



SCOTLAND'S PLACE IN EUROPE:

Security, Judicial
Co-operation and
Law Enforcement



Scottish Government
Riaghaltas na h-Alba
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FOREWORD by the Cabinet Secretary for Justice

Our vision is for a safe, just and resilient Scotland. In July 2017, the Scottish Government and justice bodies published *Justice in Scotland: Vision and Priorities*¹ which highlights key challenges for the immediate and longer-term and sets out seven priorities for 2017-2020 to help shape our collective effort, inspire collaboration and frame a shared vision for the future. Leaving the European Union (EU) was one such challenge identified and its potential effects are complex and far-reaching.

Scotland is a separate legal jurisdiction with its own legal and judicial system, criminal laws and law enforcement agencies. The Lord Advocate is head of the system of investigation and prosecution of crime in Scotland – a function exercised independently of Government. Criminal justice policy is, generally speaking, a matter for the Scottish Government. Our justice system as a whole, and the work of the independent professionals who sustain it, underpin a safe and fair Scotland. That will continue - and our justice system will continue to help to protect the public from harm - whatever the emerging challenges, crimes and threats.

The impact of the UK's decision to leave the EU has the potential to reduce our capabilities and in coming years will have repercussions on how, in Scotland, we deliver justice and safeguard the public. Over the past 40 years, EU law has become woven into the fabric of our law. We are part of a legal regime which underpins the mutual trust and confidence which promotes co-operation between the criminal justice agencies of the Member States of the EU. As members of the EU we participate in practical arrangements which make that co-operation particularly effective.

Over the years our prosecution and police services have built up direct contact with their EU counterparts and this direct contact has facilitated co-operation in tackling crime. Withdrawal from the current regime of co-operation risks Scotland's justice system being left behind as our European counterparts develop more effective tools to deal with present and future threats. Serious organised criminality and terrorism do not respect national borders; leaving the EU without securing continued participation in EU criminal justice measures could mean Scotland losing the common set of tools which allow law enforcement agencies both here and across the EU to tackle these challenges effectively at present and will force them to return to a more fragmented system.

It is in the mutual interests of both the UK Government and the Scottish Government that we are prepared and ready for the consequences of Brexit. Though we would prefer not to be leaving the EU, we share the general objectives of the UK Government in seeking a close relationship with our EU neighbours in the field of

¹ <http://www.gov.scot/Publications/2017/07/9526/downloads>.

justice and security. We have asked, on numerous occasions, for the UK Government to share their planning on key issues that will have implications for Scotland, and made clear that we stand ready to contribute and play a constructive role in developing appropriate solutions.

The UK Government's future partnership paper *Security, law enforcement and criminal justice*², published on 18 September 2017, was prepared without any engagement with the Scottish Government. It does not acknowledge that Scotland is a separate legal jurisdiction with its own criminal justice, prosecution and police agencies. It also fails to acknowledge the independence of the Lord Advocate as head of the system of prosecution and investigation of deaths in Scotland and the role of the Crown Office and Procurator Fiscal Service (COPFS) in administering international co-operation in criminal matters.

On the 9 May 2018, the UK Government published presentation slides termed "*Framework for the UK-EU Security Partnership*"³. These cover both internal and external security and were used during the recent on-going EU negotiations. The slides focus on how the UK Government will look to achieve this security partnership. The slides contain matters which directly affect Scotland, including operational matters falling under the responsibility of the Lord Advocate. However, these were prepared without any consultation with the Scottish Government or the Lord Advocate. Nor were we advised of the publication of these slides.

The UK Government has indicated that it intends to publish a White Paper in the near future containing detailed proposals for the future relationship between the EU and the UK. It is understood that this White Paper will set out UK positions on the objectives for the future relationship across the range of topics identified and published jointly with the European Commission on 4 May 2018.

It is only as the negotiations progress that everyone can see just what is at stake. Scotland's voice must be heard and we continue to push to be given real and meaningful input into the negotiations.

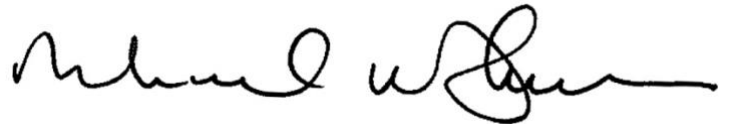
We welcome the progress made on the Withdrawal Agreement but there are areas of disagreement and divergence that remain. The EU instruments which deal with evidence gathering and extradition will depend on acceptance of jurisdiction of the Court of Justice of the European Union (CJEU) or some other form of international adjudication acceptable to the EU. Information sharing arrangements are likely to depend on the acceptability to the EU of the UK's data protection regime post-Brexit.

Unless there is successful resolution of these major outstanding issues of contention between the EU and the UK Government then we may well lose access to these important JHA cross border measures.

² Security, law enforcement and criminal justice: a future partnership paper; was published by the UK Government on 18 September 2017 and is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF

³ Framework for the UK -EU Security Partnership was published by the UK Government on 9 May 2018 and is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides_SI_FINAL.pdf.

Safeguarding our independent justice system necessitates our full involvement in the negotiations between the UK Government and the EU. We are committed to working closely with the UK Government so that it fully understands the implications of potential outcomes for Scotland's separate justice system. At the same time, we also remain fully committed to building on the strong links we have with countries elsewhere in Europe and around the world.

A handwritten signature in black ink, which appears to read "Michael Matheson". The signature is fluid and cursive.

MICHAEL MATHESON
Cabinet Secretary for Justice

CHAPTER ONE: Introduction

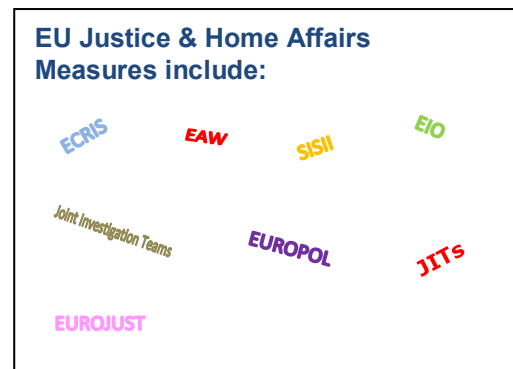
This paper is one of a series of policy papers flowing from the Scottish Government's *Scotland's Place in Europe* publications⁴, which set out the implications of a hard Brexit for Scotland and constructive alternatives.

The Scottish Government believes that Scotland's future is best served by continued European Union (EU) Membership, in line with the wishes of the Scottish people as expressed in the referendum in 2016. However, if Brexit proves inevitable our interests, as defined by the First Minister in her *Institute for Public Policy Research speech in 2016*⁵, are best protected by the United Kingdom (UK) remaining inside the EU Single Market and Customs Union.

In the area of Justice, the Scottish Government is continuing to engage with key justice and legal bodies in Scotland to assess and plan for the full potential impact of Brexit. The Scottish Government's overarching aims are to ensure that the specific implications of Brexit for Scotland's independent justice system are taken into account in the negotiation process and that the benefits which Scotland derives from effective cross-border co-operation

within the EU on justice and security matters are maintained.

The aim of this paper is to help people's understanding of how, in the case of security and criminal justice interests, continued participation in the EU Justice and Home Affairs (JHA) criminal cross border justice and security measures benefits Scotland. The paper offers a "sectoral" insight into how a range of JHA measures currently work, why it matters so much and what is likely to be different after the UK leaves the EU.



This paper will help inform the evidential basis for the Scottish Government's engagement with both the UK Government and the EU as negotiations continue.

⁴ Scotland's Place in Europe was published by Scottish Government in December 2016 and is available at:

<https://beta.gov.scot/publications/scotlands-place-europe/>.

Scotland's Place in Europe: People, Jobs and Investment was published by the Scottish Government in January 2018 and is available at:

<http://www.gov.scot/Publications/2018/01/6407>

⁵ <https://beta.gov.scot/news/scotlands-future-in-the-eu/>.

CHAPTER TWO: How Scotland is different from the rest of the UK

1. Scotland is one of three separate legal jurisdictions⁶ which comprise the UK. As a leading case puts it⁷, the systems of criminal law of Scotland on one hand and England and Wales on the other are -

“as distinct from each other as if they were two foreign countries”

2. Scotland has its own court system and its own single agency prosecution system and law enforcement agencies. Scotland’s distinctiveness as a legal jurisdiction was expressly preserved by the Acts of Union⁸ and its separate criminal justice system accordingly long pre-dates devolution and the UK’s membership of the European Union (EU).

3. Justice policy matters are within the responsibility of the Scottish Parliament and Scottish Government although some specific areas of justice, for example extradition and terrorism, are reserved to the UK Parliament. EU law currently applies throughout the UK but different approaches may be taken to the implementation of this law in different jurisdictions. Within its area of responsibility, the Scottish Parliament scrutinises, transposes and implements EU legislation and decisions of the Court of Justice of the European Union (CJEU) which affect Scotland. When the EU issues a Directive on a subject within the Scottish Parliament’s area of responsibility, it is, in the first instance, for the Scottish Government, accountable to that Parliament, to decide how the Directive should be implemented in Scotland. As a result, over the past 40 years of EU membership, EU law has become woven into the fabric of Scots law.

4. The Lord Advocate is constitutionally responsible for the investigation and prosecution of crime in Scotland. The office of Lord Advocate long predates the formation of the UK – and the Lord Advocate has had universal title to prosecute crime in Scotland since 1587. Since devolution, the Lord Advocate has been one of the Ministers of the Scottish Government⁹ but exercises prosecutorial functions independently of any other person¹⁰, including the Scottish Government and the UK Government.

5. As part of that independent function, the Lord Advocate is ministerially responsible for the Crown Office and Procurator Fiscal Service (COPFS), the sole public prosecution service in Scotland. COPFS operates entirely independently of, and separately from, the other UK prosecution services. As in other parts of Europe -

⁶ In this context “jurisdiction” refers to a particular geographic area which has its own legal system. The other legal jurisdictions of the UK are England & Wales and Northern Ireland.

⁷ *Stuart v. Stuart and Moore* (1861) 1 Macq 1, 49; quoted by Lord Hope of Craighead in *R v. Manchester Stipendiary Magistrate* [2001] 1 AC 300, 304.

⁸ The Acts of Union of 1706 and 1707 merged the Kingdom of Scotland and the Kingdom of England to form the new Kingdom of Great Britain with Scotland retaining its own legal and education systems and a separate Church.

⁹ Before devolution the Lord Advocate was a Minister in the UK Government.

¹⁰ Scotland Act 1998, s. 48(5).

but by contrast with the position in other parts of the UK - in Scotland, the investigation of crime by the police is subject to direction by the public prosecutor.

6. The Lord Advocate also has specific statutory functions in relation to cross border criminal justice co-operation which cuts across reserved areas, for example:

- Under the Extradition Act 2003 to represent requesting States and territories in extradition proceedings in Scotland; and
- Under statutory provisions governing mutual legal assistance¹¹ both within the EU and beyond as the competent authority dealing with outgoing and incoming requests for mutual legal assistance.

International co-operation matters for COPFS are handled by a specialist unit, the International Co-operation Unit (ICU), established in 2004. The ICU serves as Scotland's central authority for International Letters of Request (documents requesting Mutual Legal Assistance¹²) and European Investigation Orders (see below). As such, the ICU operates as far as possible as a single point of contact, both for criminal justice agencies in foreign jurisdictions seeking assistance in Scotland, and for Scottish prosecutors and law enforcement agencies seeking assistance from counterparts in foreign jurisdictions.

7. In Scotland we have a single national police service, Police Scotland, which is the second largest police service in the UK. One of the advantages of having a single police service is the operational capability it can bring to bear in areas such as serious and organised crime. In 2014 the Scottish Government opened the Scottish Crime Campus (SCC), at Gartcosh in North Lanarkshire, which houses staff from all the relevant agencies involved in dealing with serious crime in Scotland including Police Scotland, COPFS, the National Crime Agency and Her Majesty's Revenue and Customs. Co-location on a single site has improved information sharing and practical co-operation between agencies without compromising individual operational independence and integrity and has ultimately led to more multi-agency cross border investigations and prosecutions. Co-location of law enforcement and prosecutors at the Scottish Crime Campus has also increased early engagement with Europol and Eurojust.

8. Police Scotland has established a single International Assistance Unit (IAU) based at the SCC providing a centre of expertise for international enquiries and intelligence sharing, including provision of specialist advice and support to police officers at a local level, the tracing of fugitives abroad and the collection and removal of individuals extradited to and from Scotland. The IAU works closely with the ICU of COPFS.

9. Co-operation in criminal justice, security and law enforcement is vital. Law enforcement agencies have always had to address cross-border crime – where a person commits a crime in one jurisdiction and flees to another, or where evidence

¹¹Crime (International Co-operation) Act 2003; Criminal Justice (European Investigation Order) Regulations 2017, S.I. 2017/730.

¹² Mutual legal assistance is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public or criminal laws. Modern states have developed mechanisms for requesting and obtaining evidence from other jurisdictions for criminal investigations and prosecutions.

needs to be obtained from another jurisdiction. Today, our law enforcement agencies and prosecutors have to deal with cybercrime, terrorism, trafficking in illicit goods (including drugs and firearms) and in people, as well as serious organised crime, which increasingly has an international dimension. Within the EU, we benefit from legal rules and practical arrangements which facilitate co-operation in tackling transnational criminality, and Scotland's police, prosecutors and courts have direct connections with their counterparts in other Member States which facilitate co-operation.

CHAPTER THREE: Scotland's voice in the EU negotiations

10. For the purposes of EU membership, the UK is the Member State and the UK Government acts on behalf of all jurisdictions that comprise the UK. Scotland's voice is represented in the EU in various ways, for example through the participation of Scottish Ministers in UK delegations in Council, Members of the European Parliament for Scotland formulating EU legislation in the European Parliament and Scottish law enforcement agencies and prosecutors engaging directly with their EU counterparts.

11. The UK, including Scotland, has been an active, influential and generally respected participant in Justice and Home Affairs (JHA) matters in the EU. From participating in expert groups, working to improve draft legislation, all the way through to practical or operational contributions, this influence has been beneficial in both directions – allowing EU legislation and provision to be developed in a way that would fit with the legal traditions of the UK, and facilitating the sharing of expertise.

12. As set out above, Scotland has always had its own separate and independent legal and justice systems and agencies. Scottish criminal law, including the procedural rules which apply to criminal proceedings in Scotland, differs significantly from that in the rest of the UK. The Scottish Ministers have highlighted this to UK Government Ministers on many occasions and have emphasised the need to take account of Scotland's distinct justice system in the negotiation process. We share the objectives of the UK Government in the area of JHA matters to ensure not only the security and safety of our citizens but also EU citizens. We stand ready to work constructively with the UK Government to ensure that practical solutions, which take account of these differences, are put in place.

13. The Scottish Government recognises that decisions about justice and security do not exist in isolation from other parts of the negotiation process. Given our collective interest in these JHA measures in ensuring the safety and security, not only of our citizens but also those of the other 27 Member States, we need to ensure that justice and security issues are not de-prioritised during negotiations to achieve compromise in other areas. During negotiations the voices of the other 27 Member States will need to be taken into account. We must remain open to addressing any concerns they have and to working with them to develop solutions which promote our collective safety and security across the EU.

14. Our justice agencies, including Police Scotland and COPFS are preparing for organisational readiness as a consequence of Brexit. In order to ensure that the particular interests of those agencies, and the procedural and operational differences between Scotland and other parts of the UK are recognised, their concerns must be taken into account and their voices must also be heard at UK level.

15. The Joint Ministerial Committee on EU Negotiations (JMC(EN)) has been established with the aim of providing a means for the devolved administrations to be fully engaged in the UK Government's approach to Brexit. The discussions in JMC(EN) have up to this point in time fallen short of the ambition set out in its terms of reference, and of the Prime Minister's own commitment to "full involvement" of the

devolved administrations and have singularly failed to meet the forum's terms of reference.

16. On 2 May 2018, the JMC(EN) endorsed the creation of a Ministerial Forum (EU Negotiations). This Forum sits beneath and will feed into discussions at the JMC (EN), specifically in relation to the UK positions for the EU-UK Future Relationship. The first meeting of the Forum took place on 24 May 2018 in Edinburgh and our expectation is that this will enable the devolved administrations to be involved in the negotiations in a more meaningful way.

17. As the Government responsible in Scotland for many of the issues being discussed in the negotiations, we remain committed to seeking to secure more substantial opportunities to input into the negotiations. It is vital that we are given these opportunities before the UK position is finalised, and before issues are agreed in the negotiations.

CHAPTER FOUR: Negotiations between the UK and EU

18. On the 19 March 2018, the UK Government and European Commission announced the publication of a partially agreed version of a draft legal text on the Withdrawal Agreement. This version of the text sets out the position reached on on-going co-operation in security, law enforcement and criminal justice proceedings for a number of key aspects. It was accompanied by an announcement that agreement has been reached in principle on the terms of a time limited transition.

19. During that transition period, the UK will no longer participate in EU decision making processes and will no longer have the right to opt in to new JHA measures unless invited to co-operate by the EU. Nonetheless, the EU has made clear that because the UK will continue to receive the benefits of membership of the single market and customs union, the UK must continue to respect EU rules during that period.

20. Following publication of the draft text, both the EU and the UK Government reiterated their commitment to agreeing this treaty by October 2018, alongside a political agreement on the future relationship. However, as the Commission has reiterated “nothing is agreed until everything is agreed”, i.e. the transition is wholly dependent on the completion of negotiations as well as the agreement and ratification of final legal text on the UK’s withdrawal.

21. Despite numerous requests to engage in joint working, the Scottish Government was not involved in the negotiations which resulted in the partially agreed draft legal text nor in the agreement in principle for having a transition period. Further, the Scottish Government was not informed of progress or the outcome of those negotiations ahead of publication. This is important for a number of reasons. For example, the draft of the text dated 19 March 2018 explicitly states that beyond the transition period the UK’s participation in the European Criminal Records Information System (ECRIS) - the computerised system for the exchange of information on criminal convictions - will be limited.

22. The Scottish Government should have been involved in the discussions around ECRIS. It is used daily by Police Scotland for the reciprocal sharing of information with EU Member States. In 2017 – 7,714 EU requests were sent by Police Scotland, of which 763 came back with a match, i.e. the system produced a criminal record history of previous convictions. ECRIS is being expanded to obligate EU Member States to exchange criminal conviction information on ‘third country’ nationals convicted of offences in the EU. It is also used to facilitate the exchange of criminal records information when requests are made by employers for EU nationals applying to work in regulated activity with children.

23. The exchange of information between the UK and EU Member States in connection with recruitment into work with children could be brought to an end. Disclosure Scotland (DS) makes use of the arrangements under Directive 2011/93 to gather information about EU nationals seeking such work in Scotland. DS also responds to requests from Member States about individuals who are disqualified from working with children under the law of Scotland and who are seeking to do that work elsewhere in the EU. The procedures established by ECRIS are used for these

exchanges. The loss of ECRIS access could have a negative impact on recruitment practice.

24. The impact of Brexit on ECRIS may mean the loss of access to EU-wide criminal records of UK citizens and the inability to implement public protection provisions to manage any returning criminal in the community and reduce their risk to society. Courts would be unable to take into account previous offending when sentencing an EU citizen in the same way that they do when a UK citizen is being sentenced (which ensures a consistency in sentencing and a fairer application of justice).

25. If the UK lost access to ECRIS, the default fall-back position would be the Council of Europe Convention on Mutual Assistance in Criminal Matters, 1959. This Convention sets out some general obligations for signatories to share information on criminal records, but it is much more limited than ECRIS. There are no timeframes within which Member States would have to respond to requests, and there is no provision for enforcement, so the UK might not receive a response to some requests at all. There is also no set method for sharing information, so the process would be much more laborious and expensive: for example, requests would need to be sent manually, and the information received would not be in a standard format. By contrast, ECRIS is an efficient automated system; uses a standardised format which translates offences to those recognised in the UK; and is governed by strict time frames within which an EU Member State is required to respond. Interpol could potentially be used to issue requests, but it is not designed to deal with the high volumes of requests currently sent through ECRIS, and would not provide the same capabilities as ECRIS.

26. A number of Member States will not normally extradite their own nationals, but will do so under the European Arrest Warrant (EAW) system. This is one of the benefits of the EAW, but it may be lost even during the transition period. The draft text expressly provides that the EU may, on behalf of Member States which have an objection to the extradition to their own nationals, declare that during the transition period those Member States will not extradite their own nationals under the EAW.

27. On the 9 May, the UK Government published a presentation *Framework for the UK – EU Security Partnership*¹³. It sets out the UK Government's vision for the Future Security partnership and proposes a framework for co-operation with the UK as a "third country"¹⁴ for which there is currently no precedent. The proposal includes a new internal security treaty to provide the legal basis for on-going co-operation, using a range of existing legal precedents to enable continued co-operation on the basis of existing JHA measures. However, the document recognises that being outside the EU would severely hamper co-operation on ECRIS, Europol and Eurojust and says that: "In some cases, for example ECRIS, there are no viable existing 3rd country alternatives" while for others the alternatives are "sub-optimal resulting in capability loss".

¹³ See footnote 3.

¹⁴ The term 'third country' is used in EU Treaties, where it means a country that is not a member of the European Union.

28. The presentation acknowledges there will need to be an appropriate form of dispute resolution put in place across all areas of the future UK and EU relationship in which both parties have confidence, but there is no further detail as to what this mechanism will look like.

29. There is no specific reference in the framework to Scotland's separate legal system and our independent law enforcement and criminal justice policy and operations. It simply refers to the UK's future partnership with the EU delivering for "the whole United Kingdom". The Scottish Government was not involved in the preparation that resulted in the framework document or the negotiations that it was used for. Nor were we informed ahead of its publication.

CHAPTER FIVE: Key cross cutting issues outstanding in the EU/UK Government negotiations

Court of Justice of the European Union and Data Sharing

30. As JHA cross border measures are EU wide they fall under the jurisdiction of the CJEU, which is the ultimate interpreter of EU law, and Member States are required to give its judgements primacy. It interprets EU law to make sure it is applied in a consistent way in all EU countries, gives rulings to national courts which require to apply EU law, and settles legal disputes between national governments and EU institutions. The UK Government's opposition to CJEU jurisdiction could result in losing vital cross border co-operation on data protection, information sharing and other criminal justice co-operation measures.

31. In her speech at the Security conference in Munich on 17 February 2018, the Prime Minister pledged that the UK would “*respect*” the remit of the CJEU when “*participating in EU agencies*” but that it was important the sovereignty of the EU and UK legal systems were protected and an independent dispute resolution put in place that the UK and EU both had confidence in.¹⁵ We welcomed this acceptance of a role for the CJEU when it is in the interests of citizens' safety, but the UK Government has still not provided clarity as to the degree of tolerance it would be prepared to accept in terms of this relationship.

32. The arrangements for judicial co-operation across the EU, for example through the European Arrest Warrant and the European Investigation Order, are predicated on mutual recognition of orders by the relevant authorities of the various Member States. The principle of mutual recognition 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 CJEU. The application of the principle of mutual recognition to the jurisdictions of the UK, if it is outside that legal order, will present a novel challenge.

33. Operationally, effective co-operation is facilitated by access to EU databases. There is an inherent link between data-sharing, security and the CJEU.

34. EU privacy law forbids the movement of its citizens' data outside of the EU, unless it is transferred to a location which is deemed to have ‘adequate’ privacy protections in line with those of the EU. Once it has left the EU, the UK will become a ‘third country’ and at present no ‘third country’ currently has the same access to any of the EU's databases that the UK currently has as a member of the EU.

35. There are around 12 ‘third country’ frameworks in place but these do not cover data exchanges in the security and law enforcement sectors. There are two exceptions to that, where special arrangements for the exchange of data have been agreed in respect of cross border measures relating to Passenger Name Records and Terrorist Financing Tracking Programmes.

¹⁵ A copy of the Prime Minister's speech of 17 February 2018 is available at: <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>

36. As the UK Government has repeatedly argued, the UK already plays a major role in existing EU data-sharing systems, contributing 20 per cent of the total national security alerts on the Schengen Information System II system (SISII) and has a unique relationship with the EU both in terms of common threats and common goals. However, as the UK Government has also acknowledged, relying on precedents for EU agreements with third countries as a basis for the future relationship “*would result in a patchwork of capability with a real drop in co-operation and serious attendant risks.*”¹⁶.

37. The UK Government has therefore proposed a ‘UK/EU Security Partnership’ to ensure that these capabilities are maintained. The UK Government has also confirmed that at the point of exit from the EU, the UK’s domestic law will continue to fully align with the EU data protection framework.

38. We believe that despite the ambition it has stated for a continued close relationship with the EU, the UK Government’s opposition to CJEU jurisdiction could result in the loss of vital cross border co-operation on information sharing and other criminal justice co-operation measures. The Scottish Government would welcome CJEU jurisdiction on these matters in order to avoid losing these vital operational tools for our law enforcement bodies.

¹⁶ See footnote 3 and page 13 of the Framework.

CHAPTER SIX: The Justice and Home Affairs (JHA) cross border measures

39. Most interests for Justice and Security fall under the EU area of JHA. The JHA area is unusual relative to other existing areas of EU activity. Since the Lisbon Treaty¹⁷, which entered into force in 2009, the UK Government chooses which JHA criminal cross border measures to take part in rather than being automatically bound – and exercises the right to “opt in” or “opt out” of individual pieces of JHA legislation. As a result, the UK does not participate in a number of measures, for example those in relation to counter terrorism. However, the UK has chosen to opt into a number of significant, important JHA cross border measures.

40. The JHA criminal cross border measures create a set of instruments for preventing, investigating and prosecuting crime. The value of the suite of JHA measures, taken together, is greater than the sum of its component parts. They work together as a package to allow rapid information sharing and effective co-operation between police and prosecutors across the EU. The loss of any one measure would affect, perhaps to an extent which cannot be fully predicted, the effectiveness of the suite of measures working as a whole. For example, the effectiveness of the European Arrest Warrant which facilitates extradition between EU Member States and the jurisdictions of the UK, has been enhanced by UK participation in the Schengen Information System (SIS II) which enables law enforcement across Europe to establish, in real time, whether an individual is the subject of an European Arrest Warrant (EAW). These measures work in both directions, benefiting both the UK and the other EU Member States.

41. What follows below are examples which seek to offer a sense of some of the key JHA measures that we stand to lose and the potential impact in bold of that loss on the capabilities of the Justice system.

¹⁷ The UK participation in EU legislation on JHA is principally governed by Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

CHAPTER SEVEN: Law enforcement and investigation measures

42. Membership of Europol and the package of EU information sharing measures supports the Scottish Government's commitment to a union of solidarity where countries come together for mutual protection, working together to address big challenges which all matter to our collective peace and security and to the future of our country. They play an important role in supporting our law enforcement agencies to keep our citizens safe from organised crime and terrorism and help make our communities safer and more inclusive places to live and work.

43. In its *Framework for the UK-EU Security Partnership* the UK Government has stated that “EU agencies Europol and Eurojust are at heart of the efforts to tackle serious and organised crime and terrorism across Europe ... It is critical that the strength of these bodies are not weakened.”¹⁸ The UK Government does not provide detail as to how it intends to replicate the current UK participation in these EU agencies whilst at the same time leaving the jurisdiction of the CJEU.

Police Co-operation – EU Agency for Law Enforcement Co-operation (Europol)

44. Organised crime, cybercrime, and terrorism do not respect national borders and it is important that Police Scotland is able to share and access information, which can often be time critical, with law enforcement agencies in other Member States. 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 coordination meetings and the establishment of Joint Investigation Teams (JITs).

45. Europol identifies, tracks and disrupts the most dangerous criminal and terrorist networks in Europe. It offers a wide range of services to law enforcement agencies, including criminal analysts and produces regular assessments and reports on existing and emerging threats. In addition to the permanent Europol staff, EU police forces maintain teams at Europol HQ based in The Hague. These teams can facilitate cross-border investigations.

46. As a member of Europol, the UK brings a significant level of expertise and experience. The UK has a number of Seconded National Experts and also leads on a number of crime areas on behalf of Europol. 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. Police Scotland has also submitted 30 requests through Europol for cross-border surveillance and continued membership of Europol is seen a vital tool for our law enforcement agencies for investigating and preventing crime.

¹⁸ See footnote 3 and page 19 of the Framework.

47. Europol is also a significant player in the development of the Serious and Organised Crime Threat Assessment which identifies the range of threats posed to the EU by serious and organised crime. This report helps inform decisions on policy priorities to combat organised crime across the EU.

48. As organised crime groups seek to adapt their methods and activities to take advantage of new opportunities, Europol has developed its structures and practices to respond more effectively. In recent years Europol has established the European Migrant Smuggling Centre, the European Counter Terrorism Centre and the European Internet Referral Unit. It also plays host to the Intellectual Property Crime Co-ordinated Coalition.

49. Cybercrime is relatively new and continues to increase in variety and complexity. Europol set up the EU Cybercrime Centre, EC3, which operates across 3 main areas:

- Cybercrimes committed by organised crime groups e.g. online fraud;
- Cybercrimes that cause serious harm to the victim e.g. child sexual exploitation; and
- Cybercrimes affecting critical infrastructure and information systems e.g. Wannacry Ransomware attack on the NHS, organised crime's systematic misuse of private individuals' computers to spread viruses or spam.

50. The Scottish Government's *Safe, Secure & Prosperous: A Cyber Resilience Strategy for Scotland*¹⁹ was published in November 2015 and sets out the actions we need to take to make Scotland a cyber-resilient place to live, work and do business. Because cyber has no national borders, it is important to maintain and indeed nurture the strong collaborative relationship with Europol to ensure that Scotland can continue to build its own cyber resilience and become a digitally safe and secure country.

51. The UK is currently a full member of Europol and as such can and does influence its direction and priorities. For example, the UK has recently influenced Europol on wildlife crime and illegal firearms. To lose 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 this could mean that fugitives from other European countries may not be identified as such and steps taken to remove them from Scotland. Similarly, it would make it more difficult and time consuming to apprehend Scottish criminals who flee overseas.

52. The UK will be able to fall back on its membership of Interpol but any support required will take longer to deliver and inevitably delay action by Police Scotland and potentially impede justice. The UK may be able to negotiate an agreement to become a 'third country' member of Europol,

¹⁹ Safe, Secure & Prosperous: A Cyber Resilience Strategy for Scotland was published by the Scottish Government on 18 November 2015 and is available at: <http://www.gov.scot/Publications/2015/11/2023>.

although existing arrangements with third countries would not afford the UK the same level of direct access to data and resources held by Europol as is currently enjoyed. Negotiations are likely to take time and if not concluded by the time Brexit takes effect will leave the UK - and Scotland - more vulnerable.

53. We believe that maintaining Europol membership will help to keep people safe and secure. Membership gives Scottish law enforcement officers and specialists direct and instant access to secure Europe-wide information sharing systems that extend their reach to tracking down individuals and tackling crime. The presence of a Police Scotland officer embedded within the UK Liaison Bureau at Europol also ensures that any issues can be dealt with timeously and any concerns addressed promptly. Therefore, Europol membership should be one of the key outcomes secured in the negotiations on our future relationship with the EU.

Case Study

Operation Barva involved Police Scotland and the Belgian authorities being supported by Europol; an individual who was based in Perth was a pivotal financial figure for drugs importation into Europe through Antwerp. Police Scotland worked alongside the Belgian authorities and Europol coordinating an executive day of action across Europe including two addresses in Scotland. The individual was interviewed and later arrested on a European Arrest Warrant and ultimately extradited to Belgium in 2014.

European Arrest Warrant

54. The European Arrest Warrant (EAW) is implemented throughout the UK by the Extradition Act 2003. This is a reserved matter and the legislation was passed by the UK Parliament. 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.

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

56. 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.

57. The EAW contributes to the efficiency and effectiveness of the justice system, helping to ensure that individuals are brought to trial in the appropriate forum as swiftly as possible. There are also cost benefits in respect of reduced remand costs

and less court time. The effectiveness of the EAW is materially enhanced by UK participation in the Schengen Information System, which enables law enforcement agencies across Europe to establish, in real time, whether an individual is the subject of an EAW. This is an important public safety and protection safeguard.

58. If we leave the EU without negotiating and putting in place successor arrangements similar to the EAW, the process of extradition would be slowed down and become more complex. Overall costs, such as those incurred in longer periods of remand time, would increase. We could fall back on the Council of Europe Convention and various protocols, where those remain available. However, the associated procedures are typically considerably slower and more cumbersome than procedure under the EAW. Further, the Council of Europe Convention can only be relied on where a Member State involved has not revoked the Convention. Also, some Member States have constitutional bans on the extradition of their own citizens under the Convention, which do not apply under the EAW.

59. The EAW is an important feature of Scotland’s fight against crime. It helps to ensure that individuals accused of crime can be swiftly brought to trial, by allowing a rapid and straightforward system of surrender between judicial authorities within the EU. It also enables criminals who have been convicted but have absconded to another jurisdiction to be returned swiftly to face punishment. The Scottish Government is therefore clear that maintaining the EAW should be another key outcome of the negotiations to leave the EU and form a core part of our future relationship with the EU.

60. The tables below set out the number of extradition requests made from 2013 to 2018. Table 1 shows requests made by other Member States in respect of individuals resident in Scotland. Table 2 shows requests made by Scotland to other Member States in respect of individuals resident in another Member State.

Table 1

NUMBER OF EXTRADITIONS FROM SCOTLAND (following conclusion of court proceedings in relation to EAWs)	
Year	Number
2013	88
2014	39
2015	78
2016	82
2017	59
2018	15
Total	361

Table 2

NUMBER OF EXTRADITIONS TO SCOTLAND (following conclusion of court proceedings abroad in relation to EAWs)	
Year	Number
2013	12
2014	9
2015	9
2016	19
2017	15
2018	6
Total	70

Source: Crown Office and Procurator Fiscal Service.

Requests for extradition by way of European Arrest Warrant are made by COPFS working with Police Service of Scotland, the National Crime Agency and partners outwith the United Kingdom, where it is believed the accused may be located. The execution of such requests is a matter for the authorities of Member States where the accused is located.

Case Study

A Polish national, who had carried out a violent attack and murder in Edinburgh in January 2012, was arrested within 5 hours of issue of the arrest warrant. This was achieved using the EAW system, but was also facilitated by direct contact between Scottish prosecutors and the authorities in Poland, which in turn was facilitated by the European Judicial Network. This case shows not only how wanted individuals can be apprehended quickly, but also demonstrates the interaction between various EU measures.

61. The European Investigation Order (EIO) 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.

62. The EIO system provides for a procedure that allows a judicial authority in one Member State (the "issuing authority") to request specific criminal investigative measures be carried out in another Member State (the "executing authority"). As the request is made on the basis of mutual judicial recognition²⁰ and is intended to have more or less direct effect in the country to which it is issued, there are limited grounds for non-recognition or refusal.

63. Like EAWs, EIOs have to be dealt with within specified time limits – the requirement is that EIOs are recognised, given effect to and the evidence and information requested delivered up to the requesting State within 120 days from issue. The process of implementation by EU Member States is nearing completion. As a relatively new measure no data has yet been published regarding the volume of EIOs but COPFS ICU has already dealt with EIOs from a number of the countries which have implemented the Directive; and the early experience of ICU so far has been positive.

64. If continued access to the EIO cannot be negotiated the immediate fall-back position would be to revert to previous methods i.e. ILOR. These have no set timescales for execution and it is likely that this would slow up the administration of justice. It also creates the possibility that ILORs from the UK will be given less priority than EIOs.

65. The Scottish Government's view is that reverting to the ILOR system would be an unacceptable outcome, reversing the increased efficiency which the EIO provides in the context of assistance between Member States in criminal investigations. Therefore, this measure should be secured in the negotiations on our future relationship with the EU.

²⁰ Judicial co-operation in criminal matters is based on the principle of mutual recognition of judgments and judicial decisions.

CHAPTER EIGHT: Information sharing measures

66. The EU JHA regime includes a number of separate arrangements for data sharing. Further detail is provided on these below. At present, the various information systems at EU level are currently not interoperable i.e. able to exchange data and share information so that authorities have the information they need, when and where they need it.

67. Work is currently being taken forward at the EU level to address this issue by way of a proposed Regulation to establish a framework for interoperability between EU Information systems. The UK Government as the Member State is involved in discussions, on behalf of the jurisdictions that comprise the UK, that are taking place with the EU Commission²¹. On 18 May 2018, the UK Government gave formal notification that it will opt in to this Regulation. Interoperability of EU level information systems would enhance the efficient use of those systems, and help to eliminate “blind spots”. **However, once the UK leaves the EU the ability to be able to participate and influence policy development, in areas such as this, will fall away. This may compromise our ability to keep pace with developments and could present a risk to future operational effectiveness in tackling cross border crime.**

The Schengen Information System II

68. The UK and Ireland have negotiated “opt-outs” from the Schengen Agreement²² and continue to operate the Common Travel Area²³ and their own border checks. But the UK does participate in the Schengen Information System II (SIS II) an EU-wide database which provides UK law enforcement with real time alerts from other Member States on:

- Fugitives wanted for extradition;
- Missing people;
- People wanted to assist in a judicial process (e.g. witnesses to be traced);
- Suspected serious criminals, terrorists or objects and vehicles, on whom discreet checks are needed; and
- Stolen or missing property.

69. SIS II allows UK law enforcement agencies to create these alerts themselves and to share them with their EU counterparts - in real time. The UK shares substantial information on wanted or missing persons. In 2017, of all alerts

²¹ The European Commission is the EU's politically independent executive arm. It is responsible for drawing up proposals for new European legislation, implementing the decisions of the European Parliament and the Council of the EU and managing day to day business of the EU.

²² The Schengen Agreement is a treaty which led to the creation of Europe's Schengen Area, in which internal border checks have largely been abolished.

²³ The Common Travel Area is a special travel zone between the Republic of Ireland and the UK, Isle of Man and Channel Islands. Nationals of Common Travel Area (CTA) countries can travel freely within the CTA without being subject to passport controls. Non-CTA nationals must have the relevant immigration permission for the country they are seeking to enter. Until the UK exits the EU, citizens of EEA Member States have prevailing rights of entry and residence in the UK and Ireland under EU ‘free movement’ law.

circulated on SIS II, approximately 20 per cent were circulated by the UK and over 5,000 hit reports on UK alerts from EU partners were received.

70. A key feature of SIS II is that all EAWs are flagged within hours of arrest. This means that agencies in one Member State will know whether, for example, a suspect they encounter is wanted in another Member State, or if a vehicle they encounter has been stolen elsewhere in Europe. SIS II is also partially available at the border. This means that the police and Border Force know when a person travelling into the UK is wanted on an EAW. They can then detain and arrest the individual on arrival before he or she has the chance to enter the UK.

71. Furthermore, each time a Police National Computer check is carried out on a person/vehicle/object a SIS II check is automatically carried out simultaneously. Alerts for discreet checks have yielded great benefits for Police Scotland and other EU law enforcement agencies. It allows them to track individuals' movements throughout Europe if they are travelling. When an alert is triggered, information on the individual and/or the vehicle they are travelling in, and with whom, is relayed to the officer who has created the alert. This can support an investigation covertly, providing vital information for officers. For example, during a human trafficking investigation, agencies in all the countries involved can track the movements of both offenders and potential victims.

72. The movements of registered Sex Offenders can also be tracked utilising these alerts, allowing law enforcement agencies to alert another participating country if an offender is travelling to their country. This allows that country to manage the offender whilst they are in their jurisdiction, thus reducing the risk to their communities.

73. All EU Member States gain considerable law enforcement and security benefits from our participation in SIS II, as well as wider public welfare benefits (for example, bringing vulnerable missing people home). We and other Member States would lose these benefits if we withdrew completely from SIS II.

74. If continued access to SIS II cannot be negotiated the immediate fall-back position would be to revert to previous methods for sharing information and providing alerts - i.e. for information requests to be routed via Interpol (and Europol if we are able to maintain membership). This can be a lengthier process with a response to a request for information potentially taking days or weeks rather than seconds or minutes as happens now. These processes would rely on Member States directing information to the appropriate law enforcement agencies in the UK in order for action to be taken. Through SIS II, the UK law enforcement agencies currently have access to all EAWs and alerts in place across all EU Member States.

75. The Scottish Government is of the opinion that loss of SIS II would significantly hinder the ability of the police to take swift action, and in turn, could impact on public safety and therefore that every effort should be made to maintain access to SIS II in the negotiations.

Case study

Police Scotland launched an investigation when a child presented at school with injury to her stomach stating that her father had punched her, and following this report, the family went missing. An Article 32 alert (missing person) was raised for three children and an Article 36 alert raised for the mother and father. A hit occurred in Belgium where the Article 36 alert for the father was received as he travelled through Brussels Airport *enroute* to Vienna. This enabled Police Scotland IAU to carry out a geographically targeted enquiry. The suspect and family were traced safe and well with further instruction given to the Austrian Authorities.

Swedish Initiative

76. The Swedish Initiative is the overarching Directive which establishes rules to simplify the exchange of information and intelligence between law enforcement authorities of Member States effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations. Directives such as SIS II operate within this umbrella.

77. It is designed to create an EU wide culture of sharing of information and to build close co-operation and sharing of best practice, between practitioners in different jurisdictions. This overarching framework for co-operation across Member States is particularly important in relation to offences linked directly or indirectly to organised crime and terrorism when a fast turnaround is often of critical importance – particularly when acting upon time sensitive intelligence.

78. The principal ethos of this measure is that if any information is available to law enforcement authorities domestically without judicial authorisation, then it should be available to other EU law enforcement authorities in the same way (i.e. without the need for a court order, ILOR, etc.). The Swedish Initiative does not give Member States in receipt of information exchanged under it the right to use information or intelligence before a court. Should a Member State wish to use the information exchanged under this decision in such a way, it must obtain the consent of the State providing the information to do so through using appropriate legal instruments in the field of judicial co-operation. A request for information or intelligence from other Member States for evidential purposes is done by way of an EIO.

79. In Scotland, one of the ways the Swedish Initiative is used is by the Asset Recovery Office (ARO) within Police Scotland. The EU requires that each Member State has an ARO whose primary aims are to investigate and analyse the financial trails of criminal activity and to freeze and confiscate the proceeds of crime. The Swedish Initiative enhances the ARO and the exchange of information and intelligence, through the use of simplified and standardised forms and strict deadlines. Together, they support the recovery of the proceeds of crime both domestically and internationally.

80. Without access to the Swedish Initiative, Police Scotland could utilise other informal information sharing networks, but these would not necessarily give the same time bound response that the Swedish Initiative does. The provision of timeous intelligence allows our law enforcement partners to act quickly. Nor would these other networks provide the element of uniformity required to maintain the quality of information and intelligence that the Swedish Initiative currently provides. No longer being party to it would impact on every other information sharing measure we use to exchange information and intelligence with other Member States such as SIS II. This could lead to a reduction in the detection and investigation of crime and in turn, a vital deterrent would be lost.

81. The Scottish Government is of the view that loss of the Swedish Initiative would significantly hinder the ability of the police to take swift action and in turn, could impact on public safety and therefore every effort should be made to maintain access to the Swedish Initiative in the negotiations.

Eurojust

82. The EU Judicial Co-operation Unit (Eurojust) was established in order to facilitate and consolidate judicial co-operation in criminal matters being conducted or directed across two or more EU Member States. It works closely with Europol but has a particular emphasis on evidence gathering with a view to criminal proceedings.

83. Each Member State has a national desk within the Eurojust office at The Hague, staffed by prosecutors, judges or members of law enforcement agencies, along with central administrative support. For Scotland, the Head of ICU for COPFS is an assistant national member of the UK desk and COPFS places trainees in Eurojust for three months at a time as part of their traineeship. The co-location of prosecutors and judges from all Member States at a central location is a key advantage. Eurojust's success may be seen from the fact that a number of non-EU Member States have appointed liaison magistrates there – Norway, Switzerland and the United States.

84. The judicial co-operation facilitated by Eurojust operates at several levels. The direct personal contact possible through Eurojust facilitates the effective use of the various mechanisms of co-operation including coordination meetings. In appropriate cases, Eurojust facilitates the use of Joint Investigation Teams (JITs). A JIT agreement is entered into by prosecutors and law enforcement of two or more States to enable a joint investigation of transnational criminal activity being conducted in those States.

85. The advantages of a JIT are that it enables law enforcement agencies to operate jointly in all the States party to the JIT, for example, conducting searches on a joint basis and so ensuring that the evidence relevant to each is gathered according to domestic rules of evidence, often avoiding the need for EIOs/ILORs and paving the way for requests to be expedited. The EU provides funding for JITs – which is attractive to all participants, but especially important for some of the smaller member States.

Case Study

Apart from coordination meetings, JITs, etc., Eurojust can also work effectively at a practical level that nonetheless greatly assists the efficient delivery of justice. For example, an investigation started after a woman in Dundee contacted her mother (resident in the Slovak Republic) to say she had been kidnapped. The investigation revealed evidence of human trafficking, and a prosecution was instituted. Witnesses were cited from the Slovak Republic, who initially advised that they were happy to travel to give evidence. Two weeks prior to the trial, they changed their minds, and requested to give their evidence by Video Conference (VC). A great deal of assistance was given in the facilitation of the VC by Eurojust, which without such assistance, the VC simply could not have taken place in the timescales. The witnesses' evidence was extremely valuable to the prosecution.

86. Having access to Eurojust has improved cross-border co-operation between prosecutorial and judicial authorities. It is unlikely that judicial co-operation with the UK and Scotland would cease if we lose access to Eurojust. Judicial co-operation took place to some extent before Eurojust was established and Scottish prosecutors enjoy good working relationships with their counterparts in EU and non EU Member States. However, the ability to convene meetings with a number of countries at a convenient central location and the good personal relationships that have been fostered as a result is undoubtedly preferable and more efficient than having to make individual approaches to the same countries. A continuing relationship with Eurojust is therefore highly desirable.

87. Although the UK and Scotland would still be in a position to enter into JITs as a 'third country', the non-availability of funding to JITs may affect the willingness of other States to enter into an agreement with us. Losing access to this measure means that the UK would no longer have a voice in influencing negotiations about the future structure and operation of Eurojust or matters that affect Eurojust, such as engagement with Europol.

88. The Scottish Government's position is that we should maintain our membership of Eurojust as part of the negotiations on the future relationship with the EU.

European Judicial Network

89. The European Judicial Network (EJN) is an EU supported network of judges and prosecutors operating in Member States. The network is supported by a secretariat and web portal providing extensive country by country information and they hold regular plenary and regional meetings. While less visible than some other European institutions and instruments such as Europol and the EAW, the EJN is an effective and comparatively low-cost means of facilitating mutual legal assistance across Europe.

90. The EJN provides a useful mechanism for exchange of information and advice, which helps to support the use of formal mechanisms of co-operation.

Scottish prosecutors use the EJM much more extensively than their counterparts in the rest of the UK.

91. If the UK was to leave EJM altogether Scotland would feel the adverse impacts the most, due to our use of the network.

92. The Scottish Government is of the view that participation in the European Judicial Network is important to Scottish prosecutors in exchanging information and advice which helps to underpin the use of formal mechanisms of co-operation.

CHAPTER NINE: Victims' Measures

93. The JHA measures are not only used by law enforcement agencies and prosecutors to bring offenders to justice. There are also measures which assist victims of crime. An example of one such measure is set out below.

European Protection Order

94. Under the European Protection Order (EPO) victims of crime who are granted protection from their aggressors in one Member State are able to get similar protection if they decide to move to another Member State. The Directive allows measures which have been imposed to protect a victim, from, for example, gender violence, harassment, abduction, stalking or attempted murder, to extend that protection to another Member State.

95. An EPO may only be issued if the aggressor is banned by the initial country from places where the protected person resides or which the person visits, or if restrictions are imposed on contact or approaches by the aggressor to the protected person. An EPO is issued by the Member State in which the protection measure is originally made. Upon receipt of an EPO by the receiving Member State, an equivalent measure available under that Member State's domestic law is imposed. This ensures that a victim who moves from one Member State to another can secure equivalent protection.

96. While this particular measure ensures the cross-border enforceability of law it also helps to uphold victims' rights. However, if the UK is no longer party to the EPO Directive and no alternative arrangements have been negotiated on the mutual recognition of protection orders there would be no obligation on EU Member States to recognise measures adopted in Scotland. EPOs already in force could fall leaving an individual without protection.

97. The Scottish Government would want to retain access to the European Protection Order because of the protection it provides to individual victims.

CHAPTER TEN: Conclusion

98. The Scottish Government's determination to retain access to the JHA measures is a reflection of its commitment to a union of solidarity where countries come together for mutual protection, working together to address the challenges that affect our collective peace and security. The Scottish Government values greatly the regime of criminal justice co-operation to which we are party within the EU, and wishes to retain these. If this cannot be secured, we would look to keep as many of the existing measures as possible.

99. The JHA measures should not be seen in a hierarchy, with some measures having *greater* priority than others. The combined effect of the various measures is greater than each individual measure on their own. For example, the EAW would be less effective without the SIS II system. Further, the system is not a static one. The EU is continuing to develop the mechanisms for co-operation, in light of the justice and security priorities and different legal systems of those Members States involved in their development, and it may be anticipated that these developments will continue.

100. The UK Government is seeking a deep and special partnership with the EU and it has set out a proposal for a new security treaty to maintain continued security, law enforcement and criminal justice co-operation after the UK's departure from the EU. The UK Government's Framework for the UK-EU Security Partnership notes that *"there would be a clear mutual loss of operational law enforcement and criminal justice capability if the UK ceased to participate in and contribute to this [EU's] toolkit"*²⁴. As recently as 2014, the UK Government chose to remain opted in to a number of significant JHA measures, with the then Home Secretary describing the decision as being in *"the national interest"*.

101. We support the UK Government aim of agreeing a deep and special partnership with the EU to ensure that current levels of security, law enforcement and criminal justice co-operation can continue. This sits alongside our belief that the interests of the UK, including Scotland, would best be secured by continued membership of the European Single Market and Customs Union. Any new arrangements between the UK and the EU on law enforcement and security must respect Scotland's separate and independent justice system. These arrangements must recognise the independent role which the Lord Advocate has as head of the system for the investigation and prosecution of crime in Scotland and his specific functions in relation to cross-border criminal justice co-operation.

102. Any deep and special partnership must also protect and enable continued direct links between our independent justice agencies and their EU counterparts, so that they are able to participate and influence policy in future developments at an EU level. This is necessary in order to:

- Maintain operational effectiveness;
- Maintain our ability to co-operate fully with European partners; and
- Maintain our ability to influence developments which will affect the safety and security of the people in Scotland.

²⁴ See footnote 3 and page of the Framework.

103. In order to maintain data sharing for law enforcement purposes, the Scottish Government would agree to on-going compliance and keeping pace with data protection requirements. We would also welcome CJEU jurisdiction on these matters, if this is needed to secure on-going justice and security co-operation.

ANNEX

JUSTICE AND HOME AFFAIRS INSTRUMENTS OF EU CRIMINAL JUSTICE CO-OPERATION²⁵

JHA Title	Description	Risk from loss
<p>Europol</p> <p>Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (Europol).</p>	<p>Membership gives law enforcement officers and specialists direct and instant access to secure Europe-wide information sharing systems that extend their reach in tracking down individuals and tackling crime.</p>	<p>European Law Enforcement Co-operation. Key to intelligence sharing/gathering and advancing multi-state cross-border criminal investigations. Associate status may be possible but likely to lose access to intelligence databases.</p>
<p>Joint Investigation Teams</p> <p>Council Framework Decision 2002/465 JHA of 13 June 2002 on Joint Investigation Teams.</p> <p>Council Resolution on a Model Agreement for setting up a Joint Investigation Team (JIT) (2017/C 18/01).</p>	<p>Provides closer co-operation between police forces, customs authorities and other competent authorities in EU Member States.</p>	<p>Prosecutor led investigation teams with prosecutors and law enforcement from two or more countries. Allows efficient and speedy evidence gathering with less reliance on Letters of Request. Funding available by Eurojust.</p>

²⁵ The list of EU measures in this table sets out the main pieces of EU legislation for each area. It does not list all the amendments that have been made to each particular EU measure.

JHA Title	Description	Risk from loss
<p>Cybercrime</p> <p>Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.</p>	<p>Tackles large-scale cyber-attacks by requiring EU Member States to strengthen national cyber-crime laws and introduce tougher criminal sanctions.</p>	<p>Rapid access to emerging threats, investigations etc.</p>
<p>European Arrest Warrant</p> <p>2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.</p>	<p>Ensures that criminals can be identified and brought to justice swiftly in any EU Member State.</p>	<p>Proven success story of European judicial co-operation. Its loss will result reduce efficiency and allow many States to refuse to surrender their nationals. There is a particular issue with Ireland where there is no longer domestic legislation to support the 1957 Convention.</p>
<p>European Investigation Order</p> <p>Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.</p>	<p>Speeds up the assistance between EU Member States in criminal investigations.</p>	<p>Came into force 31 July 2017. Still to be implemented in a few EU Member States. Seeks to replicate efficiencies of EAW to evidence gathering. Likely that reversion to 1959 Mutual Legal Assistance Convention will be permissible but given volume or requests it is important this is clarified at an early stage.</p>

JHA Title	Description	Risk from loss
<p>Schengen Information System II²⁶</p> <p>Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).</p> <p>Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II).</p>	<p>Along with Prüm & ECRIS allows rapid information sharing and effective co-operation between EU Member States police and prosecutors in the prevention, investigation and prosecution of crime.</p>	<p>Pan-EU alert system. Key public protection innovation which required significant investment. Loss would reintroduce risk of dangerous fugitives slipping through fingers of law enforcement. Difficult to replace to any extent.</p>
<p>Swedish Initiative</p> <p>Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.</p>	<p>A catch-all information sharing Directive. Used with Prüm, ECRIS & SIS II.</p>	<p>Overarching framework for co-operation across EU Member States. A loss would lead to a reduction in the detection and investigation of crime.</p>

²⁶ The EU measures which are listed in this entry are those which provide the legal basis for SIS II; the operations of SIS II are supplemented by a number of other EU measures which are not been listed here.

JHA Title	Description	Risk from loss
<p>EUROJUST (European Judicial Coordination Unit)</p> <p>Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.</p>	<p>Coordinates and facilitates the investigation of cross border crime within the EU and associated evidence gathering.</p>	<p>EU Judicial Co-operation Unit. Facilitates and coordinates criminal investigations across multiple States. A forum for resolution of conflicts and centre of excellence for advice. Provides funding for Joint Investigation Teams.</p>
<p>European Judicial Network</p> <p>Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.</p>	<p>Allows for an effective and comparatively low-cost means of facilitating mutual legal assistance across Europe.</p>	<p>Performs similar function to Eurojust for everyday problem solving. Enjoys a lower profile but very useful body extensively used by Scotland.</p>
<p>European Protection Order</p> <p>Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.</p>	<p>Allows orders issued in one EU Member State to be recognised across the entire EU.</p>	<p>Mechanism for a criminal court to extend a domestic protective order to the State of residence of a protected person.</p>
<p>EURODAC</p> <p>Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation ((EU) No. 604/2013.</p>	<p>Fingerprint database for identifying asylum seekers and irregular border-crossers.</p>	<p>Allows law enforcement agencies to access and prevent and detect serious crime.</p>

JHA Title	Description	Risk from loss
<p>ECRIS - (European Criminal Records Information System)</p> <p>Council Framework Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.</p>	<p>Along with SIS II & Prüm allows for rapid information sharing and effective co-operation between EU Member States police and prosecutors in the prevention, investigation and prosecution of crime.</p>	<p>European database of criminal records. Scottish domestic criminal law requires courts to take account of European criminal records. In some cases can inform decisions. Important public protection tool.</p>
<p>Passenger Name Records & API</p> <p>Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.</p>	<p>Provides a record in the database of a computer reservation system that consists of the personal information for a passenger and also contains the itinerary for the passenger, or a group of passengers travelling together.</p>	<p>Supports delivery of the UK Counter Terrorism Strategy.</p>

JHA Title	Description	Risk from loss
<p>False & Authentic Documents Online (FADO)</p> <p>Council Joint Action 98/700/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image-Archiving System (FADO).</p>	<p>A classified restricted system for the exchange of information between document experts on travel and identity documents.</p>	<p>Provides an easy access system for sharing information on falsified identity and travel documents.</p>

JHA Title	Description	Risk from loss
<p>Prüm</p> <p>Council Framework Decision 2009/905/JHA of 30 November 2009 on Accreditation of forensic service providers carrying out laboratory activities.</p> <p>Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.</p> <p>Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.</p>	<p>Along with SIS II & ECRIS allows rapid information sharing and effective co-operation between EU Member States police and prosecutors in the prevention, investigation and prosecution of crime.</p>	<p>Allows rapid information sharing of DNA profiles, fingerprints and vehicle registration records, between EU Member States.</p>

JHA Title	Description	Risk from loss
<p>EU-LISA</p> <p>Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.</p>	<p>European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.</p>	<p>Works as a package with other security measures.</p>
<p>Human Trafficking</p> <p>Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.</p>	<p>Prevents and combats trafficking of human beings in EU Member States.</p>	<p>Broader collaboration mechanisms; loss of EU-wide anti-trafficking coordination.</p>
<p>Football Disorder</p> <p>Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension.</p>	<p>Sets out requirements to enhance security at international football matches.</p>	<p>Ensure Scottish nationals travelling to football-related events in Europe are safely policed; lack of risks knowledge.</p>

JHA Title	Description	Risk from loss
<p>Child Sexual Exploitation</p> <p>Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet.</p> <p>Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children, and child pornography and replacing Council Framework Decision 2004/68/JHA.</p>	<p>Prevents and combats child sexual exploitation across EU Member States.</p>	<p>Knowledge about criminal convictions of people disqualified from working with children.</p>

JHA Title	Description	Risk from loss
<p>Asset Recovery/Confiscation measures²⁷</p> <p>Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.</p> <p>Council Framework Decision 2006/783/JHA of 7 October 2006 on the application of the principle of mutual recognition to confiscation orders.</p> <p>Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime.</p>	<p>Allows EU Member States to confiscate assets derived from serious and organised crime.</p>	<p>Facilitate mutual recognition of asset freezing and recovery across EU Member States. Have been little used to date in Scotland.</p>

²⁷ In the asset recovery/confiscation field there is also a Council of Europe Convention of 16th May 2005 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

JHA Title	Description	Risk from loss
<p>Mutual recognition of financial penalties</p> <p>Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.</p>	<p>Enforces financial penalties in cross-border cases.</p>	<p>Framework for mutual recognition and enforcement of financial penalties between EU Member States.</p>
<p>Joint Action on Organised Crime</p> <p>Council Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.</p>	<p>An evaluation mechanism to allow EU Member States to combat organised crime.</p>	<p>Allows strong and effective international police co-operation.</p>

JHA Title	Description	Risk from loss
<p>Schengen Convention</p> <p>The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.</p>	<p>Allows effective cross-border surveillance of suspected criminals.</p>	<p>Allows strong and effective international police co-operation; increase in cross-border crime & lack cross-border surveillance.</p>
<p>Prisoner Transfers</p> <p>Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.</p>	<p>Allows for a simpler and faster process for returning prisoners to their country of origin/residence.</p>	<p>Unable to secure the transfer(s) of EU prisoners back to their Member State of origin & Scottish residents to serve sentence in back in Scotland.</p>

JHA Title	Description	Risk from loss
<p>European Supervision Order</p> <p>Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.</p>	<p>Ensures that bail conditions can be transferred so that suspects from other EU Member States can be properly monitored.</p>	<p>“Euro bail” – mutual recognised instrument that allows accused/offender to reside in another EU Member State while subject to restrictions imposed by the prosecuting State.</p>
<p>Victim’s Rights & Compensation</p> <p>Council Directive 2004/80/EC of 29 April 2004 relating to compensation to victims of crime.</p> <p>Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.</p>	<p>Establishes minimum standards on the rights, support and protection of victims of crime.</p>	<p>Establishes minimum standards on the rights, support and protection of victims of crime. Directive has been transposed into Scots Law.</p>

JHA Title	Description	Risk from loss
<p>Information in Criminal Proceedings</p> <p>Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.</p>	<p>Ensures suspects are provided with the correct information in any EU Member State to understand their charge.</p>	<p>Suspects are given a 'letter of rights' which allows Scotland to comply with the Directive.</p>
<p>Interpretation & Translation</p> <p>Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.</p>	<p>Ensures that in any EU Member State persons accused in criminal proceedings are to benefit from interpretation, and translation of essential documents.</p>	<p>Allows Scots abroad right to help in criminal proceedings.</p>
<p>Trials in absentia</p> <p>Council Framework Decision 2009/299/JHA of 26th February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.</p>	<p>Ensures that rights of accused persons are adequately safeguarded in criminal proceedings.</p>	<p>Amends five current Framework Decisions.</p>

JHA Title	Description	Risk from loss
<p>Previous Convictions</p> <p>Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.</p>	<p>Allows the recognition of convictions in all EU Member States.</p>	<p>Timeous access to any information relating to European convictions.</p>
<p>Drugs</p> <p>Regulation (EC) No.273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors.</p> <p>Council Regulation (EC) No. 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors.</p>	<p>Helps monitor illegal trade of substances across EU Member States.</p>	<p>Maintain intelligence sharing; increase in drug trafficking.</p>
<p>Explosives</p> <p>Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15th January 2013 on the marketing and use of explosives precursors.</p>	<p>Provides a mechanism to alert authorities on the sale of substances across EU Member States.</p>	<p>Public Safety; greater vulnerabilities on exploiting legislation.</p>

JHA Title	Description	Risk from loss
<p>Firearms</p> <p>Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons.²⁸</p>	<p>Allows controls to be carried out across Member States on the acquisition and possession of firearms and on their transfer to another EU Member State.</p>	<p>Public Safety.</p>
<p>Financial Intelligence Units (FIUs)</p> <p>Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information.</p>	<p>Enables information exchange on criminal finances across EU Member States.</p>	<p>Support cross-border financial investigations; slower and less effective investigations.</p>

²⁸ There are other EU measures which regulate the illicit manufacturing and trafficking of firearms (Council Decision 2014/164/EU of 11 February 2014) and set common guidance on deactivation standards for firearms (Commission Implementing Regulation (EU) 2015/2403 of 15 December 2015).



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