

Britain must commit to upholding civil liberties if the EU is to agree on security co-operation after Brexit

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The British government has made it clear it wants a new kind of security deal with the European Union after Brexit. In a speech in London on June 6, David Davis, secretary of state for exiting the EU, set out five aims for a new security partnership [<https://www.gov.uk/government/news/david-davis-speech-on-the-future-security-partnership>]. He highlighted the need for a “lasting, positive” agreement, “a stable relationship, built on trust” – a relationship that “doesn’t need to be revisited or renegotiated”.

Davis promised that the UK would make appropriate contributions to the costs of programmes that underpin continued cooperation. And he added that the UK “would respect the remit of the European Court of Justice” when participating in EU agencies, without explaining exactly how.

But Davis’s comments came a week after a senior EU official suggested that the UK would not be able to make use of the European Arrest Warrant (EAW) after Brexit – which allows for the speedy extradition of suspects and convicted persons across EU countries. The official said Britain’s continued involvement could jeopardise “the lives and liberty of citizens” [<https://www.theguardian.com/politics/2018/may/24/uk-chasing-a-fantasy-in-brexit-talks-top-eu-official-warns>].

Part of the reason for this reluctance to allow Britain access to the EAW after Brexit is a question of trust – one of the key requirements for ongoing security cooperation.

European security

The EU framework on security [https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_COD ED=23] is associated with protecting citizens against terrorism and serious forms of cross-border crime, such as drug trafficking and exploitation of irregular immigration. The narrative of the “War on Terror” after 9/11 radically influenced the concept of European security and was the catalyst for the adoption of counter-terrorism measures [<https://www.consilium.europa.eu/en/policies/fight-against-terrorism/>] – which the UK was very active in helping to formulate.

The goals of European security are achieved by police and judicial corporation, including measures on extradition, intelligence databases, sharing information, and the quick recognition of orders and decisions [https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_COD ED=23].

One key example of this cooperation is the European Arrest Warrant [<https://www.gov.uk/government/publications/framework-decision-on-the-european-arrest-warrant>], implemented by the UK in the Extradition Act 2003. The procedure is automatic and quick – judicial authorities complete a form and operate within a limited time frame and strict deadlines. A report published in 2013 by the Home Affairs Select Committee of the UK’s decision to join the EAW, said extradition under the process now takes on “average three months”, compared to around 10 months for a non-EU extradition [<https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/615/615.pdf>].

As a member state of the EU, the UK has been able to opt in or out of EU-wide measures on criminal justice policy that it liked, which has been called cherry-picking [<https://blogs.lse.ac.uk/brexit/2018/03/29/why-britains-habit-of-cherry-picking-criminal-justice-policy-cannot-survive-brexit/>].

But after Brexit, the UK won’t have automatic access to the security cooperation framework. As a result, it will default to the inefficient, costly and politicised extradition treaties under international law, that the EAW replaced, unless a security partnership is concluded that will allow the UK access to the EAW scheme.

Mutual trust remains elusive

The law surrounding police cooperation is based on the so-called model of mutual recognition. In contrast to other areas of EU law which require harmonisation, in this area security measures are recognised across member states – even if they are different. May has also used the term “mutual recognition” as a model of the kind of cooperation she wants with the EU post-Brexit [<https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>].

But, crucially, the key precondition for this mutual recognition is mutual trust [<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2018034>] – which is what is currently missing in negotiations towards a new security partnership. This is why Davis keeps referring to the “decades of trust ... that have existed” and wishes for “a stable relationship built on trust that doesn’t need to be revisited” – as if trust can be a static element. Yet trust requires some common ground to be generated. It requires certainty and consistency of patterns in that the other side will respect the freedom you risk for them.

The uncertainty of the UK’s position in Brexit negotiations does nothing but hurt trust and make security cooperation unlikely. This is because this area of security cooperation is so sensitive to civil liberties and the future protection of such liberties seems quite precarious. An example of this is the refusal, in February, of Irish judges to extradite several people requested by the UK under the EAW due to the uncertainty in relation to the law and their rights in the future UK [https://www.courts.ie/acc/alfresco/b3874264-b81a-4e67-8391-d6b42a00e952/2018_IESC_3_1.pdf/pdf#view=fitH].

It is not yet certain whether the UK government wishes to retain measures which are protective of rights. They include the EU Charter of Fundamental Rights

[https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en], the EU victims' protection framework [https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/criminal-justice/victims-rights_en], and the extensive EU procedural safeguards [https://ec.europa.eu/info/sites/info/files/factsheet_procedural_rights_package_en.pdf] which act as common minimum standards for defence rights across the EU.

A chance to show willing

On the contrary, the government has repeatedly [<https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper>] expressed [<https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>] its wish to retain many of the security measures that the EU offers which limit people's freedoms, such as the European arrest warrant [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en], Europol [<https://www.europol.europa.eu/>], European Criminal Records Information System [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en]. It is safe to say that the government is more interested in security than freedom.

The UK should now be doing its best to recover the trust of its EU partners by showing a strong and consistent position that human rights will be protected. To do this, the UK government should demonstrate an eagerness to retain all the EU measures which are protective of civil liberties.

On June 12 and 13, MPs are expected to vote on the 15 Brexit amendments from the Lords [<https://inews.co.uk/news/politics/brexit-amendments-lords-theresa-may/>], one of which would put the EU Charter of Fundamental Rights directly into UK law [<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0212/hcb212withoutendorsement.1-7.html>]. The government argues [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714377/6.pdf] this is unnecessary, arguing that human rights are already protected in UK by other sources of law. But May is infamous [<https://www.independent.co.uk/news/uk/politics/theresa-may-facing-likely-legal-challenge-to-block-human-rights-reforms-in-breach-of-northern-a7500416.html>] for her hostility towards human rights law – and not retaining the EU Charter would fuel the sense of uncertainty [<https://blogs.lse.ac.uk/brexit/2017/02/22/will-brexit-spell-the-end-of-the-ecthr-and-the-arrival-of-a-british-bill-of-rights/>] around civil liberties after Brexit.

Instead of trying to overturn the amendment, the government should eagerly incorporate it into the bill, alongside a commitment to keeping the rest of the protective measures to which it is currently signed up. This the only way that security cooperation should be maintained – and is the only way to prove the trustworthiness that Davis suggests EU partners should be taking for granted.

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