Why Britain's habit of cherry-picking criminal justice policy cannot survive Brexit

*The European Arrest Warrant is important to Theresa May. But, as **Auke Willems (LSE)** explains, it will be difficult to negotiate the pan-European security co-operation she wants unless Britain is prepared to cross the 'red line' of recognising the European Court of Justice, as well as the Charter of Fundamental Rights.*

Belgian police in Brussels, 2013. Picture: Antonio Ponte via CC-BY-SA 2.9

Cooperation on matters of police and criminal law – or security cooperation, as the UK government prefers to call it – is high on the list of Brexit priorities. In particular, the European Arrest Warrant (EAW), the EU's flagship instrument for fast-track extradition, is highly valued by Theresa May. The government has given some insight into how it wants this relationship to take shape in a Future Partnership Paper on *Security, law enforcement and criminal justice,* as well as in May's speech at the Munich Security Conference where she underlined the importance of cooperation in this area: "Extradition outside the European Arrest Warrant can cost four times as much and take three times as long." While these put forward a strong case for *why* cooperation should continue, they leave much to be desired in terms of *how* this should be achieved.

Absent from public debate, but not from the negotiating table

Surprisingly, criminal justice cooperation has received relatively little attention in public debate when compared to the blockbuster files of the divorce bill, the Irish border, citizens' rights, and future trade relations. Surprising, because the interests at stake concern such fundamental values as security, freedom and rights. But despite the lack of public attention, it is no surprise that criminal justice is one of the government's priority areas. It is, after all, a core task of a state to provide security for its citizens, and in a rapidly globalising world it is impossible to do this alone. Certain forms of serious crime are cross-border by nature – drug-trafficking, human trafficking, and terrorism – but also 'new' forms of crime such as cybercrime necessitate a joint and coordinated response. The prospect that the UK would fall outside the EU's criminal justice framework and become a safe haven for criminals and terrorists is not an appealing thought.

The UK's central, and privileged, position in EU criminal law

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The UK has long been one of the main drivers of the EU's criminal justice policy. Although reluctantly – there has never been much desire to give up sovereignty regarding criminal law, which touches on the core of statehood – the UK saw an urgent need for European states to enhance cooperation in criminal justice matters in the face of increasing cross-border crime, not least because of the freedoms the EU guarantees. Therefore the UK came up with the idea of transferring the principle of mutual recognition, which had proven successful in the internal market, to the area of criminal law. In 1999, the Tampere European Council proclaimed that mutual recognition was to become the 'cornerstone of judicial cooperation in criminal justice'. It still is today, and, despite difficulties, the success of the EAW – at least from a law enforcement perspective – is undeniable. The latest frontier in the mutual recognition era is the European Investigation Order on the gathering and exchange of evidence, and UK law enforcement is more than keen to participate in this instrument. The UK has moreover proven a major player in information and intelligence exchange and operational cooperation through platforms and databases as Europol (the current director of Europol is British) and the Schengen Information System.

In addition to successfully pushing forward mutual recognition instead of more intrusive harmonisation, the UK has long enjoyed opt-outs regarding justice and home affairs matters, which culminated in a broad arrangement under the Lisbon Treaty that effectively allowed the UK to opt in/out of any measure it desires. This arrangement, also referred to as cherry-picking, has indeed been a rather sweet deal for the UK and allows it to participate in those measures that are regarded as domestically beneficial, and avoid anything else. That deal will now end. Arguably – more than in any other area – the UK has managed to shape EU criminal law to its desires. So it seems fair to conclude that if the EU were merely a 'security union', Brexit would never have happened.

A shared interest in continuing cooperation, but what about trust?

The desire to maintain close security ties is therefore high on the UK's agenda, with an emphasis on law enforcement measures like the EAW. The EU in turn also wishes to maintain as close a relationship as possible with the UK across justice and security (see for example the European Council's Guidelines). Could this be one area where an early deal could be reached, based on shared interests? The answer should be yes. The interests at stake are simply too high for political games, and this is far from a zero-sum game. However, there are a number of snags that make it more complicated than it might seem.

The high degree of cooperation within the EU on criminal justice matters is enabled by the presumption that all Member States comply fully with fundamental rights, including laws on data protection, and more broadly comply with the EU *acquis*. Two key instruments are the EU's Charter of Fundamental Rights and the European Convention on Human Rights (ECHR). In terms of EU criminal law this is known as the presumption of mutual trust. The EU has taken active steps to strengthen this trust, for example by adopting measures enhancing fair trial rights (here the UK has a mixed record as it has opted in to some of these measures, but not all), and other flanking measures to minimise differences between national legal systems.

A further pillar to guarantee mutual trust is the jurisdiction of the Court of Justice of the European Union (CJEU), which is tasked with keeping Member States in line with EU laws, but also to safeguard the balance between rights and enforcement. The EU's Area of Freedom, Security and Justice (which is far from complete) aims to become a balanced judicial space, under the guardianship of the Commission, and with the ultimate supervision of the CJEU.

The emphasis on security rather than justice

This reality might pose a number of difficulties for the UK government. The EU Charter of Fundamental Rights will not form part of retained EU law, and the future of the ECHR is at best uncertain (dubbed 'Brexit 2' by Estella Baker). Moreover, the protection of data, required for access to EU databases, is a concern on the EU side. More broadly, the terminology used by the government, which emphasises security rather than freedom and justice, indicates that negotiators are less interested in the latter.

This may very well prove the main stumbling block. An absolute prerequisite for applying instruments as the EAW is mutual trust, which cannot be ensured by a third state if it does not comply with the EU's Charter, nor any of its procedural rights measures or the other relevant EU *acquis*. To illustrate this, the EAW deal with Norway and Iceland, two states that are within the single market and Schengen (the UK will not be in either), took ten years to negotiate and is still not operational.

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Moreover, if the jurisdiction of the CJEU is indeed a red line – as argued by some hard-line Brexiters – this will be difficult to reconcile. If two parties sign an agreement, this will raise issues of interpretation for which a judicial body is needed. It appears from May's speech in Munich as though that she has opened the door (albeit reluctantly) to accepting CJEU jurisdiction where necessary.

Overall, no matter what form an ultimate cooperation agreement will take, it will be less than what is currently in place: an 'EAW minus' at best. How much it differs will depend upon the commitment the UK is willing to make to meet EU fundamental rights law. As Valsamis Mitsilegas has noted, this has created the paradoxical situation where in order to maintain current levels of cooperation, the UK might have to accept more EU law than it currently does as a Member State.

An early end to UK participation in the EAW?

The recent case of O'Connor might serve to show how central the EU's *acquis* is to the EAW, and the consequent impact of Brexit. The Irish Supreme Court refused to surrender Joseph O'Connor to the UK due to its concerns about Brexit, in essence because his rights could be curtailed once the UK leaves the EU (the sentence sought would continue post-Brexit). Accordingly, the Irish Supreme Court referred the matter to the CJEU. This case will be a major test, as the CJEU could potentially render the precious EAW ineffective already as of now, rather than after Brexit. It underlines the need to find a solution that satisfies the rights requirements that are needed to operate the EU's enhanced model of cooperation in criminal justice matters.

Considering the difficulties that lie ahead in reaching a deal acceptable to both the UK and the EU27 which would not deteriorate either security or rights, the words of Wolfgang Ischinger at the Munich Security Conference cut right to the chase: 'Things would be so much easier if you stayed'.

This post represents the views of the author and not those of Democratic Audit. It first appeared on the LSE Brexit blog.

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