

## Will giving up the UK's veto over Home Affairs threaten the UK's legal system?

### Key Points

- At the European Council on 15 June, EU leaders instructed the EU Commission to draw up proposals to transfer issues of criminal law and police co-operation from the third pillar of the EU treaties into the first pillar. This would abolish the national veto and would greatly increase the powers of both the EU Commission and European Court of Justice (ECJ) over a sensitive area of national policy. It would give the Commission sole right to propose laws in this area. So the Commission would actually gain *even more* powers over criminal law than it would have had under the EU Constitution (where the right of initiative was shared).
- Moving criminal law to the first pillar also means that if the EU legislates in a certain area it becomes a "Community competence" and member states lose the right to propose new laws in that field. It would also give the European Court of Justice powers to rule in this area for the first time.
- The UK Government has signalled that it will "consider" the idea<sup>1</sup> and that it "will not reject" the proposal.<sup>2</sup>
- The House of Lords has warned that if current EU proposals for criminal justice harmonisation are passed it could become impossible to stop the "creeping competence" of the Commission, and could mean "incremental unification of criminal procedure throughout the EU."
- The Government itself previously argued that an extension of majority voting over criminal procedural law "could change fundamental principles of our legal system, such as *habeas corpus*, which we are not prepared to accept."<sup>3</sup> But the Government is now "considering" an idea that would do just that.
- The move is made even more significant by an ECJ ruling on 13 September 2005 which gave the EU the power to set criminal penalties for the first time, for areas in the first pillar where it had competence. This allows the Commission to propose criminal laws which are then adopted by majority vote. However, the scope of this revolutionary ruling is at least currently restricted by the limited number of subjects which could be subject to criminal laws and are under the Commission's competence (first pillar).

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<sup>1</sup> Parliamentary written answer to Graham Brady MP, 6 June 2006

<sup>2</sup> *Telegraph*, 6 May 2006

<sup>3</sup> Peter Hain, European Convention, 31 May 2003

- However - the *combination* of this judicial power grab, plus the new proposal to import the remaining parts of the justice and home affairs pillar into the first pillar, would have explosive results. It would potentially widen the scope of the Commission's competence to almost anything involving police or the judicial system. **Crucially - this could also gradually override the UK's opt-in arrangement.**
- Currently, Police and Judicial Cooperation issues are subject to a veto, but not an opt-in. As part of giving up the veto, the Police and Judicial cooperation powers would be moved into the part of the treaties (Title IV) which is covered by the UK opt-in arrangements.
- However, this raises a number of questions: (A) What happens to legislation in progress which the UK has already opted into but is currently vetoing? For example the criminal procedures directive, which we discuss below. (B) If the EU starts legislating using first pillar powers, won't the Commission be able to claim that more and more areas properly fall within its competence, thus accelerating competence creep?

## Questions and Answers

*"In the justice and home affairs area, we have agreed better arrangements for co-operation on police matters, crime and drugs. However, such co-operation will remain intergovernmental and subject to unanimity. Thanks to amendments that we also secured, the European Court will have no authority to decide cases brought in United Kingdom courts on those issues."*

- Tony Blair, Hansard, 18 June 1997

*"Britain is preparing to give up the national veto on EU law-and-order legislation after Brussels demanded that national governments surrender control of key policies to combat terrorism and organised crime."*

- The Times, 9 May 2006

### What has been proposed?

The EU Commission is proposing to transfer everything which is in the current 'third pillar' of the EU treaties into the first pillar.

### What is the third pillar?

Under the EU's complicated treaty structure different areas of policy are decided by different procedures and are pigeon-holed under different pillars accordingly. The first or 'Community' pillar contains the EU's core policy areas such as the environment, single market and employment law. The second pillar covers foreign policy and defence. The third pillar is formally known as Title VI in the Treaty of Nice and it covers "Provisions on Police and Judicial Co-operation in Criminal Matters."<sup>4</sup>

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<sup>4</sup> This was formerly known as the Justice and Home Affairs pillar before the transfer of policy on asylum, migration and judicial co-operation in civil matters to the Community pillar

### How would this change the balance of power?

Transferring Justice and Home Affairs issues into the first pillar would mean that all proposals to harmonise criminal law across the EU and matters of police cooperation would:

- Be agreed on by Qualified Majority Voting (QMV) in the Council of Ministers
- Come under the jurisdiction of the European Court of Justice which has until now had only a very restricted say on third pillar matters
- Gradually confer more power over criminal matters to the EU. Once the EU gains competence in a certain area the member states lose the right to propose new laws in that field of law
- Give the EU Commission the sole right to initiate legislation in these matters. By gaining a monopoly over the right to propose laws on criminal justice and police cooperation the EU Commission would enjoy *greater power* than it would have received from the EU Constitution under which it would have had to share the right to propose new laws.

### Would the UK be able to block legislation it disagreed with?

No. Losing the veto would mean that the UK would no longer be able to stop legislation which it disagreed with and thought could harm its distinctive legal system.

However, the current proposals would see the third pillar moved into a specific part of the treaties - Title IV. The UK, Ireland and Denmark all currently have an opt-out from all new laws proposed under this title. This would give the UK the option of sitting out of negotiations when they begin. However if the UK decides to opt-in to new proposals it would not be able to opt back out of the discussions.

### Will the UK support abolishing the veto?

The UK Government has signalled that it is "considering" the idea and that it is open to it.

A clear sign that the move has the backing of EU ministers is that the conclusions from the upcoming summit (15-16 June) state: "The European council calls upon the incoming Finnish presidency, in close collaboration with the commission, to explore the possibilities of improving decision-making in the area of freedom, security and justice".

### Has the Government always been in favour of this?

*"In the area of Justice and Home Affairs we continue to have problems, in particular with the proposal for majority voting for criminal procedural law, Article 166. This could change fundamental principles of our legal system, such as habeas corpus, which we are not prepared to accept."*

- Peter Hain, 31 May 2003, European Convention

*"On judicial and criminal procedural law it is very difficult for us. We have accepted extensions of majority voting on everything else in the Third Pillar, but if you look at our judicial system and court system - and other countries are in the same position - it becomes impossible for us."*

- Peter Hain, 11 June 2003, European Convention

*"Criminal procedures go the heart of our legal systems, and this is one area where we have got to keep unanimity... European crime fighting should deal with cross-border matters where the crime is committed across borders or the perpetrator crosses a border to try to escape justice, or where there is evidence of criminal assets in other Member States. In other words, European Union action should not touch purely domestic cases."*

- Peter Hain, 3 April 2003, European Convention

### **What's the timetable?**

The summit conclusions call for a deal to be reached by the end of the year. If this is agreed the details will be hammered out at a home affairs meeting on 22 September under the Finnish Presidency and officially agreed at the European Council just before Christmas.

### **If the UK is going to sign up, are there any other snags?**

In order for the transfer of the pillars to take place member states would have to ratify the decision according to their national procedures. In the UK this would require an Act of Parliament - in some countries such as Ireland or Denmark it *might* even necessitate a referendum.

### **How does this fit with the ECJ ruling from last year?**

In a controversial case last September the European Court of Justice [ruled](#) that the setting of criminal penalties for the breach environmental laws was a first pillar matter for the European Community and not for member states. Its justification was that environmental matters were a community competence and thus the EU is able to set penalties if necessary to achieve its objectives in that sphere. At the moment the impact of the ruling is limited. The Commission has announced that it has plans to set criminal penalties in areas such as intellectual property but it is only able to do so in areas where it has competence.

The Government was dismayed at the ECJ's ruling at the time. An official was quoted in the *Times* saying, "We firmly believed it was inappropriate to harmonise criminal law at EU level. We believe criminal law is a matter for member states co-operating inter-governmentally."<sup>5</sup> But the Government has no right of appeal. If the whole of criminal law is now moved into the first pillar the consequences will be revolutionary. Criminal justice will become an EU competence, giving the Commission increasing powers to set criminal penalties and alter criminal procedure. As the EU legislates in this area, member states will lose competence to act.

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<sup>5</sup> 14 September 2005

EU criminal justice measures are currently restricted to areas which it claims are necessary to increase cross border judicial cooperation. However, the House of Lords has argued that it will be difficult to limit the EU Commission's "creeping competence".<sup>6</sup> Current proposals are not limited simply to cross border scenarios but are also intended to govern purely internal, national criminal cases.

### A case study - the harmonisation of procedural rights

An interesting case study to consider is a framework decision currently being discussed by EU home office ministers which is proposing to harmonise certain criminal procedures.<sup>7</sup> The proposal is currently being held up by a minority of member states, because of the wide ranging implications it could have for their legal systems.

If the current proposals were to go ahead police authorities would be required to hand a "Letter of Rights" to all suspects detained in police custody throughout the EU. The letter would state at the top that "European Union law requires all Member States of the Union to guarantee common minimum standards in respect of certain rights" which would be outlined on the first page. The second page would detail other rights which national member states would grant. Although these rights already exist throughout the EU they would now be granted by "European Union law", leaving other less important issues to the member states.

Academics have argued that the Commission has overreached itself and that there is no legal base for the proposal under the current treaties. Professor Kaiifa-Gbandi told the House of Lords that "under the existing legal frame there is no competence of the EU for setting standards for rights of persons in criminal proceedings. Such a competence is recognized for the first time in the Treaty for a Constitution for Europe." She also argued that because the Commission's justification used such a "wide interpretation" of the existing treaties it could easily be extended to "include all the rules of the procedural system in a Member State".<sup>8</sup> The House of Lords has warned, "there is the risk that this approach might lead, over time, to the incremental unification of criminal procedure throughout the Union."<sup>9</sup>

### Blocked for now...

Negotiations on this framework decision are currently stalled. As the proposal currently falls under the third pillar, every country has a veto over it allowing it to exert a considerable degree of control.

While the majority of member states are in favour of pressing ahead with the framework decision a few are blocking it. The UK, Czech Republic, Ireland, Malta, Cyprus and Slovakia have all called for the proposal to go ahead only as a Council Declaration. However, if QMV was being used this would be far short of a blocking minority.

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<sup>6</sup> EU Committee, 1<sup>st</sup> Report, Procedural Right in Criminal Proceedings, 7 February 2005

<sup>7</sup> Proposal for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union

<sup>8</sup> EU Committee, 1<sup>st</sup> Report, Procedural Right in Criminal Proceedings, 7 February 2005

<sup>9</sup> EU Committee, 1<sup>st</sup> Report, Procedural Right in Criminal Proceedings, 7 February 2005

The Government has underlined that it is “broadly supportive” of the directive.<sup>10</sup> It is therefore likely that it would have opted-in to the negotiations from the start. Given that the majority of EU member states disagree with the British position it is also likely that the UK would have ended up having to take part in a decision against its wishes which would have revolutionary implications for the UK’s distinctive criminal justice system.

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<sup>10</sup> EU Committee, 1<sup>st</sup> Report, Procedural Right in Criminal Proceedings, 7 February 2005