COUNTDOWN TO THE REFERENDUM:

A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.

7: The Impact of Brexit on UK Security

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Synopsis

- *Looks at what leaving the EU could mean for the internal and external security and defence of the UK, and in particular the importance of, and potential effect on, co-operation between the UK, its European neighbours and other States.*
- *Analyses the absence of any effective common EU defence policy or defence capability, and the current shape of the UK's NATO-focussed defence policy arrangements in light of that.*
- *Argues that ultimately Brexit would not serve to improve the UK's influence in matters of defence, and there is every possibility that it will be weakened as an alternative "bridge" between the US and the EU is established.*
- *Looks at existing intelligence-sharing arrangements. Argues that international police and criminal co-operation is paramount to any effective UK defence or security policy, within the UK and abroad, and highlights some of the real problems for continued police and criminal co-operation that would flow from leaving the EU.*

Defence policy

1. On paper, the EU aspires towards a common defence policy. The Treaty of Lisbon established the European External Action Service, which is the EU's diplomatic service tasked with carrying out the EU's Common Foreign and Security Policy (CFSP). The CFSP was first established under title V of the 1992 Maastricht Treaty (a precursor to the Lisbon Treaty) in order to further co-operation on security issues. Amongst other things, the Maastricht Treaty provided for Member States to inform and consult with one another on matters of foreign and security policy "*in order to ensure that their combined influence is exerted … by means of concerted and convergent action*" and allowed Members States to adopt a common position and to take joint action. A Common Security and Defence Policy (CSDP) also exists alongside the CFSP. The CSDP allows the EU to undertake peace-keeping operations, conflict prevention and the strengthening of international security. At least thirty missions have taken place in Europe and elsewhere since 2003. The Lisbon Treaty also includes the aspiration that the CFSP would include "*the progressive framing of a common Union defence policy*".
2. However, despite this aspiration, the EU is far off from establishing a cohesive EU defence policy or a separate defence capability. The EU itself has limited military capability (although, through EUFOR missions in Macedonia, Bosnia, DR Congo and Chad, has engaged in military and peace keeping and capacity building operations outside the EU). Member States are responsible for their own territorial defence. Further, the majority of EU members are members of NATO, the alliance of European and North American States in relation to defence and security issues, which has a responsibility for the defence of Europe. In addition, the interests and positions of Member States are still very diverse making the framing of a cohesive security and defence policy difficult to achieve. For example, while

some EU Member States wish to maintain military neutrality,[1] others have different geopolitical and strategic interests.[2]

3. Understandably therefore, the UK's defence policy has been primarily focused on alliances outside those developed within the formal EU legal framework. It is striking that the UK's 2015 National Security Strategy and Strategic Defence Security Review does not mention either the CFSP or CSDP once, despite its comprehensive review of its defence and security initiatives and priorities.
4. NATO remains at the heart of the UK defence policy. The UK has confirmed that it would meet the NATO pledge to spend 2% of its GDP on defence over the next five years – the second largest defence budget in NATO after the US and the largest of any EU Member State.[3] Given that the NATO alliance includes the majority of EU Member States, this would remain the preeminent forum for cooperation between the UK and Europe on defence issues.
5. Outside of the NATO framework, the UK also maintains bilateral arrangements with certain EU Member States providing for mutual cooperation in defence matters. Its relationship with France, one of the other major defence powers within the EU, is particularly strong. The 2010 Lancaster House Treaties between the UK and France provide a framework for the co-operation between British and French Armed Forces including the sharing of materials, equipment, technology and facilities. Under this arrangement a Combined Joint Expeditionary Force is expected to be operational in 2016, which will perform a role in planning for and responding to crises. The UK has also committed to working with France to develop its Unmanned Combat Air System Program and collaboration on the development of complex weapons. The UK also collaborates with France under the 2010 Teutates Treaty to develop the technologies associated with the safe and effective maintenance of our respective nuclear stockpiles.

[1] Sweden, Austria, Ireland and Finland.
[2] For example, "Spain will always be more concerned about Morocco than about Ukraine; Poland will always worry about the eastern neighbourhood and remain unmoved by the troubles of North Africa." See Michael Leigh, *EU Global Strategy*, Paper 20 in Expert Opinion series, European Union Institute for Security Studies, February 2016.
[3] National Security Strategy and Strategic Defence and Security Review 2015, para 2.3.

6. Given the existence of these types of arrangements outside the EU framework, on one view Brexit would not likely have a significant effect on the UK's existing defence policy arrangements.[4]
7. However, and despite the influence of NATO, the influence of the EU upon the UK's defence policy should not be underestimated:
    a. The reality is that the EU's foreign policy role has grown substantially in recent years. The EU "uses other elements of power, especially economic, in pursuit of shared foreign-policy objectives. The two most recent examples of this have been sustaining economic pressure on Iran while offering it a negotiated route out of the dispute over its nuclear programme (which Iran eventually accepted); and pressuring Russia over its campaign against Ukraine, while also offering a way out through the Minsk process (which is yet to be taken up by Moscow)".[5] The UK would no longer be "in the room" politically in terms of decision-making on foreign-policy and security (e.g. diplomacy, sanctions etc) such as these;
    b. From a political perspective, there is a long-term concern that any Brexit will encourage nationalism and further fragmentation in the EU, ultimately creating regional instability.
8. In any event, the long-term consequences for the UK as a state with global influence are even less clear. The UK's close relationship with the US has traditionally been strengthened by the fact, as a member of the EU, it is able to act as a bridge between the US and Europe. Brexit could therefore ultimately lead to a weakening of influence of the UK on both sides of the Atlantic. The US would need to cultivate relationship(s) with other EU Member State allies in order to perform the bridging role currently performed by the UK.[6] Ultimately, the US wants the UK to remain a leading EU member state. Pragmatically, the UK's defence and security interests are unlikely to be best served by ignoring US security interests.

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[4] House of Commons Foreign Affairs Select Committee, *Implications of the referendum on EU membership for the UK's role in the world: Fifth Report of Session 2015-16*, para 49.
[5] Lawrence Freedman, *Brexit and the Law of Unintended Consequences*, 58 Survival: Global Politics and Strategy June–July 2016, pp 7–12.
[6] House of Commons Foreign Affairs Select Committee, *ibid*, paras 50–54.

An effective UK security policy

9. Whatever the focus of the UK's defence policy, two areas, both of which may be inextricably linked to the UK's relations with the EU, are critical to its own internal security: (1) intelligence gathering/sharing and (2) law enforcement cooperation.

Intelligence gathering/sharing

10. Given the ease with which people and communications travel around the world, effective intelligence sharing is crucial for the continued security of any State. In an article for the *Sunday Times* published on 8 May 2016,[7] the former director-general of MI5, Lord Evans, and the former head of MI6, Sir John Sawers, argue that EU membership is "the best framework" for intelligence data gathering/sharing, including effective law enforcement cooperation.
11. Whilst the EU operates a hub for intelligence analysis (INTCEN), there is no joint European intelligence agency and the arrangements that govern intelligence gathering/sharing are still opaque in many respects. All appear to exist independently of the EU framework and so should remain generally unaffected by a Brexit. For example, in 1946 the UK developed bilateral agreements with the US, Australia, Canada and New Zealand for the sharing of intelligence. This became known as the "Five Eyes" and is thought to facilitate sharing of raw intelligence, funding, technical systems and personnel.[8] In recent public comments, President Barack Obama has seemingly confirmed that the structure of intelligence arrangements between the UK and the US would remain unaffected by Brexit. All members of Five Eyes, however, regard the UK's membership of EU as important to the effectiveness of the arrangements and want the UK to remain in the EU.
12. Other intelligence-sharing coalitions are known to exist involving European States which are again outside the EU legal framework; the 9-Eyes which adds Denmark, France, The Netherlands and Norway; the 14-Eyes, including

[7] *The EU can't dictate to us on security but staying in it can keep us safer* – also published on http://www.strongerin.co.uk.
[8] Cf Ewen MacAskill and James Ball, *Portrait of the NSA: no detail too small in quest for total surveillance*, The Guardian, 2 November 2013.

Germany, Belgium, Italy, Spain and Sweden.[9] Further, the Counter Terrorist Group, which derived from the "Berne Group", includes the 28 EU Member States plus Norway and Switzerland. It regularly meets to facilitate operational cooperation among the EU's police and intelligence agencies. It also generates and communicates threat assessments to EU policy makers.

13. However, while many of these intelligence arrangements appear to exist independently of the EU framework and can be expected to remain in place post any Brexit, those formerly in charge of the UK security services have expressed serious concern about the impact of any Brexit on intelligence sharing. In their article, Lord Evans and Sir John Sawers argue that, in the event of any Brexit, the UK influence at leadership level, and possibly even participation, in these groups "would be reduced" and further that the UK "would have little say over the terms for data sharing ... [and] could undermine our ability to protect ourselves".

Law enforcement cooperation

14. Enlargement of the Union at a time of internal border abolition originally led Member States to seek to establish an Area of Freedom, Security and Justice within the Union's borders. This was a regional acknowledgement that, in a globalised world, only collaborative action could provide effective security for any State.
15. Although far from perfect from the perspective of both human rights and democracy, the EU has established advanced methods of interstate cooperation which are not easily or quickly replicated by bilateral/multilateral arrangements. By using EU agencies (e.g. Europol, Eurojust and, in the realm of immigration and asylum cooperation, Frontex) and legislative instruments (e.g. the European Arrest Warrant (EAW) and the European Investigation Order), EU Member States have accepted their individual limitations in the context of transnational crime.
16. So what are the benefits of some of the key EU criminal measures and what happens if the UK leaves the EU?

[9] *Portrait of the NSA: no detail too small in the quest for total surveillance, ibid.*

The European Arrest Warrant

17. Mutual recognition allows judicial decisions taken in one Member State to be accepted as valid in another. The EAW is the flagship of mutual recognition. Introduced in 2004, it replaces extradition agreements between EU Member States and provides a speedier system in which judges make decisions on issuing and accepting warrants with limited grounds for refusal. Many human rights concerns have been raised about the EAW, but its success as a prosecution mechanism undoubtedly lies in its speed. One example is that of the eight-week extradition of the failed 21 July 2005 London bomber Hussain Osman from Italy. The return of fugitives from the so-called "Costa del Crime" is another.
18. If the UK leaves the EU the UK would return to negotiating bilateral or multilateral extradition agreements. Sir Hugh Orde, former head of the Association of Chief Police Officers, puts it this way "If I was a villain somewhere else in Europe and I'm escaping justice, I am going to be here because it is going to take a lot longer to get me back."

The European Supervision Order

19. Mutual recognition rests, in turn, on the idea of mutual trust between EU Member States. This requires faith that Member States' justice systems will offer a fair trial. Experience with the implementation of the EAW demonstrated this trust did not exist so further action was required to protect the rights of the accused.
20. The European Supervision Order is a protection for the accused. It applies the principle of mutual recognition to decisions on pre-trial supervision. Put simply, it means that someone facing trial abroad may return to their country of residence if bail conditions can be enforced by their home authorities. For UK nationals facing trial abroad, this is an obviously attractive facility. For the UK prosecuting an EU national, it also means that the UK is relieved of the expense of supervision, and the presence of the (alleged) offender in the UK pre-trial.

21. If outside the EU, the UK would have to try and negotiate treaties to achieve the same effect without any guarantee they would succeed, especially in the absence of the EAW to secure the arrest of fugitives.

Schengen

22. The Schengen system started with a treaty between a group of five Member States in 1985 but became part of EU law in 1999. It applies to 22 EU Member States (not the UK) and there are four non-EU countries involved: Norway, Iceland, Switzerland and Liechtenstein.
23. Within the Schengen area, border checks are abolished for participating countries to speed up the movement of people and goods. Standardised rules are imposed on external border controls and short-term visas. To prevent free movement being abused by criminals, the Schengen system has developed methods of enhanced police cooperation. For example, the Schengen Information System II allows police and border guards to enter and consult real-time alerts on a large database against certain categories of wanted or missing persons and objects (e.g. stolen cars). A Protocol to the EU Treaties means the UK does not have to join the Schengen area, but it has opted into to its law-enforcement mechanisms (e.g. SIS II).

Europol

24. The European Police Office (Europol) began operating in 1999. It became an EU agency in 2010. Its mandate is to support Member States in preventing and combating organised crime, terrorism and other forms of serious crime by the collection, analysis and exchange of information. It has no executive powers, and its officials are not entitled to conduct investigations in Member States or arrest suspects. Europol's work has, however, been considered to be effective. Only recently its Director, Rob Wainwright, indicated that it has stopped three Welsh child sexual exploitation networks this year.
25. Europol signs 'cooperation agreements' with third countries so the UK could continue to cooperate while outside of the EU but its Director has said "it will be more costly and certainly much less effective because the UK will be absenting itself from having access to the kind of well-developed

arrangements that currently exist and have developed over the last 40 years". Additionally, the content of cooperation agreements can vary widely so there is no certainty about the type of agreement the UK might sign. Mr Wainwright suggests that the UK is more likely to become "a second tier member like Norway and Iceland". Being outside the EU would also mean that the UK would not have any role in the further development of Europol and its mandate.

Customs cooperation

26. Goods move freely within the EU and must comply with the rules of the internal market and Common Commercial Policy. At external borders, the Common Customs Tariff and the Integrated Tariff are applied to goods from non-EU countries. Member States' customs authorities apply the rules uniformly. Customs cooperation helps protect against smuggling and fraud, cross-border organised crime and money-laundering, threats to the environment and cultural heritage. Third party agreements can be signed with countries outside the EU but, again, they remain uncertain and those states have no say over the wider direction of travel.

Law enforcement cooperation overall

27. Consequently, in all cases, if outside the EU, the UK may find that the renegotiation of existing arrangements is uncertain, lengthy and ineffective. In a globalised context, it is doubtful that attempting to turn back the clock will do anything to enhance UK security.

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June 2016

Further information

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