



Tightening the EU referendum lock

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Open Europe
7 Tufton Street
London
SW1P 3QN

Tel: 0207 197 2333
Fax: 0207 197 2307
www.openeurope.org.uk

Research by Stephen Booth

Introduction

The Government has said it wants to give people a referendum on new transfers of power from Westminster to Brussels and give Parliament more power over these decisions. It is a bid to restore citizens' faith in Government and Parliament, so badly lost when the EU's Lisbon Treaty was imposed upon them without the referendum promised.

The Government's European Union Bill and the so-called 'referendum lock', if passed with important amendments, could indeed greatly enhance British democratic control, both via referendums and through Parliament, over the UK's future relationship with the EU.

However, there are a number of areas where the Bill as it currently stands falls short on the Government's own terms. It is therefore vital that it is amended to give the public the strongest possible reassurance that no further transfer of power to the EU can take place without robust democratic checks.

Part 1 – Unpicking the lock: Where are the loopholes?

<i>Decision</i>	<i>Loophole in the Bill</i>
<p>1. Signing up to new EU justice, crime and immigration laws.</p> <p>These laws can hand over significant powers to the EU and once the UK has 'opted in' to one it cannot opt out again. Under the Lisbon Treaty, justice, crime and policing laws fall under the ultimate jurisdiction of EU judges in all cases, a further transfer of power from the UK to the EU courts.</p> <p>Future laws may include giving the EU's judicial body, Eurojust, the power to launch "criminal investigations" in the UK.</p>	<p>The Government can take these decisions without the agreement of Parliament or citizens.</p> <p>The UK's 'opt in' means the Government can choose which laws it takes part in.</p> <p>However, there are no controls on the laws the Government can opt in to, which allows it to transfer powers over civil and criminal justice, policing, immigration and asylum to the EU.</p> <p>Parliament should have the power to approve these decisions and in significant cases there should be a referendum to decide whether the UK takes part.</p>
<p>2. The UK's 'once and for all' right to opt out of <i>existing</i> EU crime and policing laws, including the European Arrest Warrant.</p> <p>This is a binary question of more or less Europe that would fundamentally alter the landscape of the British criminal justice system.</p>	<p>The Government can take this 'once and for all' decision over the majority of existing EU police and crime laws without consulting Parliament or citizens.</p> <p>Citizens, or at the very least Parliament, should have a say over this hugely important decision.</p>

<p>Before June 2014 the Government must decide whether EU police and criminal justice laws agreed <i>before</i> the Lisbon Treaty entered force, including the European Arrest Warrant, continue to apply in the UK. If it opts to continue cooperation in these areas, the ultimate jurisdiction over these laws in all cases will be transferred to European judges in Luxembourg for the first time. The UK will also not be able to opt out of these laws again in the future.</p> <p>The decision applies to the vast majority of EU crime and policing laws currently in force in the UK.</p> <p>The European Arrest Warrant, for example, means that UK courts and ministers cannot block the extradition of UK citizens to other EU member states.</p>	<p>Future governments could opt back in to these laws on a case-by-case basis. However, once opted back in, these laws would fall under the full jurisdiction of the ECJ and the UK would not be able to opt out again (see section 1 above).</p>
<p>3. The use of the EU’s so-called ‘flexibility clause’.</p> <p>This clause allows the EU to adopt new measures to attain the EU’s “objectives” if they are not already provided for in the EU treaties.</p> <p>In the past it has been used to set up a balance of payments fund to provide financial aid for non-eurozone member states.</p>	<p>The Bill allows the Government to bypass Parliament if the EU wanted to “renew” or “extend” measures set up under this ‘flexibility clause’.</p> <p>The Bill requires Parliamentary approval to agree to establish a <i>new</i> measure under the ‘flexibility clause’ but the Government could subsequently bypass Parliament to renew a temporary measure or extend an <i>existing</i> measure to another country.</p> <p>Parliament must be given the power to approve any decision to extend the scope of measures put in place under the ‘flexibility clause’ because they can have a direct impact on the UK.</p>
<p>4. Giving up the UK’s veto over the decision to abolish vetoes applying to non-military EU foreign policy decisions.</p>	<p>The Bill’s referendum requirement would not cover an amending treaty that abolished the UK veto over use of the ‘ratchet clause’ in the existing EU treaties that allows the removal of vetoes over binding, non-military EU foreign policy decisions.</p> <p>Any treaty removing this veto should be subject to a referendum.</p>
<p>5. Parliamentary approval of a Minister’s decision not to hold a</p>	<p>There is no protected time for Parliament to consider Ministerial</p>

<p>referendum.</p>	<p>decisions on holding a referendum.</p> <p>The Bill requires Ministers' to take decisions on holding referendums, which must be approved by Parliament, but this could be rendered meaningless by a Government pushing a referendum decision through Parliament before it had time to consider the EU treaty change in question.</p>
<p>6. The Bill's 'significance condition' is open to misunderstanding and confusion.</p> <p>The Bill's 'significance condition', designed to give Ministers the discretion to avoid referendums over trivial treaty changes, has been open to widespread misunderstanding. It would only allow Ministers discretion over a very narrow area of EU treaty change, not over all decisions to referendums – the vast majority of which are automatic under the Bill.</p>	<p>The EU has been able to greatly extend its powers under the existing treaties, so it is not clear why Ministers would need the ability to declare a change to the treaties “not significant”, even in a narrow number of cases.</p>

1. No control over signing up to EU justice and home affairs laws

Justice and home affairs is the field where the EU gained the most competence under the Lisbon Treaty. Unlike in other EU policy areas, where the UK can be outvoted and forced to accept new EU rules, the UK's so-called 'opt-in' allows the Government to decide which laws apply to Britain. Under Lisbon, every civil and criminal justice, policing or immigration law agreed to gives power to the European Court of Justice (ECJ) and once the Government has opted in to a new or existing law this decision is practically irreversible. But under the current Bill, the Government will have sole responsibility for these decisions – Parliament will have no control over the opt in¹.

This Government has already opted in to the European Investigation Order, which will allow European police forces to insist that British police put citizens in the UK under surveillance and grant access to their DNA. There was no Parliamentary vote or control over this decision.

Looking forward, in 2011, the Commission is committed to “Establishing a mechanism to review the Member States' national asylum systems”² with a view to furthering its long-standing desire to set up a system of 'burden sharing' for asylum

¹ For a more detailed discussion of the EU Bill and justice and home affairs see *Open Europe*, 'The Government's EU referendum lock: Plugging the justice and home affairs leak', December 2010; <http://www.openeurope.org.uk/research/referendumlockjha.pdf>

² *European Commission*, 'Delivering an area of freedom, security and justice for Europe's citizens: Action plan implementing the Stockholm Programme', 20 April 2010, Annex 1, p56; http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf

applications, also described as a 'Common European Asylum System'. Asylum and immigration are sensitive issues that should be under the full democratic control of Parliament but, under the current Bill, MPs would not have a say over whether the UK took part in EU laws in these areas.

Another practical example that would not be covered by the Bill is any expansion of the EU's judicial body, Eurojust. The UK is currently an active member of Eurojust – its President, Aled Williams, is British – and the Lisbon Treaty allows its powers to be extended to include, "The initiation of criminal investigations"³. The European Commission is due to present proposals in 2012 to give Eurojust these new powers⁴.

Speaking in November 2009, after the Lisbon Treaty was ratified, David Cameron said that,

*We will want to prevent EU judges gaining steadily greater control over our criminal justice system by negotiating an arrangement which would protect it. That will mean limiting the European Court of Justice's jurisdiction over criminal law to its pre-Lisbon level, and ensuring that only British authorities can initiate criminal investigations in Britain.*⁵

A decision to opt in to a law giving Eurojust these powers of investigation would clearly be a significant and irreversible transfer of power over the British criminal justice system, something recognised by David Cameron himself. Such a decision should require approval in a referendum. The Bill would not even require a vote in Parliament for the Government to opt in to these new powers.

Decisions over the UK's veto on family law, efforts to extend the EU's powers over criminal procedural law and adding new types of crime over which the EU can legislate should also require a referendum.

Less significant decisions over EU justice and home affairs do not warrant a referendum. However, as every opt in to a law transfers power from the UK courts to the EU courts over that law, and legislative power in that area from Parliament to the EU, the Government should not be able to sign up to these laws without Parliamentary approval.

This would not mean that the UK will never sign up to an EU justice and home affairs law ever again – only that such decisions would be preceded by proper and transparent debates in Parliament and the media.

2. No control over the UK's 'once and for all' right to opt out of existing EU crime and policing laws

The Government must decide by 2014 whether a whole raft of EU police and justice laws agreed *before* the Lisbon Treaty took force in 2009, including the European Arrest Warrant, will continue to apply in the UK beyond 2014. Under this arrangement⁶, if the Government opts out of any one of the existing laws, it has to

³ Article 85 TFEU

⁴ *European Commission*, 'Delivering an area of freedom, security and justice for Europe's citizens: Action plan implementing the Stockholm Programme', 20 April 2010, Annex 1, p18; http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf

⁵ David Cameron, Speech on Conservative Party policy on the European Union, 4 November 2009; full text available here: <http://news.bbc.co.uk/1/hi/8343145.stm>

⁶ See Article 10 of 'Protocol No.36 on Transitional Provisions' annexed to the EU treaties

opt out of the entire lot⁷. If it decides to continue unchanged, ultimate and full jurisdiction over these laws will for the first time be transferred from the UK courts to the European Court of Justice in Luxembourg.

Besides the European Arrest Warrant, this 2014 choice would apply to the majority of EU police and criminal justice laws applying to the UK, including the ‘mutual recognition’ of sentencing by other EU countries’ legal authorities⁸, laws governing the exchange of criminal records⁹ and DNA, and EU anti-terror laws such as the sharing of sensitive personal information with security services in the United States¹⁰.

This is inescapably a binary question of more or less Europe that would fundamentally alter the British criminal justice system. But currently, this is a decision entirely for Ministers. The significance of this choice – and the lack of democratic control over it – has so far been largely missed by the media and even by parliamentarians.

The Bill needs to be amended so as to allow this decision to be settled by a referendum, or, at the very least, by Parliament.

If the UK were to opt out of crime and policing laws en bloc under the 2014 opt out, future governments could choose to opt back in to individual laws on a case-by-case basis. By doing so the law in question would come under the full jurisdiction of the ECJ and the UK would not be able to opt out again. These decisions should be subject to an Act of Parliament, in the same manner as decisions falling under section 1 above.

3. Not enough control over use of the EU’s ‘flexibility clause’

The EU treaties’ ‘flexibility clause’¹¹ allows the EU to adopt new measures to attain its “objectives” if the EU treaties do not already provide the necessary powers. In the past it has been used to establish a balance of payments facility for non-eurozone countries, in order to provide them with financial aid¹².

The Bill requires Parliamentary approval in order to establish *new* measures, such as a balance of payments facility, but allows the Government to bypass Parliament when agreeing to “extend” or “renew” *existing* measures.

For example, if the EU decided to establish a new ‘temporary financial aid fund’ for a group of member states, this would require Parliamentary approval. But if this fund

⁷ Other EU governments would decide, by qualified majority voting and without a UK vote, the transitional arrangements for the UK’s exit. The EU could also adopt a decision, again by qualified majority voting, determining that the UK “bear the direct financial consequences, if any” of seceding from these laws. The UK would have a vote in this latter decision.

⁸ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

⁹ Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

¹⁰ Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement)

¹¹ Article 352 TFEU

¹² Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States’ balances of payments; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R0332:EN:NOT>

was subsequently extended to more member states or its lifetime extended, the Government would not need to get this decision approved by Parliament, despite the fact that it would undoubtedly put extra burdens on the UK (in this case financial).

Parliament must be given the power to approve any decision to extend the scope of measures put in place under the 'flexibility clause'.

4. The UK's foreign policy veto is not fully covered

The Bill's referendum requirement, as it stands, would not fully protect the UK's veto over decisions made under the EU's Common Foreign and Security Policy. The relevant treaty article, Article 31(3) TEU, which can be used to abolish the veto in any CFSP decision taken by the Council except for those with "military or defence implications", is covered by parts of the Bill but not others. An amending EU treaty that abolished the veto that applies to the use of Article 31(3) TEU would not be covered by the Bill and therefore the 'referendum lock' does not bite on the UK's foreign policy veto.

The Lisbon Treaty established the European External Action Service under EU Foreign Minister Catherine Ashton and, in order to retain democratic control over the EU's desire to create a single EU foreign policy, it is vital that the UK's vetoes remain intact.

Any treaty removing this veto should be subject to a referendum for the Bill to be consistent.

5. No protected time for Parliament to consider whether a referendum should be held

The Bill does not provide for a protected timeframe for Parliament to consider whether an EU treaty change fulfils the referendum conditions contained within the Bill. There must be enough time to allow parliamentarians to consider whether they agree with a Government decision before it could rush an Act approving any treaty change through Parliament.

6. Is there a need for the Bill's 'significance condition'?

The Bill's 'significance condition', designed to give Ministers the discretion to avoid referendums over trivial treaty changes, has been open to widespread misunderstanding. It would only allow Ministers discretion over a very narrow area of EU treaty change, not over all decisions to referendums – the vast majority of which are automatic under the Bill.

But nevertheless, the EU has great powers to extend its powers under the existing treaties, so it is not clear why Ministers would need the ability to declare a change to the treaties "not significant", even in a narrow number of cases.

An example often cited by Europe Minister David Lidington is the establishment of an EU institution to oversee the EU's emissions trading scheme for carbon permits:

"Let us imagine a situation in which a limited and precise treaty amendment were proposed to establish a new system for the allocation of carbon credits,

under a European emissions trading scheme, perhaps with some new institution to carry out that work and set the rules. It would not seem to be sensible to have a national referendum just on that topic. Rather that is something I believe most people would accept ought to be left to be determined by Parliament.”¹³

But environmental policy is already an EU competence under the EU treaties and previous evidence shows that the Commission would not find it difficult to establish such a body under the existing treaty.

The ‘significance condition’ introduces unnecessary confusion to the Bill and the purpose of its inclusion is not entirely justified.

¹³ Speech to the UK Association for European Law on 25 November;
<http://uknato.fco.gov.uk/en/news/?view=Speech&id=249892682>

Part 2 – Tightening the lock: Proposed amendments

These proposals are based on amendments to the Bill that have already been tabled¹⁴. In some cases we have suggested new amendments or alterations to the existing amendments, either to strengthen them or adjust them in light of our other changes.

(A) Top priority:

1. *These two amendments are the key to tightening democratic control of the UK's EU justice and home affairs opt in, requiring the Government to seek Parliamentary approval to opt in to negotiations on a new JHA proposal and an Act to opt in to a JHA measure that has already been adopted by the other Member States.*

- **Amendment 27** – Would require Parliamentary approval, in the form of a resolution of each House, before a UK opt in to any EU proposal for a justice and home affairs measure and allows for a later amendment (34) requiring referendums for certain Eurojust decisions¹⁵.
- **Amendment 31** – Would require the Government to obtain an approving Act of Parliament in order to opt in to any EU JHA measure that had already been adopted without the UK, apart from the following that would require a referendum under other amendments (34 and 35): a measure extending the power of Eurojust to initiate criminal investigations; scrapping the family law veto under Article 81(3) TFEU; a measure adopted under Article 82(2)(d) TFEU adding new areas of criminal procedure in which the EU can legislate by 'co-decision'; a measure under Article 83(1) TFEU adding new types of crime regarding which the EU can legislate, by co-decision, to define criminal offences and attendant penalties.

2. *These amendments cover the UK's 2014 right to opt out of JHA crime and policing measures agreed before the Lisbon Treaty came into force. This opt out captures EU laws, such as the European Arrest Warrant, which would no longer apply to the UK beyond 2014 if the opt out was exercised. The opt out is en bloc so would apply to the vast majority of crime and policing laws agreed prior to the Lisbon Treaty.*

Waiving the opt out would mean that all EU crime and policing measures agreed before the Lisbon Treaty would fall under the full jurisdiction of the European Court of Justice and the UK would be irreversibly bound by them. It is a once and for all chance to decide whether the vast majority of EU crime and policing measures apply to the UK.

- **Amendment 82** - Would mean that the Government would have to get the approval of a referendum before it waived the UK's 2014 right to opt out of JHA crime and policing measures agreed before the Lisbon Treaty came into force.

¹⁴ Tabled amendments can be found on the Houses of Parliament website; <http://services.parliament.uk/bills/2010-11/europeanunion/documents.html>

¹⁵ Amendment 14 would also require Parliamentary approval before any opt in but amendment 27 provides for amendment 34 proposed below, requiring a referendum on the extension of the powers of Eurojust to initiate criminal investigations.

- **Amendment 83** – Is an alternative to Amendment 82, which would require an Act, and not a referendum, before the Government could waive the 2014 opt out.

If the UK were to opt out of crime and policing laws en bloc under the 2014 opt out, future governments could choose to opt back in to individual laws on a case-by-case basis. By doing so the law in question would come under the full jurisdiction of the ECJ and the UK would not be able to opt out again.

- **Amendment 84** – Would require an Act of Parliament before the Government could opt back in to any of the laws that had ceased to apply following a 2014 bloc opt out decision.

3. *Enshrining or codifying existing ‘practice’ in the treaties creates new, entrenched legal obligations on the UK and Amendment 18 would close the loophole in the Bill which would not subject such treaty changes to a referendum.*

- **Amendment 18** – Would remove provision that allows no referendum to be held on ‘codification of practice’ relating to ‘the previous exercise of an existing [EU] competence’, even though the changes would otherwise fall under the Bill’s referendum criteria.

4. *Amendment 26 addresses the EU treaties’ so-called ‘flexibility clause’ (Article 352 TFEU) which for example has been used in the past to establish the EU’s balance of payments facility for non-eurozone states.*

- **Amendment 26** – Would close the Bill’s loophole that allows proposals made under the EU Treaty’s ‘flexibility clause’ to bypass Parliamentary approval altogether, simply because a minister has stated that they pursue one or more ‘exempt purposes’ listed in the Bill. Instead, some such proposals would require approval by an Act of Parliament, and others would need a supportive resolution of both Houses.

5. *The Bill as it stands contains an inconsistency on the UK’s veto over the EU’s Common Foreign and Security Policy.*

- **Amendment 19** – Would subject to a referendum any amending treaty that abolished the veto over the use of the Common Foreign and Security Policy ratchet clause (Article 31(3) TEU).

This ratchet clause itself allows the abolition of the veto in any CFSP decision taken by the Council, except decisions with “military or defence implications”. Schedule 1 to the Bill, which lists those vetoes protected by a referendum requirement, does not currently list the CFSP ratchet clause. The treaty article is covered by other parts of the Bill so why is it not included in Schedule 1?

(B) Medium priority:

1. *These amendments complete the package of amendments that would give Parliament and voters more powers over Government decisions to opt in to EU justice and home affairs laws (see A1 and A2 above), including referendums on removing the veto over family law, extending the powers of the EU's judicial agency, Eurojust, and extending EU competence over criminal law.*

They also cover the Schengen Acquis, which, setting aside the abolition of border controls that is subject to a referendum under the current Bill, is less wide-ranging than non-Schengen EU justice and home affairs law as a basis for passing new JHA measures.

The amendments also ensure Acts of Parliament are required before the Government can agree to a justice and home affairs proposal in the Council covered by unanimity, when the precise shape of the final law will better be known, after the UK has opted in to negotiations on the law.

- *(Included as a 'top priority' above) **Amendment 27** – Would require Parliamentary approval before a UK opt in to any EU proposal for a justice and home affairs measure and allows for later amendments requiring referendums for certain Eurojust decisions.*
- **Amendment 28** – Would require the Government to give an oral statement to the House if it chose to participate in a new area of the Schengen aquis.

Amendment 28 could be strengthened to require an Act.

- **Amendment 29** – Would require the Government to give an oral statement to the House if it chose to participate in a measure building on an aspect of the Schengen Acquis in which the UK already takes part.

Amendment 29 could be strengthened to require an Act.

- **Amendment 30** – Would require an approving Act of Parliament before the Government could agree to the final adoption of an EU measure, after it had opted in to a proposal for such a law, based on the following articles: Article 77(3) on passports, identity cards etc.; Article 81(3) on family law measures; Article 87(3) on operational cooperation between Member States' law enforcement authorities; Article 89 on operation of law enforcement authorities in another member state.
- *(Included as a 'top priority' above) **Amendment 31** – Would require the Government to obtain an approving Act of Parliament in order to opt in to any EU JHA measure that had already been adopted without the UK, apart from the following that would require a referendum: a measure extending the power of Eurojust to initiate criminal investigations; scrapping family law veto under Article 81(3); a measure adopted under Article 82(2)(d) adding new areas of criminal procedure in which the EU can legislate by 'co-decision'; a measure under Article 83(1) adding new types of crime regarding which the EU can legislate, by co-decision, to define criminal offences and attendant penalties.*

- **Amendment 34** – Would require a referendum if the Government wished to opt in to a proposal or adopted law giving Eurojust powers to initiate criminal investigations.
- **Amendment 35** – Would require a referendum if the Government wished to opt in to a JHA ‘ratchet’ decision, after the adoption of such a decision by other member states, under the following articles: family law Article 81(3); a measure adopted under Article 82(2)(d) on criminal procedure under QMV/co-decision; a measure adopted under Article 83(1) on definitions of serious crime under QMV/co-decision.
- **Amendment 36** – Would require a referendum before the Government could agree to remove the veto over family law using the ratchet clause in Article 81(3), having opted in to a proposal for such a ratchet decision.
- **Amendment 37** – Would require a referendum before the Government could agree to a ratchet decision to extend EU competence over procedural criminal law, after the UK had opted in to a proposal for such a decision.
- **Amendment 38** – Would require a referendum before the Government could agree to a ratchet decision to extend EU competence over substantive criminal law, after the UK had opted in to a proposal for such a decision.
- **Amendment 39** – Would require approval in a referendum for a ratchet decision expanding EU competence in criminal law before the Government could opt in to measures based on that new competence, even though the UK had not opted in to the ratchet decision itself.
- **Amendment 40** – Would subject an amending treaty, Article 48(6) decision or Article 48(7) decision abolishing the family law veto to a referendum.

2. *This would allow parliamentarians time to examine a new amending treaty or Article 48(6) decision before the Government could rush the approving Act through Parliament.*

- **Amendments 16 & 17** – Would preserve time for Parliament to consider decisions by the Government on whether treaty change requires a referendum.