The UK and the European Area of Justice, Freedom and Security

Conference held on 24th January 2012

Summary

In this event on the UK's approach to the European Union Area of Justice, Freedom and Security, Brendan Donnelly, Director of the Federal Trust, provided a contextual introduction, noting that since the Maastricht Treaty of 1992, while foreign affairs had remained largely intergovernmental, there had been a shift towards 'communitarisation' of internal security policy, with the UK negotiating a series of opt-ins and opt-outs in this area. Dr Andrew Blick, Senior Researcher at the Federal Trust, argued that the UK approach to this issue was suggestive of a country that was and sees itself as not being a full member of the EU. Jakub Boratyński, Head of Unit, Fight against Organised Crime, DG Home Affairs, European Commission, provided a practitioner perspective. He stressed that EU activity was about more than just legislative measures and the establishment of institutions; it also involved the fostering of co-operation across the EU and various practical measures. The UK was a welcome participant in this process. Professor Steve Peers of the School of Law, Essex University discussed issues in the field that were primarily legal in nature, with broader political relevance as well. He considered in particular the possibility of a block UK opt-out from the jurisdiction of the European Court in policing and criminal law in 2014. He argued that this decision would be a more complex one for the British government than it might on the surface appear.

Context setting

With his opening remarks, Brendan Donnelly, Director of the Federal Trust, set out the historic context for the issues discussed in the day's event. The European Area of Justice, Freedom and Security was previously known as Justice and Home Affairs (JHA) and originated with the Maastricht Treaty in 1992. In the Maastricht Treaty, JHA and external affairs were conceived of as intergovernmental matters, with minimum involvement from the European Parliament and the European Court of Justice (ECJ). At the time, some thought that JHA and foreign affairs would rapidly become subject to normal Community procedures, with the possibility that states would be forced to accept decisions with which they did not agree and which they could not veto. Others said it would never be possible to 'communitarise' JHA and foreign affairs. The UK government shared this latter hope.

In the event, twenty years after the Maastricht Treaty, classical foreign policy within the European Union remains largely intergovernmental in character. Mr Donnelly said he regretted this fact, and that it had more to do with 'governmental sovereignty than national sovereignty.' But while foreign policy was easier to exempt from 'communitarisation' because it was more externally directed, there was a clearer intersection between internal security and other European Union business. There had since the Maastricht Treaty been a 'one way street of communitarisation of internal security policy' which had not been matched on the foreign policy side. As this trend developed, the British government had negotiated a series of procedures to opt into and opt out of particular measures.

The Coalition and Justice and Home Affairs

Dr Andrew Blick spoke about his pamphlet, *Neither in Nor Out: the Coalition and the European Union Area of Justice, Freedom and Security*, recently published by the Federal Trust and made available at this event.

Dr Blick argued that the special position of the UK with regard to Freedom Security and Justice was suggestive of a country which is and sees itself as something less than a full member of the European Union. Furthermore, the EU clearly could not function if all – or even a significant minority – of its members shared this approach. How far this approach serves the national interest of the UK was debatable.

As only a limited participant in the EU, Dr Blick argued, the ability of the UK to wield influence over EU business was often dependent upon other member states wishing to accommodate UK sensitivities, in the hope of inducing it to participate more fully at a later stage. It was not guaranteed that this kind of goodwill towards the UK would persist indefinitely.

Dr Blick pointed out that in depicting its approach to Justice and Home Affairs, the Coalition tended to stress the looseness of the links between the UK and the EU even more than previous UK governments. The idea of a possible congruence between national and European interests was rarely mentioned in the Coalition's rhetoric. But, importantly, and regardless of its claimed position, the Coalition was in practice opting into more measures than its official stance might suggest was likely, and than was anticipated – perhaps even by some government ministers – at the outset of the present administration. In this sense the Coalition was in a rhetorical trap it had created for itself. It had come to regard in office as objectively desirable for the UK the legislative

measures it had previously stigmatised.

A different rhetorical approach, Dr Blick argued, was available to the Coalition. Rather than portraying its decisions as grounded solely in the 'national interest' and resistance to 'loss of sovereignty', the Coalition could propose that gains could be made both for the EU as a whole and the member states comprising it, through the pooling of sovereignty. It was 'not necessarily a zero sum game'.

Dr Blick remarked however that it might well be that, in the prevailing eurosceptic environment, such lines of argument were not considered politically viable. When the UK participated in a new measure of European internal security, it was frequently considered necessary to justify such action as not amounting to an unacceptable transgression of certain principles, rather than simply explaining its positive value. In fairness, it should be remembered that this tendency to some extent predated the present Coalition government.

Against this background the British government would have to decide whether to accept the extended jurisdiction of the European Court of Justice (ECJ) in mid-2014. This issue, Dr Blick argued, would be controversial within the Conservative Party, with opponents of the EU resistant to the extension of the scope of the ECJ, while members of the government might be reluctant to avoid the complications attendant upon opting out. There was also likely to be Coalition tension between the Liberal Democrats – in principle less hostile towards the ECJ – and the Conservatives; and to some extent between Conservative ministers. Dr Blick noted that the decision fell to be taken a year before the scheduled date of the next General Election, a proximity likely to have some bearing upon the political calculations surrounding it.

Dr Blick felt it unlikely that the objective merits of the case would be decisive over the European Court issue. Political considerations were likely to predominate. This circumstance was problematic from the perspective of the British national interest, since the decision was of substantial importance to the UK. If the UK opted out of third pillar measures covered by the new jurisdiction the outcome would be more than an inconvenience. It would entail a spectrum of legal uncertainty relating to European law produced over a period of 16 years from 1993. If, faced with this prospect, the government did in 2014 decide it preferred in principle to accept the full authority of the Court, Dr Blick cautioned that the Coalition might find that its traditional rhetoric deprived it of a positive narrative about Justice and Home Affairs – and the EU in general – that would help support its case. If the Prime Minister allowed party political

calculations to take precedence, the Liberal Democrats might regard the issue and timing apt for withdrawal from the Coalition.

Fighting Organised Crime: 'A View from the European Commission'

Jakub Boratyński of the European Commission provided his perspective on the UK and JHA. While outsiders questioned the UK's 'distant, reluctant' relationship with JHA, Mr Boratyński argued that, paradoxically, the UK was much more interested and 'insightful' on this area of Union policy than other member states who sometimes have unsophisticated approaches to these issues. The UK was 'quite activist' when it came to certain JHA policies.

Mr Boratyński stressed it was important to realise that whatever the Commission did in this area was complementary to the actions of others, adding value, but not delivering core public goods, which was a task for member states. First, it could design a framework for cross-border co-operation. The tools it used were legislation, the work of the agencies, policy guidance and standard setting. Second, the Commission was trying to bring people together from across the Union, making sure that those who deal with, for instance, cybercrime could co-operate. This task was a large part of the activity of the Commission, and it did not involve standard setting or legislation. 'We have all sorts of networks, made up of expert groups'. Third, the Commission could provide funding to think-tank-type activities, support groups and joint investigations.

Mr Boratyński went on to state that 'We are not prosecuting criminals, we are not pursuing operational activities, we are not involved in investigations'. The Commission worked with Europol and Eurojust, who were closer to operations, though not doing the investigations themselves. Europol carried out background intelligence work, but had no powers of arrest. Mr. Boratyński cited one recent example of the work carried out, which was a joint investigation between UK and Romanian police supported by Europol, dealing with traffickers of Roma children in the UK.

He then spoke about organised crime. It was 'not a speciality of some EU member states'; rather it was a 'trans-national phenomenon'. It was closely related to corruption, and problems with 'basic governance standards'. The connections between organised crime, politics and business were a particular concern to policy-makers. The issue was dealt with at the EU level because organised crime was 'transnational, global'. But it also had very localised effects on citizens. It was a 'huge' business. Mr Boratyński said that the 'logic of organised crime today' follows the principle of 'low risk and high profit'.

A number of policy areas were then highlighted by Mr Boratyński:

First was the trafficking of human beings. The first post-Lisbon Treaty instrument of criminal law was in this area, making it 'An historic text'. The Directive extended its reach beyond the traditional elements of criminal law, which defines crime and punishment. It involved EU-level agreement on assistance and protection for victims, as well as measures for prevention. The UK opt-in to this measure came relatively late 'but we were happy to have it.' UK government negotiators were extremely active in shaping the legislative text. Every member state predictably tried to influence measures in such a way as to keep national legislation intact. The UK was very concerned to protect its traditional legal system. 'The mantra that we always hear is that the UK is in favour of practical measures rather than legislation.' Adding value through legislation was of course just one of the tools available in Brussels.

The second area Mr Boratyński chose to discuss was cybercrime. He noted that Article 83 of the Lisbon Treaty provided the Union with the possibility of developing crimes labelled 'euro-crimes', of which computer crime was one. A possible directive on cybercrimes was being drafted. There was also an instrument, into which the UK had opted, on combating the sexual exploitation of children, including through child pornography. The UK domestic experience was useful in influencing what was proposed at EU level, Mr Boratyński observed. There was a 'huge debate' in the UK Parliament, touching particularly on issues of internet freedom. The end result was an arrangement that allowed member states to have a system similar to that which existed in the UK. Also in the policy agenda of combating cybercrime was the establishment of the European Cybercrime centre; 'a flagship initiative of the Commission'.

Mr Boratyński's third subject was the confiscation of criminal assets. It was now widely admitted that the traditional criminal law approach of 'catching the bad guy and putting him in jail' was difficult to make effective when dealing with organised crime. A new proposal was in an advanced stage that would modernise rules of criminal asset confiscation across the Union. The UK, Mr Boratyński noted, had been a promoter of innovative methods of 'non-conviction confiscation'.

The last policy area discussed by Mr Boratyński was corruption. There was a strong feeling in the EU that it was necessary to meet governance and anti-corruption standards. Enlargement had raised corruption issues; but corruption was not confined

to new member states. There were 'no corruption-free zones in the EU'. The links between corruption, the lack of transparency, and the lack of oversight had contributed to the present financial and economic crisis. Public opinion polls across EU showed that corruption is viewed as a major problem in all countries, even in Scandinavian countries traditionally 'regarded as clean and exempt'. The main thrust of the Commission approach to corruption was not the introduction of new laws and institutions but to attempt to establish monitoring mechanisms within the EU to assess the effectiveness of anti-corruption measures taken by member states.

Mr Boratyński's final word was on the efforts to steer away from 'Presidency-driven policy making' within the Commission, which entailed one area of activity for half a year, and another set of policies for the next half of the year. A high-level agreement had been established on the 'EU policy cycle'. It involved bringing member states and European institutions together to agree on their full-year operational plans. The objectives did not cover everything, but focussed on eight specific areas. From a practitioner perspective, progress was being made on JHA, moving forward with the UK.

A view from the United Kingdom

Professor Steve Peers of the School of Law, Essex University, spoke about five issues which were both of a legal and also broad political relevance associated with UK policy towards JHA.

His first issue was that of criminal law-making since the Treaty of Lisbon. Prior to the Lisbon Treaty it had taken as long as two and a half years for a measure to be adopted after being proposed; the process had now accelerated. In the majority of cases it was now quite easy to agree on the legislation, though there were exceptions such as the European Investigation Order where it took longer. After agreement in the Council (which took about six months) it would then take another six to nine months with the European Parliament. But 'as a law-making machine' the Union was now 'operating more effectively in this area'. Professor Peers noted that once the UK had opted into the discussion of a JHA measure it could be outvoted and it could not block it. The UK had originally opted out of the anti-trafficking directive, perhaps partly because of what it feared that the European Parliament might insist on, in addition to what the Council might do. This was a case of the UK 'opting out with a positive attitude towards opting in at the end of the day'.

The ‘emergency brake’ device whereby members could stop discussion had not been used or even threatened, so far as Professor Peers was aware, though he argued its existence might have an impact on the members of the Council, encouraging them to respect the internal legal systems of member states.

The second issue discussed by Professor Peers was the case-load of the European Court of Justice. The European Court already had jurisdiction over criminal law, but the UK was in the group of countries that had opted out of this arrangement. It was not alone in opting out, but it was the largest country to do so. Yet the British courts, Professor Peers noted, had followed rulings of the Court where they were relevant to British cases. National courts had in the past sent about four to six criminal cases per year to the Court. Whether the Court would get more cases after the end of the transitional period was harder to predict. The Commission would bring more cases over compliance. Professor Peers drew a comparison with asylum, which saw in 2009 a rise in the number of cases referred when the jurisdiction of the Court was expanded.

The third issue for Professor Peers was the possible ‘block opt out’ in June 2014, which had already been mentioned by Dr Blick. Although this was technically a matter of whether to accept the jurisdiction of the European Court of Justice, it was actually about whether to opt out of legislation in the area of policing and criminal law. The potential block opt-out did not apply to immigration, asylum and civil law. It only applied to measures adopted before the Lisbon Treaty; it could not be used to opt out of later measures. Nor, Professor Peers remarked, did it apply to measures that had been amended since Lisbon.

Professor Peers considered how many measures had been amended to date; and how many were likely to be amended before the extension of the jurisdiction of the Court. He concluded that about half of the pre-Lisbon measures were likely to have been replaced. The UK would however potentially be opting out of some significant measures. It was not, Professor Peers remarked, ‘as simple as a yes or no decision’. A ‘half-way house’ was possible. The UK could opt back in to some measures; and could announce these opt-back-ins at the same time as the generalised opt-out. Moreover, leaving individual EU measures did not mean there would be no supranational cooperation, for instance through Council of Europe agreements.

The fourth theme addressed by Professor Peers was the possibility of legal disputes regarding UK opt-outs under JHA. He observed a shift in approach by the UK government. Under Labour there were (unsuccessful) legal challenges to ‘forced

exclusion' from measures. Now there were challenges beginning to 'forced *inclusion*' in measures, for instance on the extension of social security rules to third party states. The present government was also trying to interpret its opt-out powers more widely, which was likely to lead to a legal case at some point.

Fifth, Professor Peers discussed the issue of the UK opting out of measures by which it was already bound. If the UK opted out of an amendment to a measure by which it was already bound, in theory the Council could expel the UK from the measure, and charge the UK for costs arising. But there was a high threshold of extreme inconvenience to other member states. The Council had never considered applying this exclusion to the UK or Ireland. But Professor Peers pointed out that the Council had specified that the UK remained bound by the prior legislation, meaning that the old rules still applied to the UK. It was 'an odd situation…where we simply have two versions of the legislation in force.' Because of this rule the UK was still participating in the first phase of legislation on a common European asylum system while the other member states were moving to a second phase. Might the UK government challenge its being bound by the first phase? Professor Peers speculated that government legal advisers might have counselled that it was not worth trying such a challenge. He did not think the British government would necessarily heed such advice. As so often in the sphere of what used to be called "Justice and Home Affairs" political and legal issues were extremely difficult to disentangle from each other.