



Plugging Britain into EU security is not that simple

by Camino Mortera-Martinez

Brexiteers seem to think that negotiating a bespoke arrangement with the EU on police and judicial co-operation will be a breeze. Donald Trump's election has boosted their enthusiasm. Trump's suggestions on how to fight crime and terrorism (by torturing or deporting suspects) are unpalatable to most European nations. If he implemented them, Europe would need to cut some ties with America; and Leavers think that Brexit talks on law enforcement co-operation would be easier if the EU needed to find a reliable security ally closer to home. But, as often, Brexiteers overlook the EU's legal and political reality: in most cases, the British government should be prepared to accept much less generous terms than it currently enjoys.

EU justice and home affairs (JHA) is a highly regulated area. Britain's partners may be more willing to plug the British into JHA than they may be to offer a special deal on the single market. But the UK should not over-estimate what EU partners can offer: they may not be able to overcome domestic legal barriers to co-operating with a non-EU country.

There are three areas of particular importance in the EU's fight against trans-national crime: extradition, access to databases and police co-operation.

Since 2004, extradition procedures between EU countries have been simplified by the European Arrest Warrant (EAW), which has made prosecuting European criminals easier

and faster. There is no extradition treaty in the world allowing for such a degree of co-operation between countries: among other things, the EAW has lifted the constitutional ban some EU countries have on extraditing their own nationals. Britain cannot be part of the EAW, as it is only open to EU countries. If the UK wanted to get a similar deal with the EU, it would need to convince its partners to change their constitutions. In some cases, this would trigger a referendum. It is difficult to see why other EU member-states would go to such pains to accommodate Britain's demands, especially in the current political environment.

Securing access to Schengen databases (like the Schengen Information System, which contains information on lost identity documents and

wanted persons) will also be tricky. Norway, Iceland and Switzerland (which, unlike the UK, are outside the EU but inside Schengen) have deals allowing them to participate in Schengen laws and policies. But these agreements come with strings attached: in exchange, Norway, Switzerland and Iceland must make contributions to the EU budget (in 2015 Norway paid €6 million to participate in EU JHA); and they must accept the supremacy of the European Court of Justice (ECJ) over their national courts in matters related to Schengen. ECJ supremacy and budget contributions would be difficult pills for the British parliament to swallow. But without those, it will be hard for the UK to retain the same access it has now to Schengen databases.

In any case, if Britain wants to keep accessing EU databases, it will need to retain EU data protection rules. First, the ECJ will invalidate any agreement between the EU and a third country which does not adhere to EU privacy rules. For example, the ECJ stopped the 'Safe Harbour' agreement which allowed for data transfers between the US and the EU. Second, the European Parliament will have a say over who can access Europol databases soon – thanks to the new Europol regulation, which the UK has just opted into. The European Parliament will not allow a country with less-than-satisfactory privacy standards to conclude an agreement on data-sharing with the EU. Six years ago, it overturned an EU-US agreement on a Terrorist Financing Tracking Programme because of privacy concerns. Keeping access to EU databases will

be all the more difficult if Theresa May cosies up to Donald Trump. Some of his proposals during the campaign, such as killing terrorists' families, would be crimes by European standards. As the UK's intelligence services have a close relationship with the US, EU member-states (and the European Parliament) might be reluctant to share data with the UK if it might also reach the US.

The UK will be able to get an agreement with Europol, regardless of any Trump-related complications. Unlike Schengen, or the European Arrest Warrant, there are precedents for close co-operation between Europol and non-EU, non-Schengen countries. In particular, Europol has association agreements with countries such as the US and Australia. The UK should seek a US-like agreement with Europol. This would enable the UK to place a network of liaison officers from key crime and counter-terrorism bodies at Europol. In exchange, Europol should also be allowed to have officers in relevant British departments.

JHA is not like trade, which creates winners and losers: the only losers from increased co-operation in law enforcement are the criminals themselves. But British participation in some JHA measures will demand compromises with the EU. It would be better for the security of all Europeans if the UK did not rule these out for purely political reasons.

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CER in the press

BBC News

17th November 2016
Camino Mortera-Martinez of the CER, said there was "no appetite for treaty change in Brussels at the moment".

The Guardian

14th November 2016
"Even if Hillary Clinton had won, there was always awareness that Europeans would need to do more for their own defence," said Sophia Besch of the CER.

The New York Times

12th November 2016
"Never before has so much ridden on the Germans," said Simon Tilford, deputy director of the CER. "We're very fortunate that Germany is led now by Merkel, because

there is a chance she will step up and do what Europe needs her to do."

The Express

9th November 2016
Ian Bond of the CER, slammed Trump's comments on foreign policy as "incoherent and sometimes frightening". Mr Bond said: "The choice of a US President affects not just the people of America, but the rest of the world." -

The Financial Times

2nd November 2016
Agata Gostyńska-Jakubowska and Rem Korteweg [of the CER] said some Brexiters believe the US could twist arms in Brussels on behalf of their oldest European ally. "It is an article of faith among

some Brexit supporters that America will ride to Britain's rescue if relations with the EU get difficult," they say.

The Daily Mail

27th October 2016
A central problem for May's government is that Article 50 puts the country that is exiting the EU in a position of great weakness, says Charles Grant, director of the CER. EU countries can simply hunker down while the two-year clock ticks away, raising pressure on the leaver. May, therefore, would be wise to avoid an approach that alienates the EU, Grant believes.

The Economist

1st October 2016
Christian Odendahl, chief

economist at the CER says that including such a controversial provision [ISDS] in TTIP was probably a mistake; legal systems in America and Europe are developed enough for investors not to need the extra legal certainty.

Bloomberg

20th September 2016
As John Springford, director of research at the CER think-tank in London argued in a recent report: "Free movement is the only way that most such services – in construction, retail and so forth – can be traded. Poland will be unwilling to allow UK services companies to take market share while its citizens are denied equivalent opportunities in the UK."