



The Government's EU referendum lock: Plugging the justice and home affairs leak

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Executive summary

- The Government's proposed 'referendum lock' is designed to halt any further major transfers of power from Westminster to the European Union against the wishes of British citizens. It also gives Parliament greater power over the Government on decisions over EU matters.
- However, as it currently stands, the Government's proposed Bill is a missed opportunity to improve democratic control over the day-to-day transfer of crime, policing and immigration powers from the UK to the EU. The proposed Bill neglects a huge range of areas where the EU can pass new laws.
- Justice and home affairs is the area in which the EU gains the most new powers under the Lisbon Treaty and the fastest growing item in the EU budget. Under Lisbon, the European Commission has greater powers to draw up new laws, the European Parliament has the power to amend them, and the European Court of Justice (ECJ) is responsible for enforcing them.
- New EU laws therefore represent a zero-sum equation: the UK Parliament and courts maintain control or it is handed to the Commission, MEPs and judges at the ECJ. The choice is clear: more or less power for Brussels.
- Currently, Parliament, as a whole, very rarely plays a role in scrutinising the Government's decisions to opt in to new EU proposals and has no power to stop the Government from doing so. However, through a series of simple amendments to the Government's proposed Bill outlined in this paper, the Government could be required to seek Parliamentary approval *before* signing up to EU justice and home affairs laws.
- This would, for the first time, give Parliament, and voters, a real democratic check on the extension of the EU's powers and undo some of the damage done to national democracy caused by the Lisbon Treaty.
- The current Bill requires a referendum on the creation of a European Public Prosecutor but not on the extension of Eurojust's powers, which could see it take on similar powers to investigate crimes in the UK, something that David Cameron said he was opposed to before becoming Prime Minister. Any proposal to grant Eurojust powers to investigate should therefore also require a referendum.
- While the current proposals would require a referendum in order to abolish the UK's remaining vetoes over most justice and home affairs issues, family law has not been included. Any decision to abolish the UK's veto over family law proposals should also require a referendum.
- The changes proposed here could be achieved unilaterally and would not require the renegotiation of treaties with other EU member states.

1. Justice and home affairs and the day-to-day transfer of powers

Justice and home affairs is the biggest growth area of the EU budget

The intention to bolster the EU's role in justice and home affairs was marked in 2010 by a 13 percent budget increase (higher than in any other area)¹, the allocation of two European Commissioners (one for Home Affairs and one for Justice, Fundamental Rights and Citizenship) where there was previously only one, and the agreement of a five-year plan of new measures, known as the "Stockholm Programme"², which covers policing, justice, asylum and borders³. The budget is likely to increase by a further 13 percent in 2011 to €1.1bn, which, as it was in 2010, would be the highest percentage increase among the headings of the EU budget⁴.

Under Lisbon, the European Commission has greater power to draw up new laws in this area, the European Parliament has the power to amend them, and the European Court of Justice (ECJ) is responsible for enforcing them. New laws therefore represent a zero-sum equation: the UK Parliament and courts maintain control or it is handed to the Commission, MEPs and judges in the ECJ.

Democratic accountability is vital

Given the EU's ambitions for this policy, the Government's decisions on the UK's involvement must be accountable to Parliament and voters. These are big decisions about transferring power of the UK's home affairs to the EU, which are almost irreversible in practice. The UK's 'opt in' gives the Government huge discretion in deciding which EU justice and home affairs proposals the UK takes part in. But with this discretion comes huge power, which should be tempered by Parliament and, ultimately, the electorate.

The UK's 'opt in' arrangement for EU justice and home affairs allows the Government to remain outside of new legislation if it wishes. Once a proposal is tabled the UK has three months to inform other member states in the Council of Ministers whether it has decided to opt in or out⁵. Opting in allows the Government to take part in negotiations but if the proposal ends up as something with which it does not agree it is unable to opt out again. If the UK does not opt in within these three months it may however opt in to the adopted final law at a later date but will have no formal input in the negotiations⁶.

Crucially, under the rules of the Lisbon Treaty, any justice and home affairs legislation agreed after the Treaty came into effect on 1 December 2009 automatically falls under the newly extended jurisdiction of the European Court of

¹ EU 2010 budget online: http://eur-lex.europa.eu/budget/data/D2010_VOL4/EN/nmc-titleN18280/index.html

² See *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; http://ec.europa.eu/justice_home/news/intro/doc/com_2010_171_en.pdf

³ See *Open Europe*, 'How the EU is watching you: the rise of Europe's surveillance state', 2009 for an overview of the policing and criminal justice aspects of the Stockholm Programme; <http://www.openeurope.org.uk/research/howtheeuiswatchingyou.pdf>

⁴ See Commission website, 'EU budget in detail – Next year'; http://ec.europa.eu/budget/budget_detail/next_year_en.htm

⁵ Lisbon Treaty Protocol 21 "On the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice", Article 3

⁶ Lisbon Treaty Protocol 21 "On the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice", Article 4

Justice. By agreeing to *any* new or amended legislation and ceding jurisdiction to the ECJ, the Government would therefore be taking a very liberal interpretation of its promise to “ensure that there is no further transfer of sovereignty or powers over the course of the next Parliament”⁷.

Table 1: The ECJ’s powers under Lisbon

	Measures agreed after Lisbon entered into force (December 2009 onwards)	Measures agreed before Lisbon came into force (pre-December 2009)
Asylum, immigration, borders and civil justice	<p>Agreeing to any new proposal or amending an existing proposal means that it falls under the ECJ’s full jurisdiction.</p> <p>UK has the option not to opt in to new proposals or amendments.</p>	<p>The ECJ automatically gains jurisdiction over laws applying to the UK that were agreed before the Lisbon Treaty.</p>
Policing and criminal justice	<p>Agreeing to any new proposal or amending an existing proposal means that it falls under the ECJ’s full jurisdiction.</p> <p>UK has the option not to opt in to new proposals or amendments.</p>	<p>The Government must decide by June 2014 whether the ECJ gains full jurisdiction over these laws or whether the UK opts out of them en bloc.</p> <p>If the UK opts in to an amendment to a law agreed prior to Lisbon, the ECJ will gain full jurisdiction over the whole measure and the UK will no longer be able to opt out in 2014.</p>

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.*⁸

The commitment to scaling back the ECJ’s power to “pre-Lisbon” levels has been dropped in the Coalition agreement with the Liberal Democrats. However, this is all the more reason to give Parliament or, in some cases, the British people the power to authorise Government decisions to opt in to new justice and home affairs proposals – something which automatically hands more power to the EU institutions at the expense of Parliament.

The major change is to EU **police and criminal justice** legislation. Under Lisbon, the Commission is for the first time able to refer member states to the ECJ when it believes they have failed to fully implement an EU police or criminal justice law. The ECJ also has the power to interpret points of EU police and criminal justice law referred to it by all national courts. All in all, the ECJ gains essentially the same power over this area as it enjoys over areas such as the single market.

⁷ HM Government, ‘The Coalition: our programme for government’, May 2010, p19; <http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf>

⁸ 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>

For **asylum, borders and immigration**, ECJ judges already had the power, prior to Lisbon, to rule on the meaning of EU laws following references from the member states' highest courts (e.g. the Supreme Court in the UK). Now, the ECJ can decide upon such references from any national court. The Commission was also already able to take member states to court if it felt EU laws in these areas were not being implemented properly. The ECJ's extended jurisdiction includes those laws adopted before the Lisbon Treaty came into force.

The Government has already signed up to more EU criminal justice powers

The new Government has already opted into negotiations on the European Investigation Order (EIO), which will allow European police forces to insist that British police put citizens in the UK under surveillance and grant access to their DNA. As critics have pointed out⁹, the proposed directive has several flaws, which include the absence of a dual criminality requirement, meaning one state could be required to investigate conduct it does not itself treat as criminal, and the absence of a proportionality requirement, meaning that a request cannot be rejected even if the offence is considered trivial and/or the request would involve a disproportionate use of police resources. The application of the EIO will fall under the jurisdiction of the ECJ, meaning European judges will have the final say over how the EIO is used in Britain.

⁹ *Fair Trials International*, 'Fair Trials International's response to a European member states' legislative initiative for a Directive on a European Investigation Order', 29 June 2010; <http://www.fairtrials.net/images/uploads/European-Investigation-Order.pdf>

2. The Government's proposed 'referendum lock'

The Coalition Government has pledged that there will be “no further transfer of sovereignty or powers” from the UK to the EU over the course of the next Parliament¹⁰. Based on this premise, the Government has said it will introduce a ‘referendum lock’, contained within a new European Union Bill, “allowing the British people to have their say on any future proposals to transfer powers from Britain to Brussels.”¹¹ The Government says that not only new EU treaties but most of the Lisbon Treaty’s so-called self-amending ‘ratchet clauses’, which abolish national vetoes, will also be subject to a referendum¹².

The Government’s current proposal also lists a number of areas where a ‘transfer of power’ would automatically require a referendum or Act of Parliament before the Government could agree to transfer powers to the EU¹³, such as joining the euro, for example, which would require a referendum.

While the referendum lock will be an effective new tool to prevent any new major transfers via treaty changes, there is still a day-to-day risk that significant justice and home affairs powers are ceded from the UK to the EU.

Some justice and home affairs measures are covered

Under the current proposals, the following EU justice and home affairs decisions would automatically require a referendum:

- A decision on whether to participate in a European Public Prosecutor (Article 86(1) TFEU)
- If the UK were to take part in a European Public Prosecutor, any decision to extend its powers (Article 86(4) TFEU)

This referendum requirement for the creation or expansion of a European Public Prosecutor is welcome.

A number of the Lisbon Treaty’s ratchet clauses referring to justice and home affairs policy are also partially covered. This would mean that any attempt to remove national vetoes over the following areas with a Treaty revision (via a new or amending treaty under the so-called “simplified revision procedure”) would require a referendum:

- Decisions over passports, identity cards, residence permits (Article 77(3) TFEU)
- Decisions on extending minimum EU rules of criminal procedure (Article 82(2)(d) TFEU)
- Extending the EU’s definition of serious cross-border crime (Article 83(1) TFEU)
- Decisions on “operational cooperation” of police forces (Article 87(3) TFEU)

¹⁰ *HM Government*, ‘The Coalition: our programme for government’, May 2010, p19; <http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf>

¹¹ *Foreign & Commonwealth Office*, ‘Written Ministerial Statement on European Bill’, 13 September 2010; <http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=22851533>

¹² William Hague’s speech to Conservative Party Conference, 6 October 2010; <http://www.egovmonitor.com/node/38849/print>

¹³ The Bill can be accessed here: <http://www.publications.parliament.uk/pa/cm201011/cmbills/106/11106.i-ii.html>

- Decisions on the operation of law enforcement authorities on the territory of another member state (Article 89 TFEU)
- Decisions on the UK's ability to carry out checks at its borders (under Article 4 of the Schengen Acquis which is incorporated in the Lisbon Treaty under Protocol No.19)

However, in some circumstances (by using wording in specific articles already within the Lisbon Treaty), the Government could abolish some vetoes or extend EU competences referred to above without consulting the electorate but simply Parliament. These articles include:

- Decisions on extending minimum EU rules of criminal procedure (Article 82(2)(d) TFEU)
- Extending the EU's definition of serious cross-border crime (Article 83(1) TFEU)
- The veto over family law (Article 81(3) TFEU)

This effectively means that the referendum lock will not bite on these three areas in practice.

The day-to-day justice and home affairs leak

The Bill leaves huge areas where the EU could pass new justice and home affairs laws that would be neglected by Parliamentary scrutiny. For example, the EU treaty article covering immigration policy or the treaty article used to pass the European Investigation Order¹⁴ would not be covered by the current Bill, allowing the Government to sign up to new EU laws in these areas without any adequate democratic safeguards. There would be *no* control, either from Parliament or a referendum, on Ministers opting into new laws agreed under the existing treaties.

Currently, Parliament, as a whole, very rarely plays a role in scrutinising the Government's decisions to opt in to new EU proposals¹⁵ and has no power to stop the Government from doing so. Fully incorporating justice and home affairs into the EU referendum lock could, for the first time, create a robust system requiring a democratic mandate, either from Parliament or directly from the British people, *before* the Government signs up to new EU powers. It could also be achieved unilaterally, without the need to renegotiate treaties with other EU member states.

¹⁴ The European Investigation Order was tabled under Article 82(1)(a) TFEU. See *House of Commons European Scrutiny Committee*, 'First report', 8 September 2010; <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428/428i24.htm>

¹⁵ The exception is when the European Scrutiny Committee recommends a particular proposal be debated in the House. However, there are no binding votes by Parliament on whether the Government should opt in to a proposal.

3. How to plug the leak

In order to strengthen democratic accountability over this hugely important policy area, Parliament's role could be strengthened through a series of amendments to the Government's proposed Bill. These are outlined in Annex 1.

The Government should require Parliamentary approval before opting in to any EU justice and home affairs law

The Government should not be allowed to opt in to any justice and home affairs proposal or law without, at the very least, the approval of or an Act of Parliament. This would give Parliament a potential veto over the Government signing up to new EU justice and home affairs laws with which a majority of MPs and Lords do not agree.

Debating and voting on proposals in Parliament would raise the profile of these decisions among the public and the media and make these decisions democratically accountable to Parliament.

This should also cover amendments to existing EU justice and home affairs laws agreed before the Lisbon Treaty came into force, such as the European Arrest Warrant, for example. Under Lisbon¹⁶, the UK has until 1 June 2014 to decide whether it wants to accept ECJ jurisdiction over the police and justice measures put in place before the Lisbon Treaty was adopted in December 2009 or opt out of them en bloc, which would mean they no longer apply to the UK after 2014¹⁷ (see Table 1, p4).

The choice is clear: more or less powers to Brussels – the status quo is not an option. Opting in to an amendment to the EAW means transferring power to the ECJ while staying out would mean that the Government can opt out of the EAW in 2014, along with all the other police and criminal justice measures agreed before the Lisbon Treaty was passed, meaning it would no longer apply to the UK. This would be the first time that the EU's powers were actually rolled back. But if the Government opts into an amendment to one of these pre-Lisbon laws before 2014, such as the EAW, the UK can no longer opt out of it and the law will immediately fall under the jurisdiction of the ECJ.

More justice and home affairs decisions should be subject to a referendum

Some decisions, in addition to those outlined above, should be subject to a referendum. For example, the Lisbon Treaty allows the remit of Eurojust, the EU's judicial body, to be extended to carry out investigations.

Presently, Eurojust can only recommend national authorities to take certain steps such as to initiate and/or coordinate investigations or to set up investigation teams but it has no authority to launch or carry out investigations itself. However under the Lisbon Treaty (Article 85 TFEU) Eurojust's powers may be increased to include:

¹⁶ See Article 10 of 'Protocol No.36 on Transitional Provisions' annexed to the EU treaties

¹⁷ Other EU governments would decide, by qualified majority voting, the transitional arrangements for the UK's exit and could also adopt a decision determining that the UK "bear the direct financial consequences" of seceding from these laws. The UK would not have a vote.

The initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union.

When negotiating the Lisbon Treaty, Peter Hain MP called for the article to be amended so that Eurojust would only be able to *propose* to member states that they initiate investigations. Hain argued that the article needed to “set boundaries on Eurojust’s tasks”¹⁸.

The Coalition’s commitment that the future establishment of a European Public Prosecutor would require a referendum is based on the premise that, in the words of David Cameron, “only British authorities can initiate criminal investigations in Britain”¹⁹. Therefore the same logic must apply to Eurojust. Although it would not have the power to prosecute, allowing it to initiate investigations would give it much of the same powers as a European Public Prosecutor to which the Government is opposed. A referendum should therefore be required before the Government could approve investigatory powers for Eurojust.

In addition, the Government’s current proposals cover all of the Lisbon Treaty’s ratchet clauses which would abolish national vetoes over justice and home affairs under a treaty revision, except for the veto over family law. This should also be covered by a referendum.

The Government should not be able to abolish any national vetoes over justice and home affairs without an Act of Parliament and referendum.

¹⁸ Amendment form submitted to the European Convention; <http://european-convention.eu.int/docs/treaty/pdf/850/Art%20III%20169%20Hain%20EN.pdf>

¹⁹ 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>

Annex 1: Proposed amendments to the Government's European Union Bill

The amendments to the Government's European Union Bill²⁰ proposed below would require Parliamentary approval or an Act of Parliament before the Government could enter into negotiations on new proposals or sign up to justice and home affairs laws.

The proposed amendments would also subject a decision to extend Eurojust's powers to launch investigations, as well as the Lisbon Treaty's ratchet clause on family law, to a referendum.

Amendment 1

Replace title of section 9 with:

Approval required in connection with Title V of Part 3 TFEU and certain Schengen measures

- *This would extend the Bill's clause on justice and home affairs measures to include the Schengen acquis, which governs much of law relating to borders and policing cooperation.*

Amendment 2

Replace section 9(2) with:

Subsection (1) applies in relation to a notification under Article 3 of Protocol (No.21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU (the "AFSJ Protocol") that the United Kingdom wishes to take part in the adoption and application of a measure presented to the Council pursuant to Title V of Part 3 of TFEU except a decision under Article 81(1)(a) TFEU to extend the powers of Eurojust to include the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities.

- *This would ensure that the Bill's clause on justice and home affairs applies to all opt in decisions on future negotiations on new justice and home affairs proposals.*

Amendment 3

Add new subsection (x) to section 9:

Subject to subsection (xx), a Minister of the Crown may not vote in favour of or otherwise support a decision under Article 4 of the Schengen Protocol that would cause the United Kingdom to participate in further provisions of the Schengen *acquis*, unless the draft decision has been approved by Act of Parliament.

Add new subsection (xx) to clause 9:

"(xx) Subsection (x) does not apply to a draft decision that falls under section 6(4)(k)."

²⁰ The Bill can be accessed here:

<http://www.publications.parliament.uk/pa/cm201011/cmbills/106/2011106.pdf>

Add new subsection (xxx) to clause 9:

“(xxx) In subsection (x), “the Schengen Protocol” has the same meaning as that given in section 6(5).”

- *This would require the Government to seek an Act of Parliament if it wanted to participate in a new area of the Schengen acquis.*

Amendment 4

Add new subsection (xxxx) to section 9:

“Despite any Parliamentary approval given for the purposes of subsection (x), a Minister of the Crown may not permit the United Kingdom’s participation in the final adoption of a measure building upon the Schengen *acquis* unless the United Kingdom’s participation in that measure has received Parliamentary approval in accordance with subsection (xxxxx).”

Add new subsection (xxxxx) to section 9:

“Parliamentary approval is given if –

- (a) in each House of Parliament a Minister of the Crown moves a motion that the House approves Her Majesty’s Government’s intention that the United Kingdom participate in the adoption of a specified measure, and
- (b) each House agrees to the motion without amendment.”

- *This would require the Government to seek Parliamentary approval to agree to further cooperation in areas of the Schengen acquis already applying to the UK.*

Amendment 5

Replace section 9(4) with:

Despite any Parliamentary approval given for the purposes of subsection (1), (x) or (xxxx), a Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless the draft decision has been approved by Act of Parliament –

- a) The provision of Article 77(3) of TFEU that permits the adoption of provisions concerning passports, identity cards, residence permits or any other such document.
- b) The provision of Article 81(3) of TFEU (family law) that permits a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.
- c) The provision of Article 82(2)(d) of TFEU (minimum rules on criminal procedure) that permits the identification of further specific aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate;
- d) The provision of Article 83(1) of TFEU that permits the identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate.

- e) Where the United Kingdom has become a participant in a European Public Prosecutor's Office, a decision under Article 86(4) of TFEU to extend the powers of that Office
 - f) The provision of Article 87(3) of TFEU (police co-operation) that permits operational cooperation between law enforcement authorities.
 - g) The provision of Article 89 of TFEU (cross-border operation by competent authorities) that permits cross-border operation by law enforcement authorities.
- *This would require an Act of Parliament before the Government could opt in to a final decided measure in any of these areas.*

Amendment 6

Replace section 9(5) with:

A Minister of the Crown may not give a notification under Article 4 of the AFSJ Protocol that the United Kingdom wishes to accept a measure unless the notification in respect of the measure has been approved by Act of Parliament except for a decision under Article 81(1)(a) TFEU to extend the powers of Eurojust to include the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities.

- *This would require the Government to seek an Act of Parliament to opt in to any EU justice and home affairs law already in force.*

Amendment 7

Add new subsection (xxxxxx):

“(xxxxxx) A Minister of the Crown may not give a notification under Article 10(5) of Protocol (No.36) on Transitional Provisions annexed to TEU and TFEU that the United Kingdom wishes to participate in an act that has ceased to apply to it pursuant to Article 10(4) of that Protocol, where the AFSJ Protocol would apply to the procedure for dealing with the notification, unless the notification in respect of the act has been approved by Act of Parliament.”

- *This would require the Government to seek an Act of Parliament to opt back in to any justice and home affairs measure that had ceased to apply to the UK following a decision to opt out under the transitional provisions of the Lisbon Treaty²¹.*

Amendment 8

Remove section 9(6).

Amendment 9

Add new subsection (y) to section 9:

²¹ Under the Lisbon Treaty, the UK has until 1 June 2014 to decide whether it wants to accept ECJ jurisdiction over the police and justice measures put in place before the Lisbon Treaty was adopted in December 2009 or opt out of them en bloc, which would mean they no longer apply to the UK after 2014.

A Minister of the Crown may not give a notification under Articles 3 or 4 of the AFSJ Protocol that the United Kingdom wishes to take part in the adoption and application of a measure, or accept a measure, to which this subsection applies unless –

- a) the notification is approved by Act of Parliament, and
- b) the referendum condition is met

Add new subsection (yy) to section 9:

The referendum condition is that set out in section 3(2), with references to a decision being read for the purposes of subsection (y) as references to a notification.

Add new subsection (yyy) to section 9:

Subsection (y) applies to a measure that includes, at the time of notification by a Minister of the Crown under Articles 3 or 4 of the AFSJ Protocol, the extension of the powers of Eurojust to include the initiation of criminal investigations under Article 81(1)(a) TFEU.

- *This would require a referendum before the Government could either opt in to negotiations on giving Eurojust the powers to initiate investigations or opt in to a final decision which had already given Eurojust these powers.*

Amendment 10

Add to Schedule 1 of the Bill:

Article 81(3) (family law)

Article 81(1)(a) (Eurojust initiating investigations)

- *This would require the Government to hold a referendum on any decision to remove national vetoes over family law and give Eurojust the power to initiate criminal investigations.*

Amendment 11

Add to section 6(4):

(x) a decision under Article 81(3) of TFEU (family law) that permits the application of the ordinary legislative procedure in place of a special legislative procedure;

(xx) a decision under the provision of Article 82(2)(d) of TFEU (minimum rules on criminal procedure) that permits the identification of further specific aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate;

(xxx) a decision under the provision of Article 83(1) of TFEU that permits the identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate;

- *This would require the Government to hold a referendum on any decision to remove national vetoes or extend EU competence in these areas.*

Annex 2: EU justice and home affairs proposals in the pipeline

The following are examples of the types of proposals in the pipeline that the Government will have to decide whether to take part in over the next five years²².

Pan-EU criminal and police record systems

In 2009, the EU agreed and the UK opted in to the European Criminal Records Information System (ECRIS), which, when up and running in April 2012, will see member states' criminal records interconnected. The Commission is due to publish a report in 2012 on the feasibility of establishing an EU Police Records Index System (EPRIS). The Commission has said that in 2014 it will look at the future development of ECRIS, potentially "extending it to exchange information" on supervision orders, for example.

'Burden sharing' on asylum

On the issue of asylum and immigration, the key developments over the next few years will be the Commission's long-standing attempts to establish a system of burden sharing for asylum applications, also described as a 'Common European Asylum System'.

In 2011, the Commission is committed to "Establishing a mechanism to review the Member States' national asylum systems and identify the issues related to capacities which will enable Member States to support each other in building capacity"²³. The Commission will also produce a report on "enhanced EU-solidarity" in asylum, which is designed to spread the burden of accepting asylum applications that currently falls disproportionately on some member states.

The creation of a burden sharing mechanism for the reception of asylum seekers would fundamentally alter the UK's control over its borders and in practice would be almost impossible to reverse.

Legislative proposal on mutual recognition of financial penalties, including those related to road traffic offences

The Commission is looking to introduce a system by which fines imposed on citizens would automatically be directly applicable across all member states, including those for road traffic offences such as speeding. It will introduce a proposal in 2011.

Creation of a cybercrime alert platform at European level

The Commission has said it wants to propose the creation of a cybercrime alert platform under the auspices of Europol between 2010 and 2012. It will also look at "Measures, including legislative proposals to establish rules on jurisdiction on cyberspace at European and International levels" in 2013.

European Terrorist Finance Tracking Program

²² See *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; http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf

²³ *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

The Commission will look into the establishment of a European Terrorist Finance Tracking Program in 2011.

Using EU citizens' travel data for law enforcement

The Commission is due to present proposals on a “common EU approach to the use of passenger name record data for law enforcement purposes” in 2010. So-called passenger name records (PNRs) include passengers' names, travel agent or airline contact, ticket number, itinerary of at least one segment of the journey and the name of the person making the booking. They can also include sensitive areas such as racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information concerning the health or sex life of the individual²⁴.

Key questions include whether this data would be available for purely counter-terrorism or expanded to fighting 'serious crime'. The EU already has a data sharing deal with the US for PNRs for air travel and is seeking the negotiation of further agreements with other “relevant third countries”. Some member states and the Commission are seeking to extend PNRs to travel by land and sea.

Tracing pre-paid mobile phones?

The Commission has said that it will publish a report on “enhancing the traceability of users of pre-paid communication services for law enforcement purposes” in 2012.

Legislative proposal on Legal Advice and Legal Aid (2011)

In 2011, the Commission will table proposals to create “minimum standards” on access to legal advice and legal aid across the EU²⁵. Although increasing the standards of legal aid and advice across the EU might be desirable, these measures should not be seen in isolation – they are part of the wider scheme to create a cross-border system of justice, which also includes far less benign measures such as the European Arrest Warrant.

²⁴ *European Commission*, 'The Passenger Name Record (PNR): FREQUENTLY ASKED QUESTIONS', MEMO/10/431, 21 September 2010: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/431&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁵ See *European Commission* website, 'Cross-border legal aid in the European Union - on the road to minimum standards'; http://ec.europa.eu/justice/doc_centre/civil/legal/doc_civil_legalaid_en.htm