

The UK in Justice and Home Affairs: the engaged outsider

Issue 2016/6 · April 2016

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What is the state of EU policy?

Justice and Home Affairs (JHA) has been a fast-growing field of the European integration process. JHA is an umbrella term for a range of distinct policies ranging from migration, asylum, border control to civil justice and the fight against terrorism. The importance of cooperating in Europe on these issues has rarely been higher than at the present day. A series of terrorist attacks, most recently in Paris and Brussels, and an unprecedented rise in the number of migrants and refugees seeking to enter the territory of the EU have moved JHA issues high up on the agenda of policymakers throughout Europe.

Given the sovereignty-sensitive nature of most JHA issues, EU member states have long been reluctant to transfer competences to the EU level. The cooperation has developed since the mid-1970s in a range of intergovernmental groups. The Maastricht Treaty first added an intergovernmental 'Justice and Home Affairs' pillar to the EU's treaty architecture, yet preserved the strict unanimity requirement and kept the supranational EU institutions at arm's length. This changed with the Treaty of Amsterdam (1999) that incorporated the Schengen border-free project into the EU's legal framework and transferred the policy fields of asylum, immigration, external border controls and civil law matters to the Community first pillar under Title IV. The Treaty of Lisbon ended this institutional development by introducing the Community method in the remaining third pillar areas (judicial cooperation in criminal matters and police cooperation). These treaty changes have significantly altered the modes of decision-making in JHA and enhanced the opportunities for parliamentary oversight and judicial scrutiny at EU level.

The EU is not striving to replace, say, a national police-corps with a European one. The Lisbon Treaty emphasised that the different legal systems of EU member states shall not be merged at EU level: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States' (Art. 67, Par. 1 TFEU). A key difference is how legalised certain policies are at EU level. The EU does not have the same legal

By bundling the manifold policy expertise of the researchers of the Institute for European Studies (IES), this paper forms part of a series of analyses investigating the potential implications of a 'Brexit' scenario for different EU policies. All papers ask the same three questions: 1) What is the state of the EU policy in focus? 2) What is the UK's role/interest in this policy field? 3) What are the potential implications of a 'Brexit' scenario at the policy-level?

After Claire Dupont and Florian Trauner [introduce the project](#), Richard Lewis sets the [historical and cultural context](#) and explains how the UK and the EU have come to such a low-point in their relations. Next, five policy fields are analysed: justice and home affairs; [free movement policies](#); [EU external representation](#); [the \(digital\) single market](#); and [environmental policy](#).

competences for all JHA policies. For issues such as asylum or visa, the EU has embarked on developing 'common policies', for instance a 'Common European Asylum System' that harmonises the rules of member states on how to receive an asylum seeker and process her or his application.

In other areas, the EU has less legalised approaches and acts primarily on the basis of operational cooperation and the exchange of best practices. A case in point has been the integration of migrants into European societies. For a long time, member states resisted EU interference in their immigrant integration policies. Consequently, an explicit legal basis for developing or coordinating immigrant integration policy on the EU level has long been absent (van Puymbroeck, Adam &

Goeman 2010: 210). This changed when the Treaty of Amsterdam (1999) opened up the possibility for legal action to fight racial discrimination (Art. 13, TFEU). A decade later, EU institutions were granted the possibility to develop measures to support member states in their efforts towards immigrant integration, excluding, however, harmonisation of legislation on this issue (Art. 79.4, TFEU).

The challenges that the EU is currently facing in the JHA field are considerable. They include a need for closing security gaps exploited by jihadist fighters. A difficult issue has also been the fair distribution of asylum seekers within Europe. In 2015 and early 2016, the overwhelming majority of new migrants and refugees went to only a few countries such as Germany, Sweden and Greece. The EU's proposed solutions to deal with this situation, including a mandatory relocation scheme for asylum seekers in Europe, have remained contested, notably in Central and Eastern Europe.

What is the UK's role/interest in Justice and Home Affairs?

At first glance, the UK seems to have little interest in the EU's cooperation on JHA. When the Amsterdam Treaty integrated the Schengen acquis into the framework of the EU, the UK – together with Ireland and Denmark – obtained an opt-out and refrained from participating in the Schengen passport-free project. A special provision, however, allows these states to participate in certain Schengen provisions. In the Lisbon Treaty, the UK government, together with Ireland, extended the opt-out arrangements to measures relating to police cooperation and criminal justice, the newly communitarised policy fields. A new provision gives the two states the possibility to withdraw an 'opt-in' decision to a measure based on the Schengen acquis within three months. In practice, the UK has voted in most civil law measures, anti-discrimination directives, many measures on curbing irregular migrants, and several early-phase EU asylum laws. It has only accepted a few measures on visas, border controls and legal migration (Peers 2011: 75).

Has the UK therefore surrendered influence in the EU in order to protect its national autonomy in a highly politically sensitive field? In investigating this question, Adler-Nissen (2009: 63) comes to the conclusion that this has not been the case. In many instances, the UK has actively influenced decision-making processes and EU policy outcomes in the JHA field, even when it would not be bound by the EU policies. The UK's efforts have been facilitated by an informal norm of consensus-seeking in the Justice and Home Affairs Council. EU ministers of interior are usually keen to 'bring everyone on board' (Adler-Nissen 2009: 67, referring to Lewis 2005), irrespective of the formal voting rules and procedures.

Different UK governments have considered that the EU level can provide added value for fighting organised crime and terrorism. For instance, the UK has actively sought to 'europeanise' its national model of intelligence-led policing. By pushing Europol to base its Organised Crime Threat Assessments (OCTA) on the British model, the UK was able to shape Europol's work and to influence the Council's strategic priorities in the area of fighting organised crime (Carrapico & Trauner 2013). This may be interpreted as a notable achievement as intelligence-led policing 'was, and probably still is, slightly counter-cultural' for many EU member states (Peter Storr, quoted in House of Lords 2008: Q10). In criminal justice and civil law, the UK has been pushing hard for more mutual recognition arrangements although the country remained sceptical regarding harmonisation (Adler-Nissen 2009: 69).

Migration is another field in which the UK has often sought to influence EU policies and/or to provide domestic ideas with more legitimacy through EU engagement. In 2003, for instance, the UK tabled a proposal on 'extraterritorial processing' of asylum claims (Blair 2003). According to the UK idea, the processing of asylum claims could take place in both 'regions of origin' and in 'transit processing centres' in nearby third countries. The EU would fund such facilities. Successful applicants would then be resettled in the UK or another EU country, while rejected cases would be returned to their countries of origin (The Observer 2003). The UK proposal became an item of different EU summits but it finally did not receive the support of enough member states. However, it continues to be discussed up to the present day, notably in the context of the current refugee crisis (Leonard & Kaunert 2016). Furthermore, in responding to the UK proposal, the Commission developed new policies seeking to enhance protection capacities in regions with strong refugee populations such as regional protection areas (Trauner 2014).

A similar uploading of the British 'national model' to the EU took place in the field of immigrant integration (Geddes & Guiraudon 2004). For a long time the UK's integration policy was referred to as a 'race relations' model, based around its anti-discrimination legislation. This 'British model' was highly influential for the 2000 EU Anti-Discrimination Directive. This allowed Britain to play the European game with minimal need to adapt domestically. Yet, in the meantime, Britain's frontrunner role in anti-discrimination policies has waned, as well as its investment in special measures for migrants and refugees. There have been 55% budget cuts to the Equality and Human Rights Commission (EHRC) and the termination of mandatory equality impact assessments (Huddleston et al. 2015). Over time, funds available for integration activities have reduced 'to the point where now only European Union funds are available' (Phillimore 2012: 531). Evidently, if the UK were to leave the EU, there would be no more EU funds

available through the European Asylum Migration and Integration Fund (Saggar & Somerville 2012:17).

Certainly, at times, the UK's opt-out arrangement has prevented them from achieving what they sought to achieve. A prominent case has been the UK government's effort to fully participate in setting-up and running the EU's border management agency Frontex. The UK's 'opt-in' was not allowed by the other member states based on the argument that the country was not a full Schengen member – a decision that even a British appeal before the European Court of Justice could not change (Kaunert et al. 2014: 356).

What are the potential implications of a 'Brexit' scenario?

'We secured the absolute right to opt in to any of the asylum and immigration provisions that we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds. We are not obliged to have any of the European rules here but where we decide in a particular area... it allows us to opt in and take part in these measures' (Tony Blair quoted in Geddes 2005: 81, emphasis added).

The opt-out/opt-in arrangements for the JHA field have provided the UK with flexibility. In a sense, the JHA field may be seen as an ideal-type arrangement for the UK government in terms of how to set-up its relation with the EU at large – participating in joint initiatives, if deemed useful; if not, staying out. According to Adler-Nissen (2009: 68-69), 'legal scholars have wondered just how the UK managed to gain such a favourable protocol'.

The dynamics of cooperation, however, have already changed. The year 2014 was a crucial one in terms of EU-UK relations in the JHA field. According to the Lisbon Treaty, the UK was by then obliged to accept the authority of the Court of Justice of the EU over 130 existing agreements in the area of police and judicial cooperation in criminal matters (as do the other participating member states) – or to make use of a 'block opt-out' of all of these measures. UK Prime Minister David Cameron decided to exercise this right of a comprehensive opt-out. Policy-related considerations seemed to have been only of secondary importance for the decision – under pressure from Eurosceptic members of the ruling conservative party, the clause provided the UK government with an opportunity to underline that it was keen to repatriate powers and sovereignty back from Brussels (Brady 2013). The UK government, however, wished to join 35 measures after the block opt-out. These measures included the European arrest warrant, participation in Europol and Eurojust and the Schengen Information System (Council of the EU 2014). In December 2014, the other member states and the European Commission accepted these British demands. Yet, the UK's

cherry-picking in combination with the then announced plan to hold a UK referendum on EU membership – 'have pushed some other Member States' patience to the breaking point' (Peers 2014).

It is not certain that the UK will be able to rely on a similar goodwill of the

UK opt-ins under Article 10(5) of Protocol 36 to the EU Treaties in December 2014 ¹	
Schengen	6 opt-ins, including: <ul style="list-style-type: none"> • Police cooperation • Schengen Information System • Border control
Non-Schengen	29 opt-ins, including: <ul style="list-style-type: none"> • Europol • Eurojust • European arrest warrant • Exchange of information between law enforcement authorities • European Image Archiving System (FADO) • The fight against organised crime

other member states if it decides to renegotiate a new relation with the EU after a possible no-vote in the referendum on EU membership. As Hugo Brady underlines, the political context has already quite changed for the UK, with British officials finding it already harder to influence new JHA legislation. 'The 2014 opt-out is likely to be remembered as an act of diplomatic self-harm by the UK. Britain's fellow member states are united in disbelief that a large and important member state would choose to leave a policy field where it has long been an important player' (Brady 2013: 3).

Overall, it is therefore likely that the UK will not find possibilities to cherry-pick its JHA cooperation outside the EU framework in a similarly beneficial way it has been able to do so from within the EU.

Footnotes

1. For the full list see <http://data.consilium.europa.eu/doc/document/ST-15398-2014-INIT/en/pdf>

References

Adler-Nissen, R., 2009. Behind the scenes of differentiated integration: circumventing national opt-outs in Justice and Home Affairs. *Journal of European Public Policy* Vol. 16, pp. 62-80.

Blair, T., 2003. Letter to His Excellency Mr Costas Simitis: New International Approaches to Asylum Processing and Protection.

- Brady, H., 2013. Britain's 2014 justice opt-out. Why it bodes ill for Cameron's EU strategy. London, Centre for European Reform.
- Carrapico, H. & Trauner, F., 2013. Europol and its impact on EU policy-making on organised crime. *Perspectives on European Politics and Society* Vol. 14, pp. 357-71.
- Council of the EU, 2014. UK's block opt-out and partial re-opt-in to the ex-third pillar acquis. Press Release (15687/14).
- Geddes, A., 2005. Getting the best of both worlds? Britain, the EU and migration policy. *International Affairs* Vol. 81, pp. 723-40.
- Geddes, A. & Guiraudon, V., 2004. Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm. *West European Politics*, 27:2, pp 334-353.
- House of Lords, 2008: Europol: Coordinating the Fight against Serious and Organised Crime. London: Twenty-Ninth Report, Session 2007-08.
- Kaunert, C., Leonard, S., Carrapico, H. & Roze, S., 2014. The governance of justice and internal security in Scotland: between the Scottish independence referendum and British decisions on the EU. *European Security* Vol. 23, pp. 344-63.
- Katwala, S. & Ballinger, S., 2016. How (not) to talk about Europe. *British Future*.
- Leonard, S. & Kaunert, C., 2016. The extra-territorial processing of asylum claims. fmreview.org/destination-europe. Oxford: Oxford Refugee Studies Centre.
- Peers, S., 2011. *EU Justice and Home Affairs Law*. Third Edition. Oxford: Oxford University Press.
- Peers, S., 2014. The UK opt-out from Justice and Home Affairs law: the other Member States finally lose patience. London: Statewatch.
- Phillimore, J., 2012. Implementing integration in the UK: lessons for integration theory, policy and practice. *Policy & Politics* vol 40 no 4., pp 525-45.
- Saggar, S. & W. Somerville, 2012. *Building a British Model of Integration in an Era of Immigration: Policy Lessons for Government*. Washington, DC: Migration Policy Institute.
- The Observer, 2003. Secret Balkan camp built to hold UK asylum seekers. 15 June 2003.
- Trauner, F., 2014. Migration policy: an ambiguous EU role in specifying and spreading international refugee protection norms. In Falkner, G. & Müller, P., eds. *EU Policies in a Global Perspective: Shaping or Taking international regimes?* London: Routledge, pp. 149-66.
- Van Puymbroeck, N., Adam, I., & Goeman, H., 2010. The Europeanisation of the 'Belgian' integration policy: soft European instruments and their impact. In Dierckx, D., Herck, N.V. & Vranken, J., eds. *Poverty in Belgium*. Acco, pp 211-232.

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Policy briefs are published by the
Institute for European Studies

Jean Monnet Centre of Excellence
at the Vrije Universiteit Brussel

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