Lecture to United Kingdom Association for European Law

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'The tangled tale of Britain's block opt-out from the EU's Justice and Home Affairs (JHA) legislation (Protocol 36 of the Lisbon Treaty)'

by Lord Hannay of Chiswick

When your distinguished president, Sir Alan Dashwood, first approached me last February with the suggestion that I give this annual lecture I had some misgivings. For one thing I am not a lawyer myself (though my father was one), and am therefore liable to commit any number of egregious solecisms; and then the tale Alan wanted me to tell, that of the denouement of Britain's negotiations over the block opt-out from the European Union's pre-Lisbon Justice and Home Affairs legislation provided for in Protocol 36 of the Lisbon Treaty, is an exceptionally tangled one judged even by the far from straightforward precedents of previous such European negotiations; and, thirdly, how could I be sure that matters would be settled by the time I gave this lecture? Well, there was nothing I could do about the first shortcoming; setting the date of this lecture for 1 December, the deadline for the entry into force of the block opt-out and for Britain re-joining the measures the government and parliament judges it to be in the national interest to be bound by and which will now be subject to the jurisdiction of the European Court of Justice (ECJ) and to the oversight of the Commission, enabled us to escape from the third trap, albeit by the skin of our teeth; and for the complexity of what follows I can only crave your indulgence.

Without going too far back into the mists of time, it is important to say a few words about the origins and provisions of Protocol 36.

The main thing to be said is that it is what our Victorian ancestors would have called an "infernal machine". In order to avoid accepting there and then that the transitional period for introducing ECJ jurisdiction and Commission oversight of pre-Lisbon JHA legislation would end on 1 December 2014, Britain was offered a diabolically black or white choice. Opt-out of all 130 pre-Lisbon measures or into all of them; then there were complex provisions for re-joining individual measures if Britain so wanted. This choice was both technically and politically certain to be a fraught one, and, in my view, the then government (Tony Blair's Labour government) should never have agreed to it being posed in that way. Why did they do so? Not because there was pressure from the Home Secretary. Charles Clarke, who occupied that post during the relevant period, has stated categorically that he did not consider the block opt-out to be either necessary or desirable. From enquiries I have made, it is rather clear that the block opt-out was inserted in order to help differentiate the Lisbon Treaty from its ill-fated predecessor, the Constitutional Treaty, on which the Prime Minister had offered to hold a referendum. So political expediency carried the day; and a successor government was left to carry the can.

Scroll fast forward to 2012 when Protocol 36 first came onto the radar screen of the coalition government and of parliament. It all started quietly enough with detailed commitments by the government to both houses of parliament that, before taking any decisions on Protocol 36, they would consult all the relevant committees. Already, however, there were some distant rolls of thunder - 100 backbench Conservative MPs wrote publicly demanding that the government opt-out of all pre-Lisbon JHA legislation; and then the Fresh Start group of Conservative backbenchers endorsed that request and requested also that the government re-patriate all the post-Lisbon measures to which the coalition government itself had opted in (90 so far and rising) and which were thus already subject to ECJ jurisdiction and Commission oversight. Then complete silence until, out of the blue, in Rio de Janeiro of all places, the Prime Minister announced that Britain would have exercised the block opt-out by the end of the year (2012) - the proximity of the Conservative party conference may

conceivably have had something to do with the timing of the announcement. In the hullabaloo that followed, it transpired that the Prime Minister had not even consulted his own coalition partners about the announcement, let alone the two houses of parliament, the dissolved administrations, two of them (Scotland and Northern Ireland) with their own, independent legal systems, or any other interested party. A few weeks later the Home Secretary had to row back slightly on the original announcement and a consultative process of a sort limped onto the course.

For the next eight months two parallel processes, one public and transparent, the other behind the closed doors of the Cabinet Office, went ahead. The open process consisted of a joint enquiry by two of the sub-committees, those for Justice and for Home Affairs, of the House of Lords EU Select Committee. We heard a wide range of witnesses, from the dissolved administrations, from all branches of the legal profession, from academic legal experts, from the police (ACPO), from prosecutors (the CPS) and from a range of NGOs, as well as from the directors of Europol and Eurojust, from the Commission and from the relevant committees of the European Parliament. Amongst that plethora of testimony only one MP (Dominic Raab), one independent lawyer (Martin Howe QC) and one NGO, Fair Trials International, which had serious concerns about the European Arrest Warrant, spoke in favour of the opt-out. Not one, including those who favoured the block opt-out, could identify a single piece of pre-Lisbon legislation which had operated to the detriment of the UK. And the government confirmed that it had no objection of principle to the extension of ECJ jurisdiction and Commission oversight as it was accepting both in the context of the post-Lisbon legislation. Many witnesses emphasised the leading role which the UK had played in shaping the EU's JHA legislation and wanted this to continue. And many drew attention to the specific benefits to Britain's own security which had flowed from European legislation such as the arrest warrant - in that context we heard a good deal about the Irish dimension, where the introduction of a European framework had depoliticised what had previously been fraught and defective processes of cooperation. We heard too about

measures such as the European Supervision Order (often called Euro-bail) which Britain had failed so far to implement and which would have mitigated some of the negative consequences of the arrest warrant. At the end of our enquiry - in April 2013 - we concluded that the government had not made a convincing case for triggering the block opt-out in the first place.

About the parallel process which went on within government I can obviously speak with less authority and certainty. But there were plenty of leaks to the press. There was a long and bitter struggle between the two wings of the coalition over the number of pre-Lisbon measures which the UK should seek to re-join and over which specific ones should be on the list. The Conservative wing of the government began with a list in single figures. The Liberal Democrat wing insisted above all on the need to re-join the European Arrest Warrant. In the end a list of 35 measures was agreed, including the arrest warrant, on which certain changes to our domestic legislation to address problems such as proportionality were to be made. This hard fought compromise was presented to both houses of parliament to endorse at less than a weeks' notice in the summer of 2013 - in the Lords the necessary documentation and the government's response to the EU Select Committee's own report only arrived on the day of the debate and vote itself, hardly an advertisement for sound parliamentary practice.

At this stage the government made what I can only characterize as a major tactical error, for which they have paid dearly in recent days. At a series of meetings between Ministers and the relevant Lords Committee chairs - Lord Boswell, Lord Bowness, Baroness Corston and myself - the government was urged to ensure that a single vote should be taken on both the block opt-out and the list of measure to re-join. This was perfectly reasonable since the rationale for the block opt-out could only be fully appreciated in the light of what the government was planning to re-join. But, when the matter came to the Commons - where relevant Committees had hitherto conducted no enquiries at all - there was much protest, the government panicked, and no authority was eventually sought nor given for the 35 measures

we were to seek to re-join. In the Lords we held our ground and the vote taken both approved the block opt-out and the list of measures to be re-joined. The subsequent negotiations in Brussels were then delayed for a further 3 months while the Commons Committees reported; and we in the Lords re-opened our enquiry and reported, adding a few measures to the list of 35 which we believed the government should consider re-joining.

The Brussels negotiations were predictably prolonged and complex. For most of the measures only the agreement of the Commission was required; but for Schengen-based measures the additional complication of Council approval was also necessary. My impression is that the government negotiated with tenacity and flexibility. A number of the additional measures, which the Lords had identified, were added to the list of 35, while one or two others dropped out of it, leaving the total, miraculously, at 35. Agreement with the Commission was reached in June of this year; and, with the Council, on the measures needing its approval, just last month. The processes of parliamentary approval went a good deal less smoothly, at least in the Commons; but they too are now complete and we can hope that, from today onwards a measure of clarity and calm may once more prevail.

What conclusions can we draw from this tangled tale? And here I must emphasise that what follows represents my own personal views and those of no one else and of no institution - since I am no longer a member of the House of Lords' EU Select Committee nor Chair of its Home Affairs sub-Committee.

First let us look at the substance of what has occurred today as the provisions of Protocol 36 come into effect. It is all too easy and all too fruitless to get bogged down in the interstices of process, whether parliamentary or European, and to ignore the practical effect of what lies behind all the political posturing. There seems to be little dispute about the fact that the 35 pre-Lisbon measures Britain has re-joined represent the hard core of the EU's JHA legislation. That seems to be the view of most commentators, of the Commission and of the other member states. That too seems to be the view of the Eurosceptics, which explains

virulence of their opposition. A substantial number of the measures we will not be re-joining were either no longer relevant or of no practical significance, or they were mutual recognition measures where our domestic legislation will ensure that we remain within the parameters of European laws even if we are no longer bound by them. There are some losses to regret. I think it is absurd, and damaging to Britain's worldwide reputation as an upholder of human rights that we should be withdrawing from a measure proscribing xenophobia and racism. I cannot see any convincing reason that we are not continuing to work within the framework of the European Probation Order legislation which even the Lord Chancellor considers it may be in our interest to re-join in the future. So less has been lost than might have been. That was what at first tempted me to entitle this lecture "much ado about not very much".

As to the government's contention that it is in our national interest to re-join the package of 35 measures, I have no hesitation in endorsing that wholeheartedly. You have only to look at the steadily rising use our law enforcement agencies are making of these instruments and agencies to appreciate the crucial role they are playing in the fight against serious organised crime. Europol, Eurojust, the Schengen Information system, the European Criminal Record Information Service all fall into that category. And so does the more contentious European Arrest Warrant which is enabling us to bring back expeditiously from elsewhere in Europe people charged with serious crimes committed here and to remove equally expeditiously large numbers of foreign criminals indicted elsewhere. There have been problems over the arrest warrant, over proportionality and over people being held in detention for long periods before being brought to trial, but these are now being addressed either by changes in our domestic law or by new European legislation such as the European Supervision Order. The evidence given to the House of Lords enquiry showed that these instruments and agencies are essential to our own internal security and provide good value for money. Put succinctly the UK’s internal security neither begins nor ends at the water’s edge. The contention that those EU measures could easily be replaced by bilateral arrangements of equivalent or

superior value to us simply did not hold water, even if our partners were willing to devote the time, effort and resources to such negotiations, which is highly unlikely.

So then let us look at the politics of all this. A fair amount of the sound and fury emanating from those who want Britain to withdraw from the JHA legislation comes from people who want Britain to leave the EU altogether, people who would vote no in any in/out referendum which may be held. That is a legitimate point of view, which they have every right to express. But it is hardly a very useful policy prescription for a Britain which remains in the EU. More worrying perhaps is the degree to which almost any discussion of European policy in this country now becomes polarised, and polarised along what are ideological and not practical, pragmatic lines. We used to pride ourselves on being practical and pragmatic, on supporting what solution works best, at being ready to strike reasonable compromises, such as the present block opt-out/re-joining package represents. But that seems no longer to be the case. Now some prefer ideological purity and self-harm to any compromise. This is surely a trend which needs to be reversed when we come to debate the wider issues of Britain's continued membership of the EU if we are not, as some suggest, to sleep-walk towards the exit.

And then, lastly, a glance at the future for Justice and Home Affairs in the EU. Last June the leaders of all 28 member states agreed, in the strategic guidelines that they set, that the period ahead should be one of consolidation and implementation. That was very much in line with the views of the government and seems to me to make excellent sense. There is in fact a slew of unfinished business which it is very much in Britain's interest to see completed. This includes the ever more urgent need to adopt the Commission's proposed Passenger Name Recognition directive currently being held up by the European Parliament and to extend it to intra-EU flights; this is a necessary tool to help us deal with the risks from jihadis returning from the conflicts in Syria and Iraq. There is also the Proceeds of Crime Directive designed to remedy the so far pitifully low percentage of recovery of such assets. And there is the highly sensitive issue of Data Protection, where striking a balance between individual

rights to privacy on the one hand and on the other the legitimate security needs of our governments in a world living through a continuous revolution in communication technology is going to be as difficult as it is necessary. On all these issues, as well as in shaping the reformed statutes of Europol and Eurojust, Britain now has a chance to give a lead and to put behind it two years in which we have necessarily had to concentrate on that tangled tale of the block opt-out which I have attempted to relate.