests received by the UK does not represent the number of wanted people in the UK. Some Member States issue requests to numerous Member States when they do not know where a subject may be. A large proportion of the requests received by the UK will be for people who are not, and never have been, in the UK.

12 This represents the number of people who have been identified as being in the UK and have been arrested.

13 People arrested on an EAW have the right to appeal against or to contest their extradition. The surrenders figure represents the number of people who—having either failed in their appeal or chosen not to appeal—are extradited.

Table 2: Wanted by the UK: EAW statistics 2009 to May 2016

Part 3 EAWs—Calendar Year	2010	2011	2012	2013	2014	2015	Total
Requests	252	226	271	219	228	228	1,424
Arrests	141	151	148	170	156	150	916
Surrenders	133	136	136	127	145	123	800

Source: National Crime Agency, Wanted by the UK: European Arrest Warrant Statistics 2009—May 2016 (Calendar Year) (July 2016): http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/690-wanted-by-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year *[accessed 19 July 2017]*

11. In Protocol 36 to the Lisbon Treaty, the UK had secured a right to decide, by 31 May 2014, whether or not it should continue to be bound by the approximately 130 police and criminal justice measures adopted prior to the entry into force of the Treaty. The EAW was one of 35 such measures that the UK chose to re-join in December 2014, following the exercise of the Protocol 36 block opt-out.[14] In choosing to re-join these measures, and as provided for in the Lisbon Treaty, the UK accepted that the measures would be subject to the jurisdiction of the CJEU and the enforcement powers of the Commission (under Article 258 TFEU) from 1 December 2014.

12. This means that, in effect, the UK has already had to decide—within the last three years—whether to accept the jurisdiction of the CJEU in this area in return for continued use of tools like the EAW.[15] In 2014, the Government argued that this trade-off was in the national interest in respect of the 35 measures, including the EAW, which it judged that the UK should re-join. The then Home Secretary, Rt Hon Theresa May MP, told the House of Commons:

> "Since the Lisbon Treaty came into effect, the UK has signed up to 90 new Justice and Home Affairs measures, accepting the jurisdiction of the [CJEU] over them. We face the same choice today: whether to accept the jurisdiction of the [CJEU] over the small package of [pre-Lisbon] measures that we wish to remain part of from 1 December, so that our law enforcement agencies can continue to use those powers to fight crime and keep us safe; or reject those measures and accept the risk to public protection that that involves … we must act in the national interest to keep the British public safe."[16]

14 Command Paper 8897 set out the list of 35 measures that the UK would re-join. 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. The House of Commons debate and vote on the Government's approach took place on 10 November 2014: see HC Deb, 10 November 2014, col 1223. The House of Lords debate took place on 17 November 2014: see HL Deb, 17 November 2014, col 327.

15 Further details on this can be found in a series of contemporaneous reports published by this Committee. 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); European Union Committee, *The UK opt-in to the Europol Regulation* (2nd Report, Session 2013–14, HL Paper 16); European Union Committee, *The United Kingdom opt-in to the draft directive on proceeds of crime* (32nd Report, Session 2010–12, HL Paper 295)

16 HC Deb, 10 November 2014, col 1238

Box 1: Examples of EAW successes

- In 2005 an EAW enabled the UK to extradite quickly from Italy a fugitive bomber, Hussain Osman, who, along with accomplices, had attempted to carry out a terror attack in London on 21 July.
- In 2012 Jason McKay was arrested in Warsaw and sent back to the UK within a month after killing his partner. He later admitted her manslaughter.
- Also in 2012, fugitive teacher Jeremy Forrest, who fled to France with a schoolgirl, was extradited to England on an EAW issued in September of that year and later imprisoned.

Source: BBC News, Q&A: European Arrest Warrant (5 December 2014): http://www.bbc.co.uk/news/world-europe-23239493 *[accessed 20 July 2017]*

13. The referendum result raises the prospect that the Government will need to revisit this trade-off in the course of negotiations on the UK's exit from, and future partnership with, the European Union. The EAW has brought high-profile criminals back to the UK, as shown in Box 1. But because the Government's expressed intention is to remove the UK entirely from the jurisdiction of the EU institutions that perform oversight of the EAW, it now faces a much larger challenge than the Protocol 36 decision. The Government's plans for the CJEU create a tension with the operational necessity to deport serious criminals from the UK quickly and effectively, and to ensure that those who are wanted by the UK answer for their crimes in this country. In the chapters that follow, we explore this tension as well as the options that the Government might pursue to maintain close police and security cooperation with the EU post-Brexit.

CHAPTER 2: ENDING CJEU JURISDICTION OVER CRIMINAL JUSTICE COOPERATION WITH THE EU

14. The Court of Justice of the European Union is the ultimate arbiter on matters of EU law, and alongside Member States' own courts and tribunals is charged with providing consistent interpretation and enforcement of EU law across the Member States. The CJEU is tasked with ensuring that "in the interpretation and application of the Treaties, the law is observed".[17]

15. At present, questions of EU law that arise in a case before any national court or tribunal of a Member State may be referred by that national court to the CJEU for a "preliminary ruling".[18] The ruling given by the CJEU on the interpretation of EU law is binding on the national court, and will be followed by all other courts in the EU, but the application of the ruling, and the finding of facts—that is, resolving the particular dispute—are for the national court.[19] In 2009, given the expansion of the CJEU's jurisdiction into Justice and Home Affairs matters including the EAW, the preliminary ruling procedure was reformed to include an expedited process for cases involving persons in custody.

16. Professor Sir Francis Jacobs QC, Advocate General at the European Court of Justice from 1988–2006, told us that the jurisdiction of the CJEU in the UK would end automatically upon withdrawal: "It will follow necessarily from the exit of the UK from the EU".[20] With the end of its jurisdiction, the CJEU's preliminary ruling procedure will also no longer be available to UK courts. Thus the automatic jurisdiction of the Court to hear disputes, and the possibility for UK courts to refer questions on the interpretation of EU law, including on the EAW to the CJEU, "will both disappear on exit".[21]

17. In the 1960s, before the UK joined the (then) EEC, the Court gave two key constitutional judgments on the primacy of EU law[22] and its direct effect[23] that shaped EU law in ways that differ markedly from traditional approaches to international law. In *Costa vs ENEL*, the Court ruled that EU law takes precedence over the domestic law of the Member States, such that if a domestic provision is contrary to an EU provision, the authorities in that Member State must apply the EU provision. In *Van Gend en Loos*, the Court ruled that individuals may directly invoke their rights under EU law before national courts, even if the Member State in question has not incorporated the relevant EU law in its domestic law.[24]

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17 Article 19 (1), Treaty on European Union (OJ C 326, 26 October 2012, pp 13–390)

18 Article 267, Treaty on the Functioning of the European Union (OJ C 326, 26 October 2012, pp 47–390). Subject to minor exceptions, the highest courts in each Member State's legal system ("a court … against whose decision there is no judicial remedy") must refer questions on the interpretation of EU law to the CJEU if the specific interpretation is central to the Court's ability to give judgment.

19 The CJEU also has jurisdiction to hear infringement actions against Member States by the Commission or other Member States for non-compliance with EU law, and to review the legality of acts by the EU institutions, including actions for annulment of EU legislation or to require an institution to act—actions that may be brought by a Member State or by one of the EU institutions.

20 Written evidence from Sir Francis Jacobs (EAW0001), para 4

21 Q 1

22 *Flaminio Costa v E.N.E.L* (1964) Case 6/64 ECR 1141: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006

23 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECJ 26/62 ECR 1: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0026&from=EN

24 For a fuller exposition, see Eur-Lex, *The direct effect of European law* (January 2015): http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Al14547 [accessed 19 July 2017]

18. Drawing on these decisions, Professor Sir Alan Dashwood QC, Professor Emeritus of European Law at Cambridge University and a former member of the Council Legal Service, observed that "rulings of the [CJEU] penetrate to the level of the individual in a different way because of the principles of direct effect and primacy. People can go to court in a Member State and invoke a rule of EU law and cite a judgment of the [CJEU] in support of their contention".[25] He contrasted this with other international courts whose jurisdiction the UK submits to, and noted that there are also "far more ways of bringing proceedings before the [CJEU] than there are before any other international tribunal".[26] As we argue below, and despite the Government's plans as set out in its White Paper, this distinction—between the role played by the CJEU and that played by other international arbitration mechanisms to which the UK is party—will mean that replicating the CJEU's role in interpreting and applying EU criminal justice matters, including the EAW, post-Brexit will not be an easy task.

The post-Brexit role of the CJEU

19. The Government has said that it "will bring an end to the jurisdiction of the CJEU in the UK",[27] and announced that the European Union (Withdrawal) Bill "will not provide any role for the CJEU in the interpretation of … new law", and "will not require the domestic courts to consider the CJEU's jurisprudence".[28] We therefore explored with our witnesses what the Government's objectives in relation to the CJEU would mean in practice, and whether they would, indeed, be achievable—particularly with regard to whether CJEU judgments and case law would still have a role to play in British courts. We wanted to assess the ramifications of the Government's stance for criminal justice cooperation with the EU in general, and the European Arrest Warrant in particular.

20. We have seen that the jurisdiction of the CJEU to hear disputes, and the possibility for UK courts to refer to the Court, will disappear once the UK leaves the EU. But the question remains as to how the Court's functions in creating a level playing field between states participating in the EAW will be replicated in future criminal justice agreements between the UK and the EU.

Legal sovereignty

21. Commenting on the role currently performed by the CJEU in interpreting EU law, Professor Sir Alan Dashwood QC told us that "the main idea behind this red line is what is seen as the restoration of the United Kingdom's legal sovereignty". He expected that the "most important practical manifestation of that would be the Court of Justice no longer having jurisdiction …. or more particularly, its rulings no longer having the status of binding authority

25 Q 2
26 Q 2
27 Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, para 2.3: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2 [accessed 04 July 2017]
28 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, March 2017, para 2.13: https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union [accessed 04 July 2017]

for the courts in this country".[29] Rosemary Davidson, a barrister at 6KBW College Hill, similarly suggested that the binding nature of the CJEU's rulings was the nub of the issue.[30]

22. Sir Francis Jacobs nevertheless suggested that the UK "may well wish to rely upon past case law" of the CJEU, which though "not formally binding", might be helpful to follow in most cases: "If it were not, there would be a very high degree of legal uncertainty, because every past point of law could simply be reopened and argued afresh. That would be undesirable".[31] The Government in fact appeared to concede this point, noting in its White Paper on *Legislating for the United Kingdom's withdrawal from the European Union* that the European Union (Withdrawal) Bill "would provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court".[32] As for new CJEU case law arising post-Brexit, the Government said that the European Union (Withdrawal) Bill "would not require the domestic courts to consider the CJEU's jurisprudence".[33]

23. Andrew Langdon QC, however, told us that "whatever the express provision is in relation to whether we should be having regard to the case law … no lawyer worth his salt is going to go into court … without knowing what the most recent cases are on both sides of the fence".[34] He and Sir Francis agreed that it would not be feasible to prevent references being made to the CJEU's case law before UK courts, even if such case law had no formal status.[35] Mike Kennedy, former President of Eurojust and former Chief Operating Officer of the Crown Prosecution Service, also expected that "the court and its rulings will always have persuasive authority", and suggested that "defence lawyers and prosecution lawyers would be using previous judgments of the court to argue their case. They would not be binding precedents. That is the important thing and that is what the Government want to avoid".[36] Andrew Langdon QC also drew our attention to the position pre-2014, when the CJEU did not have express jurisdiction in relation to extradition. He pointed out that "domestic courts were perfectly able to develop case law without there being any significant divergence. It may be that one overstates the risk of divergence hereafter".[37]

24. While it might be the case that CJEU case law will continue to be invoked post-Brexit, albeit in a non-binding fashion, witnesses were more sceptical about the wider ramifications of the Government's stance on the CJEU for criminal justice cooperation with the EU in general, and for the EAW in particular. Mike Kennedy judged that if the CJEU "is not to be a final arbiter on any of the instruments of mutual recognition … it seems very difficult to

29 Q 1
30 Q 13
31 Q 2
32 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, March 2017, p 14 and paras 2.12–2.17: https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union [accessed 04 July 2017]
33 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, March 2017, para 2.13: https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union [accessed 04 July 2017]
34 Q 15
35 Q 5, Q 15
36 Q 25
37 Q 12

see how they would operate in practice".[38] Aled Williams, another former President of Eurojust, expected that there would be "different prospects for different organisations and institutions within the framework of European Union cooperation. I would be optimistic about the UK continuing its presence and participation at Europol and Eurojust. I would be less optimistic about the situation with the European Arrest Warrant".[39]

Creating a level playing field and resolving disputes

25. In its White Paper on *The UK's exit from and future partnership with the European Union*, the Government devoted a section (Paras. 2.4–2.9) and an Annex (Annex A) to dispute resolution mechanisms, recognising that "ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution". It noted that dispute resolution mechanisms ensured that all parties to agreements—for instance, the states participating in international trade agreements—shared a single understanding of the agreements, both in terms of interpretation and application, and "can also ensure uniform and fair enforcement".[40] The Government also underlined that although the UK participates in a number of dispute resolution mechanisms on the international plane, "unlike decisions made by the CJEU, dispute resolution in these agreements does not have direct effect in UK law".[41]

26. Sir Francis Jacobs' evidence underlined the tensions inherent in the Government's objective. In his estimation, full restoration of the United Kingdom's judicial sovereignty would make it more difficult to create a level playing field in criminal justice cooperation between the UK and the EU after Brexit: "In the fields in which the UK will want to cooperate in partnership with the European Union", an approach that privileges national judicial sovereignty "cannot be realistic".[42] In Sir Francis's view, it could not "be expected that disputes of the kind in issue can be resolved exclusively by UK courts. On the contrary … they are increasingly likely to be settled by transnational courts and tribunals, and such means of settlement can no longer be sensibly regarded as an affront to UK sovereignty".[43] Indeed, in order to be effective, such a system was "bound to encroach on national sovereignty".[44] He continued: "If there is to be a resolution of [a] dispute, one has to start with the assumption that judicial sovereignty is not really attainable in that area any more than it is attainable under the World Trade Organization system".[45]

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38 Q 22
39 Q 22
40 Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, para 2.5 :https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2 [accessed 04 July 2017]
41 Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, paras 2.8 and 2.9: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2 [accessed 04 July 2017]
42 Written evidence from Sir Francis Jacobs (EAW0001), paras 37 and 38
43 *Ibid.*
44 *Ibid.*
45 Q 5

27. In oral evidence to the House of Commons Select Committee on Exiting the European Union, the Secretary of State for Exiting the European Union, Rt Hon David Davis MP, raised the prospect of "more than one" arbitration mechanism:

> "You might have one mechanism that applies to trade and another one to arbitration in Justice and Home Affairs, for example, and they may be different in style. We are looking at that. We have already done some work on it".[46]

Mr Davis also drew a distinction between "arbitration mechanisms" and "political resolution mechanisms", highlighting for example the political resolution mechanism used to resolve disputes arising from bilateral agreements between the EU and Switzerland, which he suggested "has not worked".[47]

28. We asked our witnesses what a similar 'bespoke' dispute resolution mechanism might look like in the area of criminal justice cooperation, and whether there were any precedents or templates that would merit further exploration.

29. Contrary to David Davis MP's misgivings, some raised the prospect of a political resolution mechanism being used. Andrew Langdon QC told us that "what you see in many extradition arrangements—and in mutual legal assistance arrangements—are mechanisms for political resolution of those disputes". In practice, that might mean "an obligation on the parties to seek resolution as soon as possible, and sometimes they might appoint specific people whose job will be to resolve disputes".[48]

30. Sir Francis, on the other hand, criticised the dispute resolution mechanisms that the Government had chosen as exemplars. The mechanisms set out in Annex A to the Government's White Paper on *The UK's exit from and future partnership with the European Union* were, he told us, "in several important respects inadequate" compared with the mechanisms available under the EU Treaties. For example, in many instances the mechanism was "available only to States". He also noted that "States are often reluctant to take up a dispute with other States; this is apparent from general experience, ranging from the EU itself to the World Trade Organization. Companies and individuals will have no remedy".[49]

31. Sir Francis also emphasised that many of the mechanisms outlined in the White Paper "provide for arbitration rather than judicial settlement". This had "some disadvantages … notably, the procedure is not transparent, there

46 Oral Evidence taken before the Committee on Exiting the European Union, 15 March 2017 (Session 2016–17), Q 1498

47 Oral Evidence taken before the Committee on Exiting the European Union, 15 March 2017 (Session 2016–17), Q 1498

48 Q 20

49 Written evidence from Sir Francis Jacobs (EAW0001), paras 52 and 53

may be difficulties with enforcement, and arbitration does not give rise to a body of case law".[50]

32. Sir Francis concluded that "if one is looking at enforcement of criminal judgments and the European Arrest Warrant and such like, the only dispute mechanism that you can have … is a court. There has to be a court available to review any decision affecting the liberty of the individual". He therefore suggested that the Government's use of "the language of arbitration" was a "totally inappropriate concept in this particular context".[51] Similarly, Mike Kennedy, while acknowledging that bilateral negotiations hosted by Eurojust had helped to resolve difficulties over arrest warrants in the past, was sceptical that a political resolution mechanism would be sufficient in future. What was needed, he suggested, was "some sort of superior overarching judging authority, a court".[52]

33. Sir Alan Dashwood QC suggested that the EFTA Court could offer a useful template for a new dispute resolution mechanism. The issue of legal sovereignty had in his view been "resolved in the EFTA Court by having what is known as a two-pillar structure. The enforcement of the rules on the EU side is in the hands of EU institutions, the European Commission and the Court of Justice, and on the EFTA side in the hands of the EFTA Surveillance Authority and the EFTA Court".[53] He also noted that the EFTA Court "follows the jurisprudence of the Court of Justice but takes its own decisions, and these are not directly effective within the EFTA countries".[54]

50 Written Evidence from Sir Francis Jacobs (EAW0001), para 54. It is worth noting in this context that among the "examples that illustrate how other international agreements approach interpretation and dispute resolution", the Government has listed Investor-State Dispute Settlement (ISDS) provisions, which proved contentious in the context of negotiations on a Transatlantic Trade and Investment Partnership (TTIP) between the UK and the US. See Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Unio*n, Cm 9417, February 2017, para 2.10 footnote 5: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2 [accessed 04 July 2017] and the European Union Committee, *The Transatlantic Trade and Investment Partnership*, (14th Report, Session 2013–14, HL Paper 179) paras 156–170.

51 Q 5

52 Q 22

53 Q 5

54 Q 3

Box 2: The EFTA Court

A two-pillar system of supervision underpins the operation of the EEA Agreement. EU Member States are monitored by the European Commission, while EFTA States party to the EEA Agreement are monitored by the EFTA Surveillance Authority. Meanwhile the EFTA Court operates in parallel to the Court of Justice of the European Union.

The EFTA Court has jurisdiction with regard to EFTA States party to the EEA Agreement (Iceland, Liechtenstein and Norway). The Court deals with infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of EEA law. It also gives advisory opinions to courts in EFTA States on the interpretation of EEA rules, and hears appeals concerning decisions taken by the EFTA Surveillance Authority. Thus the functions fulfilled by the EFTA Court are similar to those fulfilled by the CJEU, save that the CJEU's opinions are binding on domestic courts in EU Member States, while those of the EFTA Court are only advisory.

The EFTA Court consists of three judges, one nominated by each of the EFTA States party to the EEA Agreement, and sits in Luxembourg.

Source: EFTA Court, Introduction to the EFTA Court: http://www.eftacourt.int/the-court/jurisdiction-organisation/introduction *[accessed 19 July 2017]*

34. The two-pillar structure was devised because the EEA EFTA States (Norway, Iceland and Liechtenstein) are not subject to oversight and judicial review by the EU institutions. Sir Alan told us that the system "leaves the courts of the EFTA countries effectively outside the scope of the jurisdiction of the Court of Justice but nevertheless guarantees sufficient homogeneity between the two systems to avoid significant disputes". He added that "these parallel institutional systems have worked so well in practice that there has not ever been a need to have recourse in respect of disputes about case law to the arbitration system that is provided for by Article 111" [of the EEA agreement].[55] He stressed, however, that this system applied only to the internal market. It does not apply to Justice and Home Affairs matters, nor does it adjudicate on Norway and Iceland's participation in the European Arrest Warrant. As Sir Alan noted, the EFTA Court represented an "ingenious" solution to legal sovereignty concerns, but its jurisdiction had not been enlarged to include the EAW, because "the judges are essentially economic lawyers rather than criminal".[56]

35. Andrew Langdon QC agreed with Sir Francis Jacobs that "ultimately, there has to be a court", but judged that it was not difficult, "in theory anyway", to envisage "some parallel court to the Court of Justice". He concurred that "theoretically, and perhaps in reality", the EFTA Court model could work.[57]

36. In our report on *Brexit: future EU-UK security and police cooperation* we concluded that there "must be some doubt as to whether the EU-27 will be willing to establish the 'bespoke' adjudication arrangements envisaged by the Government".[58] We revisited this issue with our witnesses. Andrew Langdon QC observed that creating a new court "depends upon a lot of good will on

55 Q 5
56 *Ibid.*
57 Q 20
58 European Union Committee, *Brexit: future EU-UK security and police cooperation* (7th Report, Session 2016–17, HL Paper 77) para 39

the part of the other Member States … we can understand what some of the politics may be there".[59]

37. Mike Kennedy judged that "some would find it irritating to have to negotiate this again. Some might accept it. It would be difficult. We would be starting from a position that the other Member States would understand, because of the referendum and what is happening, but I cannot see that there would be a huge amount of sympathy for our situation".[60]

Conclusions

38. **In its White Paper on *The United Kingdom's exit from and new partnership with the European Union,* the Government confirmed that it plans to "bring an end to the jurisdiction in the UK of the Court of Justice of the European Union". In practice, the jurisdiction of the CJEU will end automatically when the UK ceases to be an EU Member State. But this change leaves open the question of how the role of the CJEU in providing a level playing field between the UK and EU in criminal justice matters is to be provided for in any future agreement between the two parties, and what status the case law of the CJEU will have post-Brexit.**

39. **The CJEU will have at least an indirect role in the interpretation of any agreement between the UK and the EU. In any agreement, on any subject between the UK and the EU, the terms of the agreement will—on the EU side—be subject to the jurisdiction of the CJEU, whose interpretation will be binding on the EU and its Member States.**

40. **As for the CJEU's case law, the Government has already accepted that existing case law will stand the day after Brexit, because the European Union (Withdrawal) Bill "will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court". The Government also said that the European Union (Withdrawal) Bill would not require the domestic courts to consider the CJEU's jurisprudence, implying that new CJEU case law that develops post-Brexit will have no formal status in the UK. However, our witnesses were clear that CJEU case law is likely still to have persuasive authority. Indeed, it is conceivable that it could be a requirement of any future UK-EU extradition agreement for the UK formally to take account of relevant CJEU case law that develops post-Brexit.**

41. **It was suggested to us that in the field of criminal justice, any alternative to the CJEU must be a court and not an arbitration mechanism, since only a court can review decisions affecting the liberty of the individual. The EFTA Court model has the advantage that individuals and businesses, as well as the Contracting Parties to the EEA agreement, can bring actions before the Court, replicating one of the more effective features of the CJEU. But it should be noted that at present, this model applies only to internal market-related disputes. Its jurisdiction was not expanded to cover Norway and Iceland's participation in the EAW. Furthermore, the section of the Government's White Paper dealing with dispute resolution**

59 Q 20
60 Q 24

mechanisms does not mention the EFTA model—perhaps implying that the Government has already ruled out this option.

42. **We question, moreover, whether in the context of the EAW the EU-27 will be willing to establish bespoke adjudication arrangements such as a parallel court in order to accommodate the UK's objectives. We observe in this context that the UK has already had to decide, as recently as the Protocol 36 Decision in 2014, whether to accept the jurisdiction of the CJEU in return for continued use of tools like the EAW. Now as then, the safety of the people of the UK should be the Government's overriding consideration.**

CHAPTER 3: ALTERNATIVES TO THE EAW

43. In view of the challenges surrounding the Government's desire to discontinue CJEU jurisdiction in the UK, it is useful to explore potential alternatives to the European Arrest Warrant. At the time of the 2014 decision on Protocol 36, arguments for and against the UK retaining the EAW were rehearsed in detail, including in reports from this Committee and in the Impact Assessments published in the Government's July 2013 and July 2014 Command Papers. They were also addressed in the 2015 report of the *ad hoc* Extradition Law Committee.[61] We do not revisit those substantive arguments here.

44. In our December 2016 report on *Brexit: future UK-EU security and police cooperation* we also considered possible alternatives to the EAW, and concluded that "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".[62]

Retaining the EAW

45. More recently, in March 2017, the Home Secretary, Rt Hon Amber Rudd MP, announced that "it is a priority" for the Government "to ensure that we remain part of the [EAW] arrangement". She told the House of Commons that "our European partners want to achieve that as well".[63] We asked our witnesses to comment on the Home Secretary's remarks and on whether the UK might be able to remain part of the EAW from outside the EU.

46. Andrew Langdon QC told us that it was "almost impossible to decipher the words in a way that is helpful", and that it was "very difficult to square, bluntly, leaving with staying". He added that "the answer … is that we must replicate something as closely as we can to maintain uniformity", and suggested that "something like the Norway-Iceland agreement" was "what most who have applied their minds to this subject think may be the way forward".[64]

47. Sir Francis Jacobs told us that "it does not seem at all clear how it will be possible for the UK to remain part of the arrangement if it is outside the European Union". He too judged that "the best that could be hoped for would be an arrangement on the same lines as Norway and Iceland have", which would be "less than satisfactory" and "may be difficult to attain".[65]

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61 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 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 04 July 2017]; 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/326698/41670_Cm_8897_Accessible.pdf [accessed 04 July 2017]; Select Committee on Extradition Law, *The European Arrest Warrant Opt-in* (1st Report, Session 2014–15, HL Paper 63).

62 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report of Session 2016–17, HL Paper 77), para 141

63 HC Deb, 6 March 2017, col 550

64 Q 14

65 Q 3

48. Mike Kennedy suggested that the Home Secretary's remarks "seem quite clear … in one sense: that the Home Secretary feels that the EAW is a successful instrument", one that both the UK and other Member States want to proceed with. The "difficulty", would be "how that fits with not complying with or following the [CJEU's] decisions". He expected that "the way through this must be some form of negotiation", and that the Home Secretary might be hoping "that there can be some solution to this that will allow the red line to be observed, but will also continue the arrangements that are currently in place".[66]

Alternatives to the EAW: Norway and Iceland

49. Norway and Iceland, which are both outside the European Union but members of the EEA and the Schengen Area, began negotiating an extradition agreement with the EU in 2001. The agreement was signed in 2006 and concluded in 2014, but has yet to enter into force.[67] We explored with our witnesses how the functions performed by the CJEU in respect of the EAW have been re-assigned in the Norway-Iceland agreement. The agreement provides for a political dispute resolution mechanism in Article 36, which states:

> "Any dispute between either Iceland or Norway and a Member State of the European Union regarding the interpretation or the application of this Agreement may be referred by a party to the dispute to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months".

50. As regards the CJEU's case law, the agreement (Article 37) provides that the Contracting Parties "shall keep under constant review" the development of the case law of the CJEU and that of the competent courts of Iceland and Norway, and that to this end "a mechanism shall be set up to ensure regular mutual transmission of such case law". The ultimate objective is to arrive "at as uniform an application and interpretation as possible of the provisions of this Agreement".

51. Sir Alan Dashwood judged that a duty of constant review of this kind could also provide a way forward for the UK:

> "There will be scope for courts in this country to treat rulings of the Court of Justice, including in this field, as persuasive authorities. It is clearly the intention of the harmonisation approach that is adopted under the Iceland-Norway agreement and might be adopted in relation to the UK as well. It is expected that close attention will be paid by the courts on both sides to the development of the case law, and that can be effective".[68]

52. Rosemary Davidson went further, suggesting that "in relation to interpretation issues, really the only model you have is the Iceland-Norway one, where it is left to the [CJEU] on behalf of the EU and national courts on behalf of the

66 Q 23
67 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, pp 1 and 2). Denmark is not party to this agreement.
68 Q 4

other signatories to the treaty. That is aligned through this duty of constant review".[69]

53. However, our witnesses also emphasised that an arrangement along these lines would not deliver the same level of consistency as the current arrangements involving the CJEU. Sir Francis Jacobs told us that "what Article 37 provides for is keeping under review the case law and exchanging the case law between the parties. That is a very basic form of co-ordination".[70] Sir Alan Dashwood noted:

> "The harmonisation approach that is provided for in Article 37 of the agreement is clearly not as effective. It does not provide the same assurance of a consistent approach that a preliminary rulings procedure would provide. But it could work effectively if it is taken very seriously by both sides, as I am fairly sure it would be. It would require setting up a permanent monitoring facility on both sides".[71]

54. In our report on *Brexit: future UK-EU security and policy cooperation* we noted that the length of time it had taken to implement the Norway-Iceland agreement was a cause for concern, and that an operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk. Sir Alan was optimistic about the speed with which the UK might be able to reach a bilateral extradition agreement with the EU similar to that secured by Norway and Iceland: "I do not think it will take us 13 years, as it did Iceland and Norway, because it has been done already and because we are already subject to the European Arrest Warrant".[72] He also did not believe "that there is any close connection between the removal of frontiers and free movement of the Schengen system, and a well-functioning arrest warrant type of system".[73] Rosemary Davidson judged that "if what we want is to replicate the Norway-Iceland agreement exactly or exactly the EAW agreement, that would be an easier sell than a third EAW-style agreement, which would be the UK-EU one".[74]

Alternatives to the EAW: the 1957 Council of Europe Convention

55. If the UK were not to secure new extradition arrangements with the EU or its Member States, either collectively or individually, as part of its negotiations on withdrawal from the EU, the 'default' outcome would be to revert to the 1957 Council of Europe Convention on Extradition (the 1957 Convention) as the legal basis for extradition between the UK and the remaining EU Member States.

56. In our *Brexit: future UK-EU security and police cooperation* report we said that we saw "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".[75] We nevertheless explored this 'default' scenario with our witnesses.

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69 Q 20
70 Q 6
71 *Ibid.*
72 Q 7
73 Q 6
74 Q 14
75 European Union Committee, *Brexit: future UK-EU security and police cooperation*, (7th Report, Session 2016–17, HL Paper 77) para 141

57. They offered a range of views as to whether the 1957 Convention could serve as a safety net in the event of no alternative provision being made. Sir Francis Jacobs told us that there was "general agreement" that the 1957 Convention "is not an adequate substitute for the European Arrest Warrant", and that "it will be necessary to devise up-to-date arrangements for surrender". He predicted that if there were no agreement at the time that the United Kingdom exits the European Union, "there will be a cliff-edge".[76]

58. Sir Alan Dashwood, however, found it "hard to believe" that the Government "would allow the country to fall over a cliff edge", and argued that if it began to look as if there would be no agreement on this issue, there would have to be an amendment to the Extradition Act 2003 to designate EU Member States as category 2 territories rather than category 1 territories. At present, Part 1 of the Act implements the EAW and designates the EU Member States as category 1 territories. Part 2 of the Act makes provision for the UK's other international extradition arrangements, which apply to category 2 territories.[77] Mike Kennedy also expected that the 2003 Act might need to be amended to move EU countries from category 1 to category 2.[78]

59. Sir Alan nevertheless expected that there "would be a problem with those Member States that have rescinded their legislation implementing the Convention".[79] The Committee's concern is that because extradition is a two-way, reciprocal arrangement, in the case of such Member States, simply amending the Extradition Act would not in itself be sufficient. If the UK did not have pre-existing extradition arrangements with certain member states, extradition could become impossible at the moment of Brexit.

60. A return to a political, rather than a judicial approach to extradition might also create practical problems. Operating under the 1957 Convention would mean reverting to diplomatic channels for resolving disputes. Aled Williams noted that "the EAW introduced a system of court-to-court contact, whereas the Convention is still essentially a diplomatic governmental approach to things, which partly led to delay". He suggested that such cases were "where the argument for the Court of Justice of the European Union comes into its own". Overall he judged that "going back to the Convention would be counterproductive in relation to the security of our citizens and delays".[80] Andrew Langdon QC also judged that the 1957 Convention "is not an adequate substitute", since it "conjures up the vista, again, of the process no longer being a purely judicial one, but extradition requests being made through diplomatic channels and so on—with all the complications and time constraints". He suggested that "nobody who knows the field is advocating that that is any sort of satisfactory fallback position".[81]

61. Yet Rosemary Davidson was sanguine about other states' reactions to the UK changing its extradition arrangements. She suggested that, as a matter of international law, "there is a good argument that we could still rely on the [1957] Convention". She noted that "nobody has rescinded their membership of the Convention", and that although there is an academic debate about whether Article 31 of the EAW Framework Decision has ousted

76 Q 7
77 Q 7
78 Q 27
79 Q 7
80 Q 26
81 Q 16

the Convention in international law terms, "if all parties agreed that they would revert to using the [1957] Convention, it seems to me that that would be a fallback position". She noted that in the early days of the Framework Decision, Germany reverted to reliance on the 1957 Convention when its constitutional court struck down the implementing legislation for the Framework Decision.

62. As for what reverting to the 1957 Convention would mean for the relationship with the CJEU, our witnesses agreed that in this event, future CJEU case law would still have persuasive authority. Sir Alan Dashwood anticipated that in litigation, courts in the UK would still take the CJEU "very seriously".[82]Andrew Langdon QC and Rosemary Davidson also expected the CJEU to retain persuasive (as opposed to binding) authority in this field.[83]

Transitional Arrangements

63. The Government's White Paper on *The UK's exit from and future partnership with the European Union* indicates that "a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest", adding that "this might be about … the way in which we cooperate on criminal and civil justice matters".[84] We explored with our witnesses what a "phased process of implementation" could look like in this area, including what the role of the CJEU might be during such a transition, and what would happen to extradition requests the day after the UK leaves the EU if no alternative to the EAW had been put in place.

64. Rosemary Davidson suggested that in "a real Armageddon scenario, where you have negotiated no alternative and you have negotiated no transitional agreement … at the domestic level, in one sense, you could just leave the legislation in place and continue to process all the EAWs we have here. That could be our choice and that would be a perfectly reasonable way to proceed". However, in this scenario, the UK would "not have any control over how our outgoing requests were treated abroad".[85]

65. Sir Alan Dashwood speculated about "a possible interim arrangement [that] would be an effective continuation of the present system but under a special interim agreement, perhaps with the Court of Justice giving advisory rather than binding rulings on the interpretation of this new agreement".[86] Sir Francis Jacobs, on the other hand, expected that "there may be some pressure from the European Union in the event of transitional arrangements that more or less preserve the status quo that the jurisdiction of the Court should continue for that period too". He judged that this "might be acceptable in the context of the negotiations as a whole".[87]

66. Mike Kennedy also envisaged that transitional arrangements would involve "a continuation of what we have at present, until both sides could get things

82 Q 7
83 Q 16
84 Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Unio*n, Cm 9417, February 2017, para 12.2: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2 [accessed 04 July 2017]
85 Q 17
86 Q 7
87 Q 9

sorted out". He expected that "any transitional arrangement would have to have arbitration", and that it would likely be "more straightforward to adopt the current arrangements in transition for a period of time. That might have to include the court". He judged that "any sort of alternative to the Court is going to be quite difficult to negotiate and agree", given the limited time available.[88] Andrew Langdon QC agreed that "if, unhappily, with a few months to go we still have not understood where we are going in terms of a new agreement, a simple agreement that there is a transitional postponement of current arrangements until such time as we have reached an agreement would be very sensible".[89]

Extradition of EU citizens to the UK post-Brexit

67. The feasibility of securing a transitional arrangement that simply extends the *status quo* seems likely to depend on the outcome of other aspects of the Brexit negotiations. For example, Sir Francis Jacobs noted that the "exchange or surrender of prisoners is subject, according to the case law of the Court, to certain standards of fundamental rights. Although from the United Kingdom point of view there was no problem whatever with respect for fundamental rights in the United Kingdom, there is no independent adjudication on that issue after Brexit. That might pose a problem". He also warned that "in relation to the exchange of information about criminals and terrorists and others, there are certain underlying standards of data protection that have to be observed, where standards might diverge if the United Kingdom was no longer a member of the European Union".[90]

68. It is also not clear how any interim arrangement extending the status quo would deal with own nationals if the UK had formally left the EU. In our report on *Brexit: future UK-EU security and police cooperation* we warned that "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".[91]

69. Rosemary Davidson judged that extradition of own nationals would be "very difficult for the EU-27. For many of them, it is a constitutional issue". She noted that:

> "To take Germany as an example, the amendment to the German constitution [made in order to implement the EAW Framework Decision] is very confined. They will extradite their own nationals within the EU—and that is it. It is a case of having to conduct negotiations on other negotiations in this context, and trying to persuade Member States that it is worth the political risk for them to seek to negotiate to amend their constitutions internally. That is the practical difficulty that stands in the way there."[92]

70. Mike Kennedy told us that "often in this country we underestimate how big a decision it is for some of the European Union Member States to extradite their own nationals. In many countries before 2004 it was simply a no-go

88 Q 27
89 Q 18
90 Q 6. See also European Union Committee, *Brexit: The EU Data Protection Package* (3rd Report, Session 2017–19, HL Paper 7)
91 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77) para 141
92 Q 19

area. In fact, when the agreement was put into legislation in Germany, it was struck down first by the German constitutional court, its most senior court, because it was contrary to the constitution to extradite own nationals". He observed that "historically, Poland and several of the Scandinavian countries would not extradite their own nationals either. We have always been willing to extradite our own nationals".[93]

Conclusions

71. **We welcome the Home Secretary's announcement that it is a priority for the Government to ensure that the UK remains part of the European Arrest Warrant. However, it is not clear how this objective is compatible with the Government's objectives in relation to the CJEU, let alone other aspects of the UK's withdrawal from the European Union.**

72. **For this reason, we have explored how the most promising avenue for the Government to pursue might 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. That agreement has taken a long time to negotiate, and applies to two European states ostensibly moving towards EU membership that also participate in the Schengen Area. It has yet to enter into force, so it has not been tested in practice. Nevertheless, it contains provision for a political dispute resolution mechanism, which would be compatible with the Government's desire for such a mechanism as it seeks to end the CJEU's jurisdiction in the UK.**

73. **Falling back on the 1957 Council of Europe Convention on Extradition would significantly slow down extradition proceedings, since it would mean going back to making routine extradition requests—as well as resolving disputes about extradition requests—through diplomatic channels.**

74. **The Government has indicated that it is contemplating a "phased process of implementation" in which the UK, the EU institutions and Member States prepare for new arrangements, specifying explicitly that this could include cooperation on criminal justice matters. We agree with those witnesses who suggested that any transitional arrangement is likely to include accepting, at least in part, the jurisdiction of the CJEU, if only because any other interim arrangement would itself take time to negotiate and agree—time that is already at a premium in the run-up to March 2019.**

75. **We stress, however, that a transitional arrangement that simply extends the status quo in relation to the EAW will be difficult to secure. In leaving the EU, the UK will no longer be party to other, related EU arrangements, such as the EU Charter of Fundamental Rights, EU data protection laws, and laws on EU citizenship. We therefore remain concerned about the prospect of a "cliff-edge", and emphasise that an operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk.**

93 Q 28

SUMMARY OF CONCLUSIONS

1. In its White Paper on *The United Kingdom's exit from and new partnership with the European Union*, the Government confirmed that it plans to "bring an end to the jurisdiction in the UK of the Court of Justice of the European Union". In practice, the jurisdiction of the CJEU will end automatically when the UK ceases to be an EU Member State. But this change leaves open the question of how the role of the CJEU in providing a level playing field between the UK and EU in criminal justice matters is to be provided for in any future agreement between the two parties, and what status the case law of the CJEU will have post-Brexit. (Paragraph 36)

2. The CJEU will have at least an indirect role in the interpretation of any agreement between the UK and the EU. In any agreement, on any subject between the UK and the EU, the terms of the agreement will—on the EU side—be subject to the jurisdiction of the CJEU, whose interpretation will be binding on the EU and its Member States. (Paragraph 37)

3. As for the CJEU's case law, the Government has already accepted that existing case law will stand the day after Brexit, because the European Union (Withdrawal) Bill "will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court". The Government also said that the European Union (Withdrawal) Bill would not require the domestic courts to consider the CJEU's jurisprudence, implying that new CJEU case law that develops post-Brexit will have no formal status in the UK. However, our witnesses were clear that CJEU case law is likely still to have persuasive authority. Indeed, it is conceivable that it could be a requirement of any future UK-EU extradition agreement for the UK formally to take account of relevant CJEU case law that develops post-Brexit. (Paragraph 38)

4. It was suggested to us that in the field of criminal justice, any alternative to the CJEU must be a court and not an arbitration mechanism, since only a court can review decisions affecting the liberty of the individual. The EFTA Court model has the advantage that individuals and businesses, as well as the Contracting Parties to the EEA agreement, can bring actions before the Court, replicating one of the more effective features of the CJEU. But it should be noted that at present, this model applies only to internal market-related disputes. Its jurisdiction was not expanded to cover Norway and Iceland's participation in the EAW. Furthermore, the section of the Government's White Paper dealing with dispute resolution mechanisms does not mention the EFTA model—perhaps implying that the Government has already ruled out this option. (Paragraph 39)

5. We question, moreover, whether in the context of the EAW the EU-27 will be willing to establish bespoke adjudication arrangements such as a parallel court in order to accommodate the UK's objectives. We observe in this context that the UK has already had to decide, as recently as the Protocol 36 Decision in 2014, whether to accept the jurisdiction of the CJEU in return for continued use of tools like the EAW. Now as then, the safety of the people of the UK should be the Government's overriding consideration. (Paragraph 40)

6. We welcome the Home Secretary's announcement that it is a priority for the Government to ensure that the UK remains part of the European Arrest

Warrant. However, it is not clear how this objective is compatible with the Government's objectives in relation to the CJEU, let alone other aspects of the UK's withdrawal from the European Union. (Paragraph 69)

7. For this reason, we have explored how the most promising avenue for the Government to pursue might 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. That agreement has taken a long time to negotiate, and applies to two European states ostensibly moving towards EU membership that also participate in the Schengen Area. It has yet to enter into force, so it has not been tested in practice. Nevertheless, it contains provision for a political dispute resolution mechanism, which would be compatible with the Government's desire for such a mechanism as it seeks to end the CJEU's jurisdiction in the UK. (Paragraph 70)

8. Falling back on the 1957 Council of Europe Convention on Extradition would significantly slow down extradition proceedings, since it would mean going back to making routine extradition requests—as well as resolving disputes about extradition requests—through diplomatic channels. (Paragraph 71)

9. The Government has indicated that it is contemplating a "phased process of implementation" in which the UK, the EU institutions and Member States prepare for new arrangements, specifying explicitly that this could include cooperation on criminal justice matters. We agree with those witnesses who suggested that any transitional arrangement is likely to include accepting, at least in part, the jurisdiction of the CJEU, if only because any other interim arrangement would itself take time to negotiate and agree—time that is already at a premium in the run-up to March 2019. (Paragraph 72)

10. We stress, however, that a transitional arrangement that simply extends the status quo in relation to the EAW will be difficult to secure. In leaving the EU, the UK will no longer be party to other, related EU arrangements, such as the EU Charter of Fundamental Rights, EU data protection laws, and laws on EU citizenship. We therefore remain concerned about the prospect of a "cliff-edge", and emphasise that an operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk. (Paragraph 73)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

List of Members

Baroness Browning
Lord Condon
Lord Cormack (Member until April 2017)
Lord Crisp
Baroness Janke
Lord Jay of Ewelme (Chairman)
Baroness Massey of Darwen
Lord O'Neill of Clackmannan
Lord Kirkhope of Harrogate
Baroness Pinnock
Baroness Prashar (Chairman until April 2017)
Lord Ribeiro
Lord Soley
Lord Watts

Declaration of Interests

Baroness Browning
No relevant interests declared

Lord Condon
Metropolitan Police Commissioner (1993–2000)

Lord Cormack
No relevant interests declared

Lord Crisp
No relevant interests declared

Baroness Janke
No relevant interests declared

Lord Jay of Ewelme
Member; Advisory Council, European Policy Forum
Member; Senior European Experts Group
Patron; Fair Trials International

Lord Kirkhope of Harrogate
Solicitor (England and Wales)
Member of European Parliament (1999—2016) (Conservative Spokesman on Justice and Home Affairs (2009—2016))

Baroness Massey of Darwen
No relevant interests declared

Lord O'Neill of Clackmannan
No relevant interests declared

Baroness Pinnock
No relevant interests declared

Baroness Prashar
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 Browning
Lord Cromwell
Lord Woolmer of Leeds
Lord Jay of Ewelme
Lord Liddle
Baroness Neville-Rolfe
Lord Whitty
Baroness Wilcox
Earl of Kinnoull
Lord Teverson
Lord Crisp
Baroness Faulkner of Margravine

During consideration of the report, no interests relevant to the to the subject-matter of the report were declared by Members of the Committee.
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-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at http://www.parliament.uk/brexit-european-arrest-warrant 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

**	Professor Sir Francis Jacobs QC	QQ 1–10
*	Sir Alan Dashwood QC	
*	Andrew Langdon QC	QQ 11–20
*	Dr Anna Bradshaw	
*	Rosemary Davidson	
*	Mike Kennedy	QQ 21–30
*	Aled Williams	

Alphabetical List of all Witnesses

*	Dr Anna Bradshaw	
*	Sir Alan Dashwood QC	
*	Rosemary Davidson	
**	Professor Sir Francis Jacobs QC	EAW0001
*	Mike Kennedy	
*	Andrew Langdon QC	
*	Aled Williams	