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Justice Committee Comataidh a' Cheartais

The impact of Brexit on the civil and criminal justice systems and policing in Scotland



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. In June 2016, the people of the United Kingdom voted to leave the European Union in a referendum. Shortly after, the Prime Minister informed the EU that she was triggering Article 50 of the Treaty on European Union to begin the process of negotiating the UK's withdrawal from the EU in the form of a Withdrawal Agreement. This Agreement would be informed by the framework of the UK's proposed new relationship with the EU27 states.
2. As of June 2019, no such Agreement has been concluded and, as yet, no agreement to any proposed deal with the EU27 has been able to command a majority in the House of Commons. At present, the UK will remain a member state of the EU until 31 October 2019, with the option to leave earlier if the Prime Minister can secure House of Commons support for her Brexit deal.
3. Since 2016, much of the public debate has focused on issues such as the future economic ties and trade arrangements between the UK and the EU, the border between Northern Ireland and the Republic of Ireland, immigration arrangements and the rights of EU27 citizens based in the UK and UK nationals based in the EU27 states.
4. Criminal and civil justice matters and policing have been far less prominent in the Brexit debate, with one or two exceptions, such as a recognition that the legislative framework covering the European Arrest Warrant may need to change.
5. In the first half of 2018, the Justice Committee held [three round-table evidence sessions](#) on key aspects of Brexit and the justice portfolio to better inform the public on the potential impact of Brexit in these areas. The Committee then took evidence from the UK Government's [Secretary of State for Scotland](#) and, separately, from the Scottish Government's [Cabinet Secretary for Justice and the Lord Advocate](#) in September 2018. The Committee has also spoken informally to representatives of Police Scotland in March 2019 on the impact of Brexit on this service.
6. The Committee has also been scrutinising a series of statutory instruments that have made changes to the statute book in Scotland in preparation for a potential 'no deal' scenario, where the UK leaves the EU without an agreed deal in place. A separate [report](#) summarising the changes made to the law was published in May 2019.
7. **This report sets out the potential impact of Scotland - with its separate legal system and with justice and policing matters broadly devolved - leaving the EU. The report summarises the evidence we have heard on these matters and makes a series of recommendations on action that needs to be taken.**

How does the Scotland currently co-operate with the EU and what may change with Brexit?

8. The UK and Scotland currently co-operate with the EU and other EU member states in a number of areas spanning the civil and criminal justice spheres and on policing. These include aspects relating to the arrest and extradition of those suspected of crimes, cyber security, asylum, illegal immigration, intelligence sharing and counter-terrorism, family law and custody disputes, cross-border commercial law etc.
9. It is important to recognise that Scotland itself has a particular interest and locus in the negotiations on justice and policing matters with the EU because of Scotland's independent justice system. The impact on this needs to be taken into account in the negotiation process.

In general

10. The UK, as an EU Member State, is the entity which signs up to both EU Treaties and individual EU justice measures.
11. However, Scotland has always had a separate legal system within the UK, with its own civil and criminal law, as well as its own courts, legal profession, police forces and prosecution service. Devolution in 1998 did little to change this as most policing and criminal justice matters are devolved under the Scotland Act 1998 (Scotland Act) – the main exception in the policing and criminal justice field is that rules on national security, interception of communications, official secrets and terrorism are reserved to Westminster, as is extradition. In addition, most aspects of civil law relate to devolved matters.
12. Consequently, although the UK Government controls the direction of the UK's involvement in EU justice policies, the Scottish Government has a key role in submitting its views into the UK's negotiating positions as well as implementing EU legislation. The Scottish Parliament also has an important role in scrutinising such legislation.
13. Scottish bodies are also involved in parts of the UK's institutional framework for dealing with EU justice matters – for example, the Crown Office and Procurator Fiscal Service (COPFS), which is responsible for prosecuting crime in Scotland, participates in the UK Government's "Eurojust Oversight Board" which sets the direction of the UK's Eurojust policy. Police Scotland also has an officer based in the Europol Liaison Office in the Hague.
14. Similarly, in the civil field there is a separate Scottish Government contact in the European Justice Network.
15. Scottish bodies are also responsible for the operational and administrative aspects of the EU's justice policies in Scotland. For example, in the criminal sphere, the Crown Office's International Co-operation Unit deals with outgoing and incoming

European Arrest Warrants, with Police Scotland's Fugitive Unit executing incoming European Arrest Warrants in Scotland.

16. Similarly, in the civil sphere, it is the Scottish courts which are responsible for interpreting and implementing the various EU rules, for example by enforcing judgments from other Member State courts in Scotland. The Scottish Central Authority, which sits within the Scottish Government's Justice Directorate, acts on behalf of Scottish Ministers to process applications and discharge other duties set down in various EU Regulations, notably those concerning parental child abduction (Brussels IIa) and reciprocal enforcement of maintenance obligations. The Scottish Government also contributes to the formation of UK Government policy in respect of areas which are devolved to Scotland.

Policing


17. As part of the UK, Scotland currently participates in a range of policing and criminal justice measures and agencies as a result of the 2014 bulk opt-inⁱ, and individual opt-ins exercised since then. While this is not an exhaustive list, these include:
- Europol
 - Eurojust
 - The European Arrest Warrant which came into force in the UK on 1 January 2004 as a result of the Extradition Act 2003.
 - The European Investigation Order – this provides criteria for the mutual recognition and transfer of evidence gathered in one Member State to be used in other Member States. It replaces most of the EU rules on the transfer of evidence between Member States in criminal cases.
 - The European Protection Order – this allows a victim of domestic violence in one Member State to have a restraining order against the abuser transferred to another Member State if the victim moves there.
 - Rules on the recognition of assets and freezing orders in relation to the proceeds of crime and on cooperation between Asset Recovery Offices in Member States.
 - The EU Directive on minimum standards for crime victim's rights.
 - The EU Directive on the right to interpretation and translation in criminal proceedings.
 - Rules on the exchange of police information, i.e.:
 - The Schengen Information Systems – in 2015 the UK joined the second generation of these systems, known as SIS II. SIS II enables participating countries to share and receive law enforcement alerts in real time.
 - The Customs Information System – used in trafficking and drugs cases.

- The Prüm Decisions – these provide Member States with access to police databases on fingerprints, vehicle registration data and DNA.
- The European Criminal Records Information System which allows for the exchange of criminal records.

Common frameworks

18. In addition to the negotiations currently taking place between the UK and the EU27, the UK Government has also been considering what future arrangements it considers may need to be put in place within the UK on a range of matters. These include issues of civil and criminal justice, and policing and any agreements in these areas – post-Brexit – will also have a major impact on criminal and civil justice, and policing in Scotland.
19. These arrangements may be of a legislative or non-legislative nature and are more typically referred to as '**common frameworks**'. Currently there is a fair amount of debate on the need for these frameworks and how, if at all, they should apply between the UK Government, the Scottish Government and other devolved administrations.
20. On 9 March 2018, the UK Government published its [provisional analysis](#) of the returning EU powers that intersect with the devolution settlement. The analysis shows that there are 24 policy areas that will be subject to, “more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part”. A further 82 policy areas have been identified where non-legislative common frameworks may be required.
21. Within this analysis, a number of justice related policy areas were identified where **non-legislative common frameworks** may be required. These are:
 - Civil judicial co-operation - applicable law in contractual and non-contractual obligations
 - Civil judicial co-operation – cross border mediation (Mediation Directive)
 - Civil judicial co-operation - jurisdiction and recognition and enforcement of judgments in civil and commercial matters
 - Civil judicial co-operation - jurisdiction and recognition and enforcement of judgments: instruments in family law
 - Civil judicial co-operation - legal aid in cross border cases
 - Civil judicial co-operation – service of documents and taking of evidence

i The UK's right to decide on a case-by-case basis whether or not to opt in to proposals relating to the area of freedom, security and justice (covering issues such as policing and criminal justice) was set out in Protocol No. 4 to the Amsterdam Treaty in 1997, and confirmed by the Treaty of Lisbon in 2009. In 2014, the UK chose not to opt out of a series of reforms to EU justice and home affairs law.

- Civil judicial co-operation – uniform fast track procedures for certain claims
 - Criminal offences minimum standards measures
 - Mutual recognition of criminal court judgments measures and cross border cooperation
 - Procedural rights (criminal cases) – minimum standards measures
 - Provision of legal services (temporary and permanent basis)
 - Sentencing - taking convictions into account
 - Victims' rights measures in criminal cases – minimum standards (Victims' Rights Directive)
22. The UK Government and the Devolved Administrations in Scotland and Wales have agreed on the need for common frameworks in a number of areas. [Principles underpinning common frameworks](#) were agreed at the Joint Ministerial Committee (European Negotiations) on 16 October 2017.
23. The agreement between the governments outlines where common frameworks are necessary, they must:
- enable the functioning of the UK internal market, while acknowledging policy divergence;
 - ensure compliance with international obligations;
 - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
 - enable the management of common resources;
 - administer and provide access to justice in cases with a cross-border element to safeguard the security of the UK.
24. The SPICe Briefing on [Common UK Frameworks after Brexit](#) sets out the different forms that non-legislative frameworks could take:
-  Some might contain agreed shared standards, some could facilitate data-sharing, and others might set out detailed arrangements for intergovernmental relations, including more robust dispute resolution mechanisms (for instance around fisheries, or to set out how devolved ministers will be consulted during trade negotiations that might impact on devolved policy areas).
25. The need for common frameworks, post-Brexit, will also require governance arrangements to allow them to operate effectively. There may be a requirement for Joint Ministerial Committees or similar bodies in areas where common frameworks are created, including where justice frameworks are developed.

How might Brexit impact on the civil and criminal justice system and policing

26. It is not yet clear what impact Brexit will have upon the UK's relationship with the EU in the area of justice and home affairs, and therefore on institutions in Scotland. Much remains unclear because we do not know the terms of the UK's withdrawal from the EU. The UK could ultimately leave the EU with an agreed deal, covering a range of issues including justice and security matters, or it could leave without one, in which case the UK is likely to fall back on a number of bilateral arrangements and other forms of international co-operation.
27. Additionally, if the UK does reach a withdrawal agreement with the EU that is agreed by the UK Parliament, there is likely to be a transition period whilst the UK agrees the nature of its future co-operation with the EU. The current draft Withdrawal Agreement says that the transition period will run until the end of December 2020, with the possibility of extension for up to two years. A decision on extension must be taken by 1 July 2020. Therefore, the nature of the UK's co-operation with the EU on justice and home affairs issues could evolve again after any transition period.

Potential impacts on policing and criminal justice

28. Depending on the outcome of the negotiations with the EU and whether a deal is reached, Brexit could result in a substantial change to the current arrangements covering:
 - A series of cross-cutting matters relating to co-operation with the EU and its members states in policing and criminal justice;
 - A number of specific law enforcement and investigation initiatives; and
 - A set of information and data-sharing programmes.
29. At present, certain aspects of the law that is defined by reference to EU law is ultimately interpreted by the European Court of Justice (ECJ). The UK Government has previously indicated that, as part of Brexit, it no longer wishes this arrangement to continue. Instead it seeks to reach an agreement which respects the remit of the ECJ when the UK participates in EU agencies but also seeks to recognise the sovereignty of the EU and UK legal systems, putting in place an independent dispute resolution that the UK and EU both had confidence in.
30. Many aspects of judicial co-operation across the EU are predicated on the mutual recognition of orders by the relevant authorities of the various Member States. The principle of mutual recognition also operates in the context of participation in the EU legal order, which includes the Charter of Fundamental Rights, and which is ultimately subject to the oversight of the ECJ.
31. Once the UK leaves the EU, it will be a 'third country' and will not be covered, in the main, by the range of judicial co-operation and information sharing arrangements that are in place between the Member States, unless some other form of agreement is reached. A limited number of exceptions to this are in place for sharing air passenger names and tracking terrorist financing.

32. At present, the EU's justice and home affairs criminal cross border measures create a set of instruments for preventing, investigating and prosecuting crime. Taken together, they allow for rapid information sharing and effective co-operation between police and prosecutors across the EU. A loss of access to some or all of these measures would have an impact on current arrangements.
33. In June 2018, the Scottish Government published a [study](#) - *Scotland's Place in Europe: security, judicial co-operation and law enforcement* – which sought to summarise what the potential impact in Scotland could be if the UK no longer had access to these justice and home affairs criminal cross border measures.
34. In its report, the Scottish Government states that Brexit could result in a withdrawal of membership for Scotland, and the UK, of Europol. Europol is the EU's law enforcement co-operation agency, which works to assist Member States and across borders to combat serious international crime and terrorism. Europol is a support centre for law enforcement operations, a hub for information, and a centre for law enforcement expertise. Although, primarily an intelligence sharing agency it also offers operational support in tandem with Eurojust, supporting Eurojust co-ordination meetings and the establishment of Joint Investigation Teams.
35. The Scottish Government notes that the UK has a number of Seconded National Experts and also leads on a number of crime areas on behalf of Europol. Additionally, Police Scotland has an officer embedded in the UK Liaison Bureau to ensure expediency and operational efficiency in Scottish cases. In 2017, 6,000 intelligence contributions were made to Europol by the UK, which was more than any other Member State. Europol is involved in over 18,000 cross border investigations every year. In 2016, Police Scotland submitted 34 requests through Europol for cross-border surveillance and continued membership of Europol is seen as a vital tool for our law enforcement agencies for investigating and preventing crime.ⁱⁱ
36. According to the Scottish Government's analysis, losing membership of Europol without any other agreement in place would mean that information provided by Police Scotland will be removed from Europol databases due to data protection rules which could prejudice on-going investigations. Also, Police Scotland will no longer have access to data held by Europol. In practice, the Government believes that this could mean that fugitives from other European countries may not be identified as such and this will impact on taking the necessary steps to remove them from Scotland. Similarly, the Government believes that it would make it more difficult and time consuming to apprehend Scottish criminals who flee overseas.
37. One major cross-border measure is the European Arrest Warrant (EAW). The EAW is implemented throughout the UK by the Extradition Act 2003. It is a reserved issue. The EAW establishes procedures for transferring individuals relatively quickly and smoothly between EU Member States to face justice. It is designed to limit governmental involvement, is operational in all Member States and over-rides the objection in some EU Member States to the extradition of their own nationals.
38. Under the EAW regime, extradition is a judicial rather than a political process. The Lord Advocate has a statutory responsibility to conduct extradition hearings on

ⁱⁱ Figures released by then Justice Secretary Michael Matheson and Lord Advocate James Wolffe, 6 February 2017.

behalf of the requesting State. The decision on whether to order extradition is a matter for the courts.

39. The EAW operates on the basis of mutual recognition of decisions made by the relevant authorities in other Member States. It uses a Europe-wide pro forma warrant, with limited grounds for refusal and specified time limits for execution. Extradition proceedings by EAW can now generally be measured in days and weeks rather than months and years, as can be the case with traditional extradition requests. Since 2004, the UK has surrendered over 10,000 individuals under the EAW.
40. Between 2013 and 2018, there were 361 extraditions from Scotland (following conclusion of court proceedings in relation to EAWs). In the same time period, there were 70 extraditions to Scotland.
41. Evidence on the potential impact in Scotland of a loss of access to the EAW is covered in the next section of this report. The merits or otherwise of reverting to a 'fallback' position where extradition is based on the Council of Europe Convention and various protocols is also covered.
42. Another major cross-border measure is the European Investigation Order (EIO). This came into effect in 2017 and replaces International Letters of Request (ILOR) as the means by which EU Member States request from each other, evidence, information required or other assistance for criminal investigations and proceedings. The intention of the EIO Directive is to provide for a simpler, unified system for the gathering of evidence across jurisdictions and provide legal certainty for law enforcement agencies and individuals subject to criminal proceedings.
43. According to the Scottish Government, if continued access to the EIO cannot be negotiated, the immediate 'fall back' position would be to revert to previous methods i.e. ILOR. The Government notes that these have no set timescales for execution and, in its view, it is likely that this would slow the administration of justice. It also creates the possibility that ILORs from the UK will be given less priority than EIOs.
44. The EU's justice and home affairs regime includes a number of separate arrangements for data sharing.
45. The essential question for policing in terms of potential Brexit impacts is whether the 'fallback' positions of using suboptimal non-EU tools as a replacement for EU instruments (which are often automated) will require changes to policing practice and whether this, potentially, could be exploited by criminals and reduce police capability. This could be in relation to a reliance on Interpol over Europol, the Council of Europe Convention on extradition over European Arrest Warrants or an inability to access key EU databases such as ECRIS.
46. Brexit may also have an impact, financially, on the budgets required for Police Scotland and potentially other parts of the justice system. The Committee heard mixed views on whether adequate funds have been provided by the UK Government.
47. The Chief Constable of Police Scotland had plans – now on hold – to recruit an additional 95 officers, as well as retain 300 who had been due to be cut – to respond to Brexit. It was estimated this would cost some £17 million in 2019/20,

with additional costs for equipment of £0.8 million. Although these plans were put on hold in May 2019, costs of £1.27 million have already been incurred.

48. In evidence provided to a meeting of the Scottish Police Authority board on 22 May 2019, Deputy Chief Constable Will Kerr said that the total costs projected for the policing of Brexit for rest of financial year (2019/20) were expected to be £17 million, if the same level of current spending continues. He said that Police Scotland was spending £300,000 per week on Brexit and that the organisation had no budget allocated for additional spend.
49. DCC Kerr also highlighted the work that Police Scotland was carrying out to build bilateral ties with other national forces, Europol and Interpol. He reported that the focus had been on replacing European Arrest Warrant with alternative options. DCC Kerr told the SPA Board that that these alternatives though would be “sub optimal”.

Potential impacts on civil justice, family and commercial law

50. Scotland’s civil justice regime and that of commercial law also has the potential to be affected by Brexit. The extent of the impact will again depend on what form Brexit takes.
51. In general terms, the EU civil law regime is based on mutual recognition across the EU. UK and Scottish legislation cannot, of course, unilaterally make provision on mutual recognition across the EU. As indicated above, that depends on the results of the current negotiations between the European Commission and the UK Government and any agreement being given effect in EU Member States. The main concern is that the current arrangements governed by EU civil and commercial law will no longer apply to Scotland and, potentially, that any fallback position on based on non-EU alternatives would be less efficient and less effective.
52. There are essentially three areas of potential impact that need to be considered. First, there are questions of jurisdiction. Which court is competent to hear a particular dispute involving a cross-border family? Secondly, there are questions of applicable law. What law will the court that is exercising jurisdiction apply? Which country’s law will it apply to determine the dispute? Thirdly, there is the question of the recognition and enforcement of overseas judgments. To what extent will a Scottish court recognise judgments from overseas and vice versa? All of these can be impacted by Brexit insofar as the current arrangements at EU level have addressed these questions.
53. The range of areas that could be affected by Brexit is extensive. Mutual recognition of each other’s systems is important in cross-border cases of divorce and parental responsibility judgments and child abduction cases. Current EU law also allows someone taking a case to be clear which jurisdiction is appropriate and to see judgments enforced for civil and commercial matters.
54. EU civil law also provides for the provision of common minimum standards for granting legal aid in cross-border disputes, and facilitates access to alternative dispute resolution and encourages the use of mediation.

55. At an intergovernmental level, EU law in this area – through the European Judicial Network in Civil and Commercial Matters - improves cooperation at an official level between judicial and legal authorities.
56. In relation to freedom of movement of citizens, EU civil law has simplified the requirements for presenting certain public documents e.g. birth, marriage or death certificates, thereby making it easier for citizens to move between countries.
57. Finally, the UK is a member of some Hague Conventions in its own right. For other Hague Conventions, UK membership is as an EU member: these are the 2005 Convention on Choice of Court Agreements and the 2007 Convention on Family Maintenance. That is also the position in relation to the Lugano Convention, which covers jurisdiction and the enforcement of judgments in civil and commercial matters between the EU and some European Free Trade Association countries. If the UK leaves the EU without a negotiated settlement, there may potentially be a gap during which there is no provision for international arrangements while the UK re-joins Conventions in its own right.

What views have been expressed to the Committee?

58. In 2018, the Committee held a series of round-table evidence sessions with a range of bodies to inform members on the potential impact of Brexit on the justice system. These were held on:

[30 January 2018](#) - Brexit and family law, with evidence from:

Janys M Scott QC, Faculty of Advocates;

Lucia Clark, Partner, Morton Fraser;

Juliet Harris, Director, Together Scotland;

Professor Paul Beaumont, Chair in EU and Private International Law, University of Aberdeen;

Professor Janeen Carruthers, Professor of Private Law, University of Glasgow

[30 January 2018](#) - Brexit and civil, commercial and consumer law, with evidence from:

Jason Freeman, Legal Director (Consumer), Competition and Markets Authority;

Frank Johnstone, Partner, Dentons;

James Mure QC, Convenor, European Committee, and Peter Sellar, Member, Faculty of Advocates;

Graeme Paton, Chartered Trading Standards Practitioner, Society of Chief Officers of Trading Standards in Scotland;

Professor Paul Beaumont, Chair in EU and Private International Law, University of Aberdeen;

Professor Janeen Carruthers, Professor of Private Law, University of Glasgow

[20 February 2018](#) - Brexit and policing and criminal justice, with evidence from:

Helen Nisbet, Assistant Procurator Fiscal, Specialist Casework and Head of International Co-operation, Crown Office and Procurator Fiscal Service;

Clare Connelly, Advocate, Faculty of Advocates;

Michael Clancy, Director, Law Reform, Law Society of Scotland;


Detective Chief Inspector Lorraine Henderson, EU Constitutional Change Programme, Specialist Crime Division, Police Scotland;

Dr Philip Glover, University of Aberdeen;

Dr Leandro Mancano, Lecturer in EU Law, Programme Director of the European Law LLM, University of Edinburgh.

59. Additionally, over the course of two consecutive Committee meetings, the Secretary of State for Scotland and then the Cabinet Secretary for Justice and Lord Advocate gave their views to the Committee on the key issues and the current state of negotiations between the UK and the EU27 in the area of criminal and civil justice, and policing.
60. The Committee also spoke informally to representatives of Police Scotland on the potential impact of Brexit on policing during our visit to the National Crime Campus at Gartcosh in March 2019.
61. The main points emerging from our evidence sessions to date are set out below.

Criminal justice and policing

62. In his evidence to the Committee, Dr Leandro Mancano pointed out the inter-connectiveness of much of EU law in these areas. He was of the view that the UK needed to take a holistic approach in its negotiations, because many of the instruments work together. In his opinion, for example, we cannot have an agreement between the EU and the UK on the European Arrest Warrant framework decision without having a related agreement on the UK's participation in the Schengen information system. Those two elements work together, as member states can enter the Schengen information system and then issue an alert on wanted or missing people or objects, for example. He stated that “a comprehensive agreement on security that would include those priorities seems to be unlikely, and a fragmented and piecemeal approach would not be very effective.”¹
63. In her evidence, Claire Connelly noted that the development of co-operation across the EU on criminal justice issues has paralleled a development and an increase in international crime, which itself had become more global and cross-border in nature.²
64. The view of the Faculty of Advocates was that the existing harmonisation, co-operation and mutual recognition must continue. The Faculty said that it “is important so that the United Kingdom, and Scotland in particular, do not become a haven for those who commit particular types of crime and wish to hide from pursuers or receive a more favourable punishment that is not in line with punishments elsewhere.”³ They also said that:
 it is also important for individual members of the public. They may not be aware of how such co-operation impacts on their day-to-day lives, their security and their person, but it does, and we must ensure that it continues post-Brexit.
65. Helen Nisbett of the COPFS told the Committee that a final agreement to some all-embracing treaty that preserved the current position as far as possible, albeit on a different legal basis from the current one, and—more importantly—if it sought to preserve the capacity for us to innovate further in future in our relationship with European partners, might mean that the practical impact of Brexit from the UK or Scottish prosecutor's point of view might be minimal. However, she added that there

were two issues that might add real challenges in that respect: the need for data sharing and the question of who arbitrates in the event of dispute. In her view, those challenges still needed to be properly addressed. She added, “until we know how those aspects are to be dealt with, it is difficult to properly assess what the practical impact will be.” ⁴

66. In his evidence, Detective Chief Inspector Henderson of Police Scotland indicated that, as practitioners, the police service had identified a number of measures as its priorities, which linked together. In his view, the Schengen Information System is a hugely effective tool in front-line policing to enable the police to keep communities and police officers safe. He noted that officers could get real-time information on whether someone is wanted in another country including whether they are a violent individual, given the crimes that they have previously committed. ⁵
67. DCI Henderson added that in the year before the Schengen information system came into effect in April 2015, the police executed 73 European Arrest Warrants. Following the system’s introduction, that figure jumped to 111 because the police had real-time access to information. In his view, “that will be lost if we do not have access to the second phase of the Schengen information system, or SIS II.” ⁵
68. DCI Henderson also noted the value of the UK’s participation in Europol. In his view, “when we no longer have full membership, we will not have any opportunities to bring our influence to bear”. He believed that the UK could become a strategic member such as Albania and Russia, with which no personal data is exchanged, or we could move to operational membership, as the USA, Canada and Norway have done. He noted that that involved fuller membership than is the case for strategic partners, but those countries do not have full membership, so, in his view, “our opportunity for influence would be gone”. He concluded by noting that “the UK Government was seeking to eke out a more unique relationship with Europe, but we do not know how realistic that is.” He also added ⁵ —

” From a policing perspective, will we still be able to co-operate with our partners throughout Europe? Yes. Will that co-operation be as slick and effective as it is at present? Probably not, if we do not maintain full membership. It will be more time consuming, cumbersome, bureaucratic, and possibly more financially constraining because the current measures were put in place to cut out all, or a lot of, the bureaucracy.

69. In terms of future co-operation in the areas of criminal justice and policing, Dr Mancano highlighted what he described as the Brexit paradox ⁶ —

” If the UK is going to reach a comprehensive and specific agreement with the European Union on policing and judicial co-operation on criminal matters, it will have to comply with European Union standards of law. There is no scenario in which the EU has signed an agreement with a third country without that country providing reassurance that it is complying with EU law standards, especially with regard to the protection of fundamental rights. It will be very interesting to see what happens. One of the main arguments for Brexit is that the UK does not want to be bound by the charter of fundamental rights any longer. If the UK wants to get back in through the window at the moment that it signs an agreement with the EU, with which conditions will it need to comply? That is something that we should consider. Which conditions, specifically on fundamental rights, will the UK be able to comply with in order to sign an agreement?

European Arrest Warrants

70. One particular area where the Committee took a substantial amount of evidence was that of the European Arrest Warrant (EAW). The EAW is a simplified cross-border judicial surrender procedure, for the purpose of prosecuting or executing a custodial sentence or detention order. A warrant issued by one EU country's judicial authority is valid in the entire territory of the EU.
71. Part of the debate surrounding Brexit in the justice field concerns whether or not the UK - as a third country outside of the EU - can participate as fully in the EAW process or has to fall back on what some argue are less efficient and more time-consuming processes.
72. Speaking to the Committee, the Secretary of State for Scotland confirmed that, after any transition period where current arrangements would apply, the UK wishes to enter into a new arrangement with the EU. He said this should have an extradition agreement which is the "equivalent" to the EAW and that there was no "operational or legal reason why that cannot happen" ⁷. Mr Mundell accepted, however, that not reaching such an agreement would be "sub-optimal". ⁸
73. The Cabinet Secretary for Justice was critical about the UK Government's proposals in relation to the EAW. Mr Yousaf said that any arrangement that can be negotiated will be "deficient in comparison with what we currently have." He said ⁹ —

” My strong belief is that if we have any measures, any structure, any governance, or any mechanisms that are deficient in comparison with what we currently have—and, inevitably, we will—whether that is for European arrest warrants, Europol, Eurojust or ECRIS, the only people who will benefit from that will be those who are trying to evade justice.
74. The Lord Advocate also commented. He compared the EAW system with Part 2 of the Extradition Act 2003 which deals with non-arrest warrant extraditions. Mr Wolffe described extraditions under this Act as "significantly more cumbersome" ⁹ saying that "the average time for the execution of a European arrest warrant is 42 days and the average time for a part 2 extradition is between nine and 10 months".

75. The Lord Advocate also noted that ⁹ —

” The other important practical difference is that the arrest warrant is plugged into the SIS II system. It sits alongside the system of alerts, which means that if we issue an arrest warrant for a suspect whom we want for trial in Scotland, they may be picked up very quickly through the operation of the SIS II system. A good example of that is Marek Harcar, the man who was accused and ultimately convicted of the murder of Moira Jones. We issued an arrest warrant and, following that, he was picked up very quickly in his home country of Slovakia and ultimately returned for trial. There are alert systems through Interpol, but alerts do not go up on to the system as quickly as they do through the SIS II system.

76. The Lord Advocate said that the fallback position after Brexit is likely to be the European Convention on Extradition. He said that there were still some "technical issues" to resolve if this were to be the case, as some members states had repealed their domestic legislation which would allow them to rely on this Convention. He also noted that, unlike the EAW, some countries (such as Germany) will be able to refuse to extradite their own nationals to the UK due to a constitutional ban that is currently overridden by the EAW.

77. Finally, the Lord Advocate also commented on the related issues of data-sharing and data protection. He noted that SIS II underpins the EAW, enabling a two-way exchange of information between law enforcement agencies. He warned that, without some form of deal, difficulties could now arise due to the UK's third-country status after Brexit ¹⁰ —

” The point that underlines that is that there is EU law about the transfer of data to third countries and one anticipates that, from the EU's perspective, any arrangement that we put in place for access to those databases will have to comply with its requirements in relation to the transfer of data outside the EU. The UK has recognised that this is a cross-cutting issue. We will be required to maintain a data protection regime that meets the EU's requirements in relation to the transfer of data outside the EU.

78. Others who gave evidence to the Committee also commented on the merits of the EAW and the potential disadvantages of the fallback position. For example, Dr Mancano said ¹¹ —

” ... when we talk about fallback regimes and say, for example, that we might rely on the Council of Europe's Convention on Extradition rather than the European arrest warrant framework decision, we must recognise that, as systems for interstate co-operation on criminal matters, they are not comparable. The European arrest warrant is not just a variant on extradition, but the flagship of a completely new system of collaboration that is based on mutual recognition.

79. Claire Connelly said that the EAW had “been hugely efficient in enabling us not only to bring home criminals who have sought refuge elsewhere but to send those who are accused of crimes to other countries so that they can face a proper trial or receive a punishment that has already been handed down to them.” ¹²

Civil justice, family and commercial law co-operation

80. In relation to civil law relating to families, in her evidence to the Committee, Professor Janeen Carruthers stated that ¹³ —

” On the advent of Brexit, the European Communities Act 1972 will be repealed, and with that the private international law landscape will change dramatically, because the private international law landscape in Scots law is currently European in character. Various European regulations are applicable, and the operation of those instruments will be in question on the advent of Brexit.

81. In contrast, Professor Paul Beaumont told the Committee that Brexit would not really cause a problem in most civil law areas. He thought it was a case of “much ado about nothing” in most cases aside from divorce. He added ¹⁴ —

” If we stop applying the EU instruments unilaterally, the fallback position in this context is the common law, not an international regime. Our fallback is Scotland’s proudest development in that area of law, which is *forum non conveniens*ⁱⁱⁱ. We are the architects of a concept that has now been accepted throughout the common-law world—in the United States and all the Commonwealth countries. It is one of the few things that we can say is a product of Scottish legal endeavour. Therefore, it would not be shocking to apply a system of *forum non conveniens*, which would involve our courts making the assessment as to whether there is a more appropriate forum to deal with the matter and declining jurisdiction in favour of that more appropriate forum.

82. Janys Scott QC agreed that the current EU regime is not perfect and that it could be seen as “work in progress”, but, in her view, it was better than what we had before. She noted that it prevented parties from having to litigate in two places at once because they both thought that they had the right regime, which could lead to a problem with enforceability. She stated that the benefit of the current regime in the EU is that it provided for determination and finality to reduce expense and distress for families. She added that EU instruments help bring certainty to the parties involved in cross-border disputes and that ¹⁵ —

” What is proposed [from Brexit] would send us off into the wilderness of uncertainty in family proceedings, whereas we were on a course that was bringing us towards greater certainty. Albeit that it was not perfect, we were definitely working on it.

83. Lucia Clark predicted some difficulties with the fallback position advocated by Professor Beaumont. She said that *forum non conveniens* was “expensive and can be quite time consuming, and it is discretionary”. ¹⁶

ⁱⁱⁱ **Latin for “inconvenient forum” this common law doctrine allows a court to dismiss a civil action (even though the forum or venue is proper and the court has jurisdiction over the case and the parties) where an appropriate and more convenient alternative forum exists in which to try the action.**

84. Juliet Harris was able to quantify some of the human impact that may result from Brexit. She said ¹⁷ —

” Research that has been carried out with children and young people shows that even now there are implications for their mental health from not knowing what will happen next in terms of Brexit and their rights. Research that we conducted last year identified that 10 per cent of the babies born in 2016 have a parent from the EU, so we are talking about a lot of children and families who will be affected by that uncertainty—more than 5,000 babies who were born in 2016 will be affected by it.

85. In contrast through, Professor Beaumont said that, for children who have been abducted, the Hague regime was better than the EU regime. In his view, “the EU regime gives left-behind parents false hope that they will be able to get their children back using the override mechanism, when all the evidence shows that that mechanism simply does not work because the states will not apply it properly and will not enforce it.” He added that, in other areas of child law, the Hague regime is, in his view, “just as good as, if not better than, the alternative.” ¹⁸
86. On this point, Professor Carruthers argued that the Hague regime is not entirely comprehensive. On maintenance, she said, the Hague regime is not as good than the EU regime, in so far as there are no direct rules of jurisdiction. On the allocation of jurisdiction—which court can exercise competence over various matters—there are differences between the Hague and EU systems. However, Professor Carruthers acknowledged that the Commission never brings enforcement action against member states for non-compliance in relation to maintenance decisions.
87. She stressed that the fallback position in some areas of family law – the Hague Convention – was not as effective. In her view, the current EU is actually stronger than the Hague framework that we would fall back on. The EU regime is, in her opinion, very clear about the need for children and young people to have their voice heard in court proceedings, it emphasises their best interests and it talks about the timescale for those proceedings, which is so important in a child’s life.
88. In terms of broader aspects of civil and commercial law, Professor Beaumont noted that the UK was likely to fall-back on the Lugano Convention. The UK’s participation in the Convention is as an EU Member. Professor Beaumont therefore noted that, to stay in this Convention, this would need the consent of all the other contracting states. In his view, if the UK were in the Lugano Convention, the changes in comparison with our current adherence to the EU’s regime “would not be enormous”. He did point out, however, that one benefit of the EU’s regime over Lugano related to EU rules on choice of courts and the inability of one party to a dispute to hold processes up by raising issues of choice of court. This would be much more difficult to prevent under the Lugano Convention.
89. Professor Carruthers said that the current EU regime, seen from the point of view of a UK business, consumer or employee, provides great advantages for such parties. She noted that the regime, which was designed to support the internal market, constitutes a set of agreed rules of jurisdiction in civil and commercial matters and, flowing from that, it sets out the principle that a judgment on a civil and commercial matter that is issued by a court in one member state will be recognised and enforced in all other member states.

90. She added that, when Brexit happens, even if the UK adopts the wording of the recast regulation^{iv} in domestic law, we cannot bring about the reciprocity that we currently enjoy. Even if a Scottish court is prepared to recognise a judgment that is issued by a French court, for example, we cannot ensure that a French court will reciprocate vis-à-vis a Scottish judgment. In her opinion, the consequences of that for businesses and consumers—people who currently operate under the terms of the recast regulation—will be prejudicial.
91. Speaking about the efforts of the UK Government to put in place a new agreement with the EU, rather than rely on fallback positions like the Hague of Lugano Conventions, Professor Carruthers concluded ¹⁹ —
- ” We have a whole suite of EU regulations in this area that have given us a very sophisticated set of rules for cross-border problems, not only for families but for consumers, employees and businesses. Looking in the round at that suite of regulations, it would be possible—in line with what the House of Lords and House of Commons committees have favoured—to try to negotiate some sort of bilateral solution whereby we retain all the great benefits of speed and more limited costs that the EU regulations have brought. I would support that as the current negotiating position.
92. During his appearance before the Committee, the Secretary of State for Scotland was asked to comment on civil justice and commercial law co-operation matters after Brexit. He confirmed that the UK Government was "seeking to agree new and reciprocal agreements ... based on our current depth of co-operation". ²⁰
93. He indicated that the UK Government's views was that the Hague Conventions will continue to apply during and after the process of Brexit and that the Government will continue to apply the provisions that the UK has signed up to. He also said ²⁰ —
- ” ... the scenario that we are working towards is that there will be an implementation period which will operate until 2020 in relation to the continuation of existing arrangements as we leave the EU. That means that there will be an extended period during which a number of those issues will be developed. I say to anybody who is involved in an on-going legal matter across jurisdictions that we want to do nothing that would prejudice their current legal rights, and that is what we will seek to ensure.
94. The Secretary of State confirmed that the UK Government would publish a technical note in this area. A note - *Handling civil legal cases that involve EU countries if there's no Brexit deal* – was published on 13 September 2018.

iv Refers to Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation) which regulates jurisdiction and the recognition and enforcement of judgments between EU member states. It has direct effect in the UK and in other member states except Denmark.

Role of the European Court of Justice

95. In its White Paper of July 2018, the UK Government states that the role of the European Court of Justice (ECJ/CJEU) in the UK will come to an end, and it sets out detailed proposals for joint institutional arrangements to police future economic ties. However, the Paper also says that the Court is the ultimate legal authority on EU rules with which the UK proposes to harmonise (e.g. where the UK participates in an EU agency). The White Paper proposes that if there are disputes in areas where the UK has agreed to be part of a common rule book then “there should be the option for a referral to the European Court of Justice for an interpretation”. Furthermore, the Paper is clear that when disputes do arise and are not resolved through dialogue, then the EU can subject the UK to measures which “could include financial penalties or suspension of specific obligations”.
96. Some of those giving evidence to the Committee noted the importance of the ECJ in relation to the interpretation and enforcement of EU law.
97. Dr Mancano, for example, expressed some reservations that the shape of the final agreement between the EU27 and the UK will in fact see the end of the current role of the ECJ in favour of a new bilateral body. He cautioned that we should “not take it for granted that there will be an autonomous body or an international arbitration model as part of a potential agreement, given that the CJEU will have to decide whether the presence of such an external body is compatible with European Union law.”²¹
98. Some of those giving evidence to the Committee were particularly concerned about what would happen to EU law and the work of the ECJ in the event of a ‘no deal’ Brexit or one where the courts role in a transition was limited or non-existent. In relation to family law, for example, Janys Scott noted²² —
- ” The Court of Justice is not involved in substantive family law, as far as we are concerned; it is simply concerned with assisting us with disputes that arise in relation to implementation, procedure and enforcement. That is not particularly unacceptable, politically, and part of what we have been proposing is that the Court of Justice should continue to do that, at least during the transitional period, so that we make sure that we are in conformity with all the other jurisdictions that implement the regulations. We are asking you please just to give us a breather.
99. As Professor Beaumont also noted, a desire for continued involvement in EU instruments after Brexit potentially came with complications in relation to the ECJ. He noted that¹⁶ —
- ” ... in the long run, doing so would mean accepting the jurisdiction of the European Court of Justice when we do not have a judge on that court. It does not seem to be a very rational solution.
100. Members of the Committee also questioned the Secretary of State for Scotland on these matters, asking how much the proposals ensured that the UK was ‘taking back control’ of its laws given what was being proposed. He replied that²³ —

” ... any reference to the Court of Justice would be made by our choice; we would have chosen to do that. We would have chosen the arrangements that had been put in place which led to reference seeming to be appropriate or desirable. We have made clear that the Court of Justice would have no automatic, direct right of involvement in the United Kingdom, but where we are co-operating with EU member states in relation to frameworks or arrangements that they have set up, it might be appropriate to make such a reference, and the opportunity to do so would be available.

101. In response to a suggestion that the choice to refer a matter to the ECJ, as opposed to a requirement, was not a credible position and one that the EU27 would be unlikely to agree to, Mr Mundell replied ²⁴ —

” If we were to remain part of certain arrangements, there would be on-going matters in relation to which the court would have an expertise—if I may put it in that way—and all parties might consider it appropriate to make a reference to it. Our position has always been clear: there would be no continuing direct role for the Court of Justice—and that is the case; that is the position that we have taken forward into the negotiations—but in areas where, in essence, there was participation on our part in a European institution, there would be the option for a referral.

102. The Cabinet Secretary for Justice commented on this position when he appeared before the Committee. He said that it remained unclear the extent to which the UK Government will accept the authoritative interpretation of EU law by the ECJ. He added ²⁵ —

” This will undoubtedly come down to the debate—to put it politely—that we are seeing between those who want as hard a Brexit as possible and those who take a more pragmatic view. Those who are pushing for an ideologically hard, isolationist Brexit will not accept the jurisdiction of the European Court of Justice. Given that we want to be a nation that trades globally and is outward looking, I just do not see how we can square that circle.

103. The Lord Advocate also commented ²⁵ —

” There are a couple of points to make. One is that there must be a system that ultimately decides what the rules mean. If, and insofar as, we simply continue to participate in the set of rules that already exist, by definition we will continue to be part of the EU legal regime and the European Court of Justice will ultimately decide what that means.

A good illustration of that is what will happen during the so-called transition period, assuming that we have a withdrawal agreement along the lines of the one that has been published. During that period, we will continue to be subject to the rules of the EU and we will continue, therefore, to be subject to the interpretation that the European Court of Justice makes of those rules, although during that period we will not have any British judges on that court. That is an illustration of how, if we want to be part of a regime of rules, we will be affected by the way that the court whose job it is to interpret those rules interprets them—regardless of whether we are directly involved in the court by way of having judges there.

Current status of negotiations and timetables

104. Since the triggering of Article 50 to bring about the process of the UK leaving the EU, negotiations have been underway between the UK and the EU27 - led by the European Commission - to agree the terms of the UK's withdrawal and discuss a framework for the UK's future relationship with the EU. Additionally, within the UK, there have been some discussions between the UK Government and the devolved administrations on some aspects of Brexit. Differing views have been expressed on the adequacy of these intra-UK discussions.
105. The UK Government's then Secretary of State for Exiting the EU, David Davis, began meeting with the European Commission's negotiator, Michel Barnier, in June 2017. A series of meetings have taken place with him and with his then replacement, Dominic Raab (now replaced), and also between the Prime Minister and other Heads of Government in the European Council.
106. These meetings have culminated in a negotiating process which, at the time of publication, had not been concluded and which is currently extended to the end of October 2019.
107. In his evidence to the Committee in September 2018, the Cabinet Secretary for Justice said ²⁶ —

” At this late stage, it is deeply concerning that the UK Government does not know what the future relationship with the EU on justice matters will be. The lack of clarity and detail from the UK Government in relation to negotiations with the EU presents us with considerable challenges, but however regrettable the position that we find ourselves in, the Scottish Government and Scotland's operational partners such as Police Scotland and the Crown Office will continue to make responsible preparations for all exit possibilities. Planning is well under way to prepare for an unfathomable no-deal scenario. ²⁶

108. His preference - in relation to a preferred outcome - was as follows—

” The Scottish Government shares the aim of having a close relationship with the EU in relation to security, law enforcement and civil judicial co-operation. It is critical that the UK Government negotiates a future relationship with the EU that takes account of Scotland's separate legal system and the independent role of the Lord Advocate and maintains the direct links that our justice agencies have with the EU. Given that the level of engagement from the UK has not always been consistent or meaningful, I hope that the acknowledgement of all those points in the UK Government's white paper in July signals a willingness to protect and promote Scotland's independent system amid negotiations. ²⁷

and that—

” If there is any detriment to the current arrangements with the European arrest warrant, Europol, Eurojust and many other measures, only one set of people will benefit, and that will be those criminals who are on the run, hopping from country to country across the European continent. Nobody else will benefit from any looser arrangements.

109. The Lord Advocate in his evidence told the Committee that ²⁸ —

” From an operational perspective, one would want participation in a legal regime that is equivalent to what we currently have. While there will be, I anticipate, a great deal of good will about co-operation across borders between criminal justice agencies, it is very important to keep in mind that we will be dealing with the rights of individuals—suspects and people accused of crime—so we will need in place a legal regime that is effective. There must, from the operational perspective, be legal instruments and participation in institutional structures that facilitate co-operation and access to data.

110. In his evidence, the UK Government's Secretary of State for Scotland pointed to the proposed 2-year implementation (transition) period that is being discussed and said that ²⁹ —

” Under the implementation period, as is currently the case, everything would remain the same through until 2020. There are one or two exceptions, but the EU and the UK would operate on the same basis as we do now. In that period, the future relationship agreements would be concluded. That is the basis that I am seeking to achieve, and I believe that it is achievable.

111. Within the context of discussions within the UK, the Cabinet Secretary for Justice was somewhat critical, describing the situation relating to discussions between the UK and Scottish Governments as "a mixed bag". He said some information on civil judicial co-operation had been shared but ³⁰ —

” Other matters have been a bit more difficult—particularly issues on which we have been dealing with the Home Office. On when we have seen detail and so forth, the level of engagement on justice issues has, as I said, been a mixed bag. It is fair to say that we are getting some information, but it would have been helpful if that information had been shared a lot earlier in order for us to be able to make necessary preparations.

He added ³¹ —

” ... the clear pattern that is emerging is that the communication flow is certainly better with the Ministry of Justice than with the Home Office. What I have done, when I have been told of that, is to seek to redress it, so I have written to the Home Secretary. I will keep the committee informed of the response that I will undoubtedly get from the Home Secretary and, I hope, of any conversations that I have with the Home Secretary.

112. In response to questioning from the Committee, the Secretary of State for Scotland said that UK-Scottish discussions were "always on-going" and that he recognised the "distinct nature of Scotland's civil and criminal legal system" ^[10]. He also said that, in recent months, a new forum has been set up by the Cabinet Office and the Department for Exiting the EU which would have a specific discussion on justice issues.

113. In relation to the European Arrest Warrant and discussions around this, the Secretary of State said ³² —

” We want an outcome that will afford our citizens maximum protection, which the current arrangement provides. That is why, after the implementation period during which the existing arrangements will apply, we will want to enter a specific new arrangement with the EU to continue to operate on such a basis. That will be subject to agreement, but it is clear from recent figures that EU member states would have significant benefits from maintaining such an arrangement with the UK. I understand that, in the past year, approximately 10,000 individuals in the UK were the subject of European arrest warrant proceedings, which meant that they were arrested and returned to other EU member states. We have exercised about 1,000 European arrest warrants in EU member states. There is a clear mutual benefit in coming to an agreement, which is our objective.

Common frameworks

114. Once the UK is no longer a member of the EU, consideration will need to be given to what replaces previous EU legislative frameworks on civil and criminal justice and policing co-operation within the UK. Both governments are currently discussing so-called common frameworks of both a legislative and non-legislative nature.

115. Speaking at the Committee meeting, the Secretary of State for Scotland said ³³ —

” Scotland’s separate justice system is already respected in the system, and that is not going to change. The area of justice will not be subject to a legislative framework, because of the different legal system that currently operates in Scotland. Clearly, it is desirable to have consistency across the United Kingdom—for example, in recognising a divorce in an EU member state. It is desirable that the arrangements in Scotland, England and Wales are the same, but it is not essential, and that is the basis on which we have proceeded with our distinct Scottish legal system over many years. What we hope to achieve in a number of areas is agreement to operate on a similar basis across either Great Britain or the United Kingdom. However, justice is an area in which there will not be a single legislative framework as such. In many cases, we will seek to build on the existing agreements.

116. He also envisaged "building on the existing co-operation" to reach agreement on these matters.

117. In response, the Cabinet Secretary for Justice said that he was "encouraged" by what he had heard from the Secretary of State but that more detail was required. He wished to see "experts talking to experts" in the justice domain and hoped that the Home Office's new "senior steering groups" would deliver some of these expert exchanges. ^[12] He added the following on the pro-active steps that the Scottish Government could take to articulate its views on common frameworks ³⁴ —

” ... we have not been shy in giving our opinion on how robust those mechanisms need to be and on the need for them to be more meaningful. Unfortunately, we have not necessarily had reciprocal feedback from the UK Government or a willingness to engage at the level at which we would like it to engage. However, there have been some positives and it would be churlish not to acknowledge some of the progress that has been made and some of the warm words from the Secretary of State for Scotland. Of course, when you say those warm words, they are on the record for ever more, so I will look to follow up on with the secretary of state and with other UK Government members.

Brexit preparedness

118. The final substantive issues explored with the witnesses from the two governments was that of the analysis, planning and contingencies being put in place to prepare for Brexit.
119. The Secretary of State for Scotland stated that "significant work" has been done with the Scottish Government and between UK police forces, including Police Scotland. In the event of a 'no deal', which he believed was "unlikely", then the UK Government was providing detail of its plans via a series of technical notices that were being published. He also indicated that contingency planning was underway with the Scottish Government and described the discussions as being "positive".⁷
120. The Cabinet Secretary for Justice said that the Scottish Government had been analysing the statute book for legislative deficiencies within the justice portfolio and would be preparing legislation to resolve these.
121. He also confirmed that the Scottish Government was "liaising with a number of agencies and bodies such as Police Scotland to assist them with workforce planning in the event of a no deal to help them prepare for exit from the EU." He said that a number of regular meetings had been held to discuss that contingency planning, and that "too is very much focused on a possible no-deal scenario."³⁵
122. He indicated that the Scottish Government had recruited extra staff to assist in its work relating to justice and Brexit and that a sub-board of the [justice board](#) had been formed to look at readiness and planning for Brexit. He indicated that some discussions had been held at official level with the UK Government and in ministerial forums.
123. In his evidence, the Lord Advocate confirmed that the Crown Office has been part of the UK's contingency planning since the start of 2018 looking at a range of possible scenarios and which was now focusing more heavily on a 'no deal Brexit'. An official from the Crown Office told the Committee that³⁶ —

” We have not seen huge detail on gap analysis. An increasing amount of information is being made available, but not the full analysis and data that I suspect the Home Office has. We are working quite hard to try to tally up as much as we can for our own planning purposes. For example, on Europol, the Scottish Government has no control in the negotiations around what a no-deal Brexit might look like, what its impact might be, or ultimately what the arrangements might be. We need to work closely with the Home Office to try to get that information to make sure that we are, and Police Scotland is, in as good a position as possible. That is where costing and so on come in.

A load of work is going on and we are getting ourselves in as strong a position as possible, but for us to be able to do that, the information flow from the Home Office is crucial, in terms of both the analysis that it is doing and feedback on what is happening at the EU level with those negotiations.

Conclusions

124. The primary purpose of this Report is to provide an update on how the UK's withdrawal from membership of the EU may affect the civil and criminal justice systems and policing in Scotland. Whilst the Committee has been able to provide some analysis based on what we have heard from both the UK and Scottish governments in September 2018, and from other witnesses at our round-table evidence sessions in early 2018, it is concerning that with a little over 4 months remaining until the revised date for Brexit we are no clearer on the nature of the UK's withdrawal or the framework for its future relationship with the EU.
125. Scotland's criminal and civil justice system and our arrangements for policing are closely integrated with, and reliant upon, EU law in these areas. The UK's withdrawal from the EU will therefore have profound implications in Scotland. We have heard evidence of the potential impact on numerous parts of our judicial system, from the ability to extradite suspects from other EU27 states, to the sharing of information on civil and criminal justice matters and on policing. The exact impact will depend on what, if any withdrawal deal, is agreed between the UK and the EU27 and on any future relationship agreement. **The Committee notes the comments of the Secretary of State for Scotland that not reaching such an agreement covering civil, criminal and policing matters would be, as he described it, "sub-optimal".**
126. **The Committee also notes the comments from the Cabinet Secretary for Justice that "any dilution of the arrangements that we have currently—any stepping back or moving away from them—is going to be to the detriment of justice and justice capability, full stop."**
127. **The Committee believes that leaving the EU without a withdrawal agreement – the 'no deal' scenario – would have a detrimental impact on the civil and criminal justice systems and policing in Scotland which is undesirable.** We have already seen examples - through the notifications of Brexit Statutory Instruments that we have scrutinised - of the alternative arrangements that need to be put in place in a no deal scenario. These alternatives are, as we heard in evidence from experts and both governments, less effective than the current legislative framework.
128. The Committee welcomes the evidence that there has been some discussion between the Scottish and UK Governments at both ministerial and official level on preparing for Brexit and in relation to the UK's negotiations with the European Commission around withdrawal. It is vital that the priorities for Scotland are heard, especially so as Scotland is a separate legal jurisdiction. However, we are concerned to hear examples, such as with the Home Office, where these intergovernmental discussions have been more limited. Although we note the publication of a document by the Scottish Government - *Scotland's Place in Europe: Security, Judicial Cooperation and Law Enforcement* – and a variety of technical notes published by the UK Government, it is incumbent on both governments, especially given there is just over 4 months before exit day, to share fully information with each other so that our courts, tribunals, police and other judicial bodies in Scotland can make the necessary preparations for whatever outcome is agreed to, and put adequate resources in place.

129. It is disappointing that, to date, aside from one technical notice on civil justice matters, there is so little information available on what alternatives will be agreed to and what will replace initiatives such as the European Arrest Warrant, Scottish involvement in Europol and Eurojust, and many other aspects of UK-EU co-operation on judicial and policing matters. **The Committee also agrees with the comments from the Lord Advocate that Scotland benefits “from a particularly effective legal regime and a suite of effective and practical arrangements that facilitate and underpin cooperation in the field of criminal justice” and that “leaving the EU without replacing that regime would significantly and adversely affect our capabilities.”**

130. In light of the above, we call upon the UK Government to publish further information without delay on all other major aspects of criminal justice and policing arrangements to supplement what they have published for civil justice in the event of a 'no deal' Brexit. These should be shared in advance with the Scottish Government so that it can comment and provide input on the priorities within the Scottish civil and criminal justice systems and policing.

131. Similarly, we recommend that the Scottish Government provides the Committee with additional information generated from its Sub-Board on Justice, which has been meeting to discuss Brexit preparedness in Scotland. We ask the Cabinet Secretary to consider sharing copies of agendas, minutes and key planning papers with the Committee. We make a similar request to the UK Government to share more information on Brexit preparedness, as it relates to Scotland, with the Committee.

132. Furthermore, we call on the Cabinet Secretary for Justice to provide information on his discussions with UK Government ministers on Brexit matters in line with commitments made in the [Agreement](#) between the Scottish Parliament and Scottish Government covering the provision of information on intergovernmental discussions.

133. We also call on the Secretary of State for Scotland to discuss the current state of relations between the Home Office and the Scottish Government with Home Office ministers. We have been told that these are not operating as they should do and are not as effective as those between the Scottish Government and the UK Ministry of Justice.

134. Finally, we give notice that the Committee intends to pay particular attention to the discussions between the two governments on the future legislative and non-legislative common frameworks that will need to be negotiated. These frameworks will define how the UK and Scotland will co-operate on civil and criminal justice matters and policing after Brexit. We ask both governments now for an update on the progress of their discussions so far and a detailed statement

on what priorities both governments see in relation to each of the common frameworks that will need to be put in place in the justice portfolio.

DRAFT

Annex A

Extracts from the minutes of the Justice Committee and associated written and supplementary evidence

4th Meeting, 2018 (Session 5) Tuesday 30 January 2018

Brexit and family law: The Committee took evidence, in round-table format, from—

Janys M Scott QC, Faculty of Advocates;

Lucia Clark, Partner, Morton Fraser;

Juliet Harris, Director, Together Scotland;

Professor Paul Beaumont, Chair in EU and Private International Law, University of Aberdeen;

Professor Janeen Carruthers, Professor of Private Law, University of Glasgow.

Written evidence

Janys M Scott QC, Faculty of Advocates

Lucia Clark, Partner, Morton Fraser

Professor Paul Beaumont, Chair in EU and Private International Law, University of Aberdeen

Brexit and civil, commercial and consumer law: The Committee took evidence, in round-table format, from—

Jason Freeman, Legal Director (Consumer), Competition and Markets Authority;

Frank Johnstone, Partner, Dentons;

James Mure QC, Convenor, European Committee, and Peter Sellar, Member, Faculty of Advocates;

Graeme Paton, Chartered Trading Standards Practitioner, Society of Chief Officers of Trading Standards in Scotland;

Professor Paul Beaumont, Chair in EU and Private International Law, University of Aberdeen;

Professor Janeen Carruthers, Professor of Private Law, University of Glasgow.

Daniel Johnson declared an interest as a director of a retail company.

Written evidence

Professor Paul Beaumont, Chair in EU and Private International Law, University of Aberdeen

Jason Freeman, Legal Director (Consumer), Competition and Markets Authority

Graeme Paton, Chartered Trading Standards Practitioner, Society of Chief Officers of Trading Standards in Scotland

Work programme (in private): The Committee considered its work programme and agreed to hold a round-table evidence session on 20 February on Brexit and police and criminal justice.

6th Meeting, 2018 (Session 5) Tuesday 20 February 2018

Brexit and policing and criminal justice: The Committee took evidence, in round-table format, from—

Helen Nisbet, Assistant Procurator Fiscal, Specialist Casework and Head of International Co-operation, Crown Office and Procurator Fiscal Service;

Clare Connelly, Advocate, Faculty of Advocates;

Michael Clancy, Director, Law Reform, Law Society of Scotland;

Detective Chief Inspector Lorraine Henderson, EU Constitutional Change Programme, Specialist Crime Division, Police Scotland;

Dr Philip Glover, University of Aberdeen;

Dr Leandro Mancano, Lecturer in EU Law, Programme Director of the European Law LLM, University of Edinburgh.

Written evidence

Crown Office and Procurator Fiscal Service

Law Society of Scotland

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- [2] Justice Committee. (2018, February 20). Official Report, col 6.
- [3] Faculty of Advocates. (2019). Written evidence.
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- [6] Justice Committee. (2018, February 20). Official Report, col 22.
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- [9] Justice Committee. (2018, September 11). Official Report, col 18.
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- [11] Justice Committee. (2018, February 20). Official Report, col 5.
- [12] Justice Committee. (2018, February 20). Official Report, col 7.
- [13] Justice Committee. (2018, January 30). Official Report, col 4.
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- [15] Justice Committee. (2018, January 30). Official Report, col 8.
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- [18] Justice Committee. (2018, January 30). Official Report, col 10.
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- [20] Justice Committee. (2018, September 6). Official Report, col 14.
- [21] Justice Committee. (2018, February 20). Official Report, col 12.
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- [23] Justice Committee. (2018, September 6). Official Report, col 10.
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- [26] Justice Committee. (2018, September 11). Official Report, contrib. 10.
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- [31] Justice Committee. (2018, September 11). Official Report, contrib. 98.
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- [33] Justice Committee. (2018, September 6). Official Report, col 17.
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- [36] Justice Committee. (2018, September 11). Official Report, col 24.

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