

Open Europe Parliamentary Debate briefing # 1

Justice and Home Affairs

Summary of the New Powers

Justice and Home affairs is one of the areas in which the Lisbon Treaty will make the biggest difference. All the proposals and text from the original Constitution in this area would be implemented by Lisbon. The changes proposed are radical:

(1) Police and Judicial cooperation

- The European Court of Justice (ECJ) would be given full jurisdiction over this area for the first time. The UK Government previously strongly opposed this.
- In a memorandum to the Foreign Office the Lords EU Select Committee in July 2000 warned: "The Government does not accept that we should agree to extend full ECJ jurisdiction over the very sensitive areas covered by the Third Pillar. These raise sensitive issues relating to national sovereignty – law and order and the criminal justice process."
- The EU judges group Eurojust would gain the power to initiate investigations of UK citizens - despite the fact that the UK Government opposed this power during the negotiations.
- The role of Europol would be extended to include "organisation and implementation of investigative and operational action" - despite the fact that the UK opposed this power during the negotiations.
- Currently there are vetoes in all areas of police and judicial cooperation - these are all abolished.
- The EU would gain the power to define what counts as a criminal offence including a new power to set minimum and maximum prison sentences.
- The Charter of Fundamental Rights would give the European Court of Justice jurisdiction over various criminal justice and migration issues. The Charter contains a variety of new rights and formulations which expand beyond current rights. For example, it states that prison sentences must not be "disproportionate," and that people cannot be tried twice for the same offence.
- The Government has u-turned on the status of the Charter. After the initial agreement on the Lisbon Treaty Tony Blair said, "It is absolutely clear that we have an opt-out from both the Charter and judicial and home affairs." However, in direct contradiction of the former PM, Europe Minister Jim Murphy admitted last week: "It is clear that the UK does not have an opt-out on the Charter of Fundamental Rights". (Hansard 25 June 2007 and 21 January 2008)

- The EU would get new powers to harmonise civil and criminal laws and legal procedures. This would include ruling on the admissibility of evidence and the rights of criminal suspects in Court - in other words, the balance of the legal system between the rights of victims and the rights of the accused.
- The Lisbon Treaty provides for the creation of a European Public Prosecutor despite the fact that the UK has always opposed any such moves. Despite an 'emergency brake' the Prosecutor could be set up by 'enhanced cooperation' (i.e. a group of countries forging ahead) even if the UK objects, and UK citizens could then be prosecuted. This move which allows enhanced cooperation is new since the Constitution.

(2) Asylum and Immigration

"It is ridiculous that the EU, where free circulation of people exists, has 27 migration policies." - *Commission President Jose Barroso, 17 April 2007*

- Under the current treaties, the European Court has almost no power in this area. During negotiations on the EU Constitution, the UK Government twice unsuccessfully attempted to re-insert limits on the role of the Court in assessing asylum cases. It failed.
- As well as expanding the jurisdiction of the Court, the Treaty also demolishes limitations on "standing" which currently limit the ability of individuals to use European law as grounds for an appeal. Both the Government and legal experts have expressed concerns that this will lead to many asylum cases being referred to the Court for rulings.
- In November 2006, Geoff Hoon warned, "There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes."
- The Treaty also sets out a legal framework for the further development of a "Common European Asylum System" and a "Common European Immigration Policy" - which become treaty objectives for the first time.
- The Treaty ends the national veto over legal migration issues. The Government had reservations about this, and in an amendment argued that the free movement rights of third country nationals should be brought back under unanimity. However, the UK amendment was rejected.
- Asylum measures are already decided by majority voting, but changes in this area are still highly significant. Asylum powers are reworded to allow the EU to set *uniform* standards on how asylum applicants are received and processed and what rights asylum seekers should have. Currently the EU can only set *minimum* standards.
- New asylum policies will now have to be *governed* by "the principle of solidarity and fair sharing." This paves the way for what the Commission has called "corrective" burden sharing. According to a Commission proposal, this is likely to mean physically transferring successful asylum seekers from one member state to another or sharing out the financial burden.

(3) The UK's opt-out is undermined - the "bullying" clause will mean the UK will face some difficult choices for the first time

There is an arrangement under the current treaties which allows the UK to opt-out of asylum measures on a case by case basis. However, under a provision created by Lisbon (article 4a of the UK protocol), when amendments to an existing piece of legislation are proposed where the UK has opted in already, it must either go along with the amended version or be thrown out of the existing legislation. In other words - keeping the status quo will not be an option for the UK.

The Labour Chairman of the European Scrutiny Committee, Michael Connarty, has described the clause setting up this unpalatable choice as a "bullying" clause. He told David Miliband: "Do not pretend that this is not a bullying tactic by whoever proposed it to pressurise the UK. These are bullying clauses to cajole and pressurise us into opting in and I am shocked that you try to defend them. Honestly, I really am.... I do not think anyone with a bit of principle would sign up to them... It interferes in a great way because it puts massive pressure and there are now penalties for not opting in that were not there before." (ESC hearing, 16 October)

This would mean unpalatable choices for the UK. For example, the Commission has announced that it will propose to update the "Dublin II" agreement (which the UK has opted into) by building "burden sharing" arrangements into it. The UK is opposed to this but would definitely not want to be thrown out of the Dublin system, which allows the UK to deport 100 asylum claimants a month back to the country where they first entered the EU. The UK could face similar dilemmas in criminal justice - for example, if the Commission proposes an amendment to the European Arrest Warrant.

In evidence to the Lords EU Committee, Professor Steve Peers noted that: "For the first time there is a possibility of pressure that could be placed on the UK to opt in to something, whereas at the moment there is not any mechanism to place pressure on us to opt in to something." (21 November). James Flynn QC told the Lords that the clause was a way of other member states "applying a certain amount of pressure." (12 December)

(4) New powers, new objectives - and majority voting across home affairs

According to the Government's analysis, the veto is abolished in nine areas of justice and home affairs:

- Immigration and frontier controls
- Judicial co-operation in criminal matters
- Minimum rules for the definition of criminal offences and sanctions
- Eurojust (structure, operation, field of action and tasks)
- Police co-operation (data sharing and training)
- Europol (structure, operation, field of action and tasks)
- Establishment of an integrated management system for external borders
- Mechanism for peer review of member states' implementation of policies in the Justice and Home Affairs (JHA) area
- Measures to promote crime prevention

The powers of the EU are also widened in several areas in which the Government has already given up the veto - including asylum, legal migration and civil law.

(1) Police and Judicial Cooperation in detail

Enabling Eurojust to initiate investigations of EU citizens

Lisbon gives the European prosecutors network "Eurojust" sweeping new powers. The new article 85 of the Treaty on the Functioning of the Union says that the tasks of Eurojust "may include the initiation of criminal investigations". Johannes Thuy, a spokesman for Eurojust, confirmed that under the new treaty, "*We could compel the British police to make a prosecution.*" (Sunday Times, 5 August 2007)

The UK Government was initially opposed to giving Eurojust these new powers. Peter Hain 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". He threatened that, "this is an essential precondition for majority voting ... Eurojust should have the power only to *ask* that an investigation or prosecution is initiated." However, the Government later gave way on this issue.¹

A European Public Prosecutor - now a stronger possibility than under the Constitution

Lisbon says that: "In order to combat crimes affecting the financial interests of the Union, the Council, by means of a regulation adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust."

During the European Convention, the Government said there should be no possibility of setting up a European Public Prosecutor - *even if they had a veto*. Peter Hain wrote: "We are firmly opposed to establishing a European Public Prosecutor. *Unanimity does not mean that this article can be accepted...* There is clearly no need for a separate prosecution body at EU level." ²

In a later amendment he again called for it to be deleted. He wrote: "We are opposed to establishing a European Public Prosecutor." But again this was ignored.³

Unlike in the original Constitution, under which the Prosecutor could only be established by unanimity, in the new version the Prosecutor can be set up by enhanced cooperation (i.e. a group of member states forging ahead). Professor Jo Shaw from the University of Edinburgh told the Lords EU Committee that UK citizens could be arrested by the Prosecutor using the European Arrest Warrant, which the UK is already part of:

Chairman: Am I right that the European Arrest Warrant could be used to take the United Kingdom citizen from this country to the foreign state to be prosecuted by the European Public Prosecutor?

Professor Shaw: It would indeed work like that, and assuming that the Evidence Warrant comes in in due course, recourse will be had to other mechanisms in order to facilitate a crossborder prosecution process. (14 November 2007)

¹ <http://european-convention.eu.int/docs/treaty/pdf/850/Art%20III%20169%20Hain%20EN.pdf>

² <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20170%20Hain%20EN.pdf>

³ <http://european-convention.eu.int/Docs/Treaty/pdf/850/20Hain.pdf>

Increased powers for Europol

Lisbon strengthens the role and powers of Europol. Previous treaties have gradually expanded the role of Europol but its scope has remained limited to coordination. New powers would widen its role to include “organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities.”

The new power to implement directly operational action could mean that Europol would be able to take part in police raids alongside national police, giving it a similar role to America's FBI.

The UK Government has raised various objections to this proposal. In an amendment Peter Hain wrote, “the word ‘operational’ should be deleted. ‘Investigative’ is sufficient and avoids the suggestion of Europol having operational powers on the territory of Member States.”

Hain added that “[the words] ‘carried out jointly’ should be replaced by ‘in support of’”. It is essential that Europol is not able to carry out independent operational activities or to direct Member States' operational activities.” However, the changes Hain called for were not made.⁴

EU powers to define criminal offences and set minimum sentences

Lisbon allows the EU to set “rules concerning the definition of criminal offences and sanctions”. This is intended to prevent criminals “shopping around” for countries where their activities will carry the lightest penalties. The new powers list the types of crimes over which the EU can harmonise sentences. These include drug trafficking, people smuggling and money laundering. The list was supposed to limit the EU to dealing with cross-border crimes. But the list of crimes over which the EU can rule also includes vaguely-defined categories such as “organised crime” and “corruption”, which is likely to enable the EU to rule over a wide variety of offences.

The Government opposed giving the EU this power to set minimum and maximum sentences. Peter Hain wrote, “Framework laws on substantive criminal law must not require the imposition of mandatory minimum penalties. We hope that the Treaty would exclude the possibility of measures requiring all Member States to impose a minimum penalty of at least x years on anyone convicted of a crime... irrespective of the circumstances or any mitigating factors.” However, the UK Government later abandoned its objections.⁵

New EU powers to enforce “mutual recognition” of legal judgments

Lisbon sets out a legal basis to legislate for the mutual recognition of legal judgments in civil and criminal cases respectively. Mutual recognition of judgments is intended to end existing barriers to successful prosecution of cross-border crimes. The article covers the mutual recognition not just of final judgements on cases, but also other judicial decisions such as the power to search homes and seize evidence.

⁴ <http://european-convention.eu.int/docs/treaty/pdf/851/Art%20III%20172%20Hain%20EN.pdf>

⁵ <http://european-convention.eu.int/Docs/Treaty/pdf/850/17Hain.pdf>

There are two main problems with mutual recognition.

Firstly, there are potential complications with mutual recognition in itself. Several of the other member states have poor records of fairness in their legal systems which is compounded by the nature of cross border cases - e.g. the use of the European arrest warrant has led to a growth in the number of cases of trial *in absentia*, which have to be recognised by the UK legal system.

Secondly, mutual recognition is intended to lead to legal harmonisation. The UK Government initially acknowledged this problem.

In a proposed amendment to the article on mutual recognition of civil law, Peter Hain wrote that, "the principle of mutual recognition is welcome. However there is no need for ... approximation of the civil law. It is neither necessary nor appropriate. The purpose of civil judicial co-operation should be to ensure that borders do not represent an obstacle to litigation or the recognition and enforcement of judgments. Whilst that might require a degree of harmonisation of civil law and procedure we should respect and recognise each others' legal systems and work on the interface between them, promoting compatibility between them. Unfortunately the current draft suggests that approximation of law should be an end in itself."

New EU powers to harmonise civil and criminal laws and legal procedures

Lisbon allows the EU to set common rules concerning legal procedures in criminal cases. EU rules, decided by majority voting, could determine the rights of criminal suspects and control the admissibility of evidence in Court. There is also a provision for EU rules to cover "any other specific aspects" of legal procedure if EU leaders so decide.

One problem with this proposal is that it would no longer be possible for voters in individual member states to alter the balance of the legal system between the rights of victims and suspects' rights. For example, if EU rules were to set the balance in such a way as to favour protection for suspects, voters in any one member state would not be able to vote for a policy which would make it easier to secure convictions. The rules could only be changed subsequently if the majority of other members agreed.

The UK Government was initially unhappy with this proposal, and called for major changes. However, it gave way on this issue as part of the overall agreement on the EU Constitution. Peter Hain told the cross-party European Scrutiny Committee that the current Article was "unacceptable" and that his principle was "cooperation yes, harmonisation no". (25 March 2003)

A very wide variety of procedures could be harmonised under this basis. Lord Lester suggested in the Lords EU Committee that this could mean significant changes: "hearsay evidence and rules about the admissibility of hearsay evidence as between a common law system and a civil law system would be in play; or say the rights of individuals in criminal procedure, where you have inordinate delay in a criminal trial - say ten years after the facts. In England the remedy would include quashing proceedings, stopping them because you cannot have a fair trial; but in France the remedy would not be that; it would be compensatory only."

Stephen Hockman QC responded that "It seems to me that a lot may turn on what the phrase "establishing minimum rules" means... To take either the hearsay example that you give or the delay example that you give, how can one find the lowest common denominator between the right to have the proceedings stayed for delay, and the right to have compensation? I respectfully agree that it is not at all easy to see what minimum you could arrive at in that situation. Hearsay might be slightly easier of course: our law increasingly recognises the possibility of hearsay being relied on, so a minimum standard there may be something that is easier to get at." (12 December 2007)

(2) Immigration and Asylum in detail

The EU's immigration and asylum powers would be expanded by Lisbon in two main ways.

It would give the Court of Justice new powers in this area by giving it jurisdiction over home affairs, and also by making the Charter of Fundamental Rights legally binding. The increased role of the Court is likely to impact not just on whether applicants gain asylum or the right of legal residence, but also on the welfare and work entitlements of asylum applicants and migrants. The Government sought to limit the role of the Court in this area in an amendment - but the changes it requested were not made.

Lisbon also sets out a legal framework for the further development of the EU common asylum and immigration system. It would end the national veto over legal migration issues.

Expansion of the jurisdiction of the Court into immigration and asylum

During the original negotiations on the Constitution the UK Government twice unsuccessfully attempted to re-insert limits on the role of the Court in assessing asylum cases.

Under the current treaties, the role of the Court is very limited in this area, which was originally in a separate pillar for decisions between governments. The provisions in the original Constitution would have removed the restrictions on the role of the Court. Under the current treaty articles, the Court only has jurisdiction where specified, and there is only a very limited role for the Court, including provisions that the ECJ can only take up a case once it has exhausted all appeals in the member state. As a result only one immigration case has reached the Court.

In an amendment Peter Hain called for two new paragraphs to be added to the text, which would have meant that the ECJ could only have been called upon to make a preliminary ruling after a high court ruling on a case. However, the changes the UK proposed were not made.

In November 2006, Geoff Hoon told the Lords EU Committee that: "*There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes.*"

A legal basis for common asylum and immigration systems, and moves towards a single system

Lisbon sets out a framework and a legal basis for the further development of the Common European Asylum System and Common European Immigration System, both of which become treaty objectives for the first time.

The treaty also proposes the end of member states' right of veto over asylum and all categories of immigration. In December 2004, the UK Government agreed to give away the veto on asylum and *illegal* immigration, but did not agree to end the veto on legal migration.

Asylum - from minimum standards to uniform standards

The Commission has recently announced the completion of the first phase of the Common European Asylum System. The Lisbon Treaty and subsequent Commission proposals indicate that the trend in the second phase of the development of asylum policy will be to move away from *minimum* standards, and towards *uniform* rules and common processing. The Commission's stated objective in its recent Green Paper on asylum is to reduce the discretion given to member states to set their own asylum policies.

During the original negotiations, the UK called for the main article on the common asylum system to be completely rewritten. In particular, the Government called for the deletion of the proposals to create:

- "A uniform status of asylum for nationals of third countries, valid throughout the Union"
- "A common system of temporary protection for displaced persons in the event of a massive inflow"
- "Common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status"
- "Partnership and cooperation with third countries with a view to managing inflows of people applying for asylum or subsidiary or temporary protection."

The Government twice tried to have the whole article re-written. Peter Hain wrote that:

*"This is a fundamentally important amendment...The Treaty should not contain a catalogue of measures to be taken...The UK would prefer to see an asylum article which sets general objectives rather than catalogued competences."*⁶

The Government also protested in general against the plans to create a single set of rules, and suggested that the proposals violated the UK's previous understanding about how the European Asylum System would operate.

Peter Hain wrote, "The Tampere conclusions nowhere said that the second stage of work on a common system should consist of converting the minimum standards under negotiation as part of the first stage into common rules."⁷ However, the article was not changed.

⁶ <http://european-convention.eu.int/Docs/Treaty/pdf/848/Art%20III%20162%20Hain%20EN.pdf>

⁷ <http://european-convention.eu.int/Docs/Treaty/pdf/848/11Hain.pdf>

Asylum burden sharing

Lisbon requires that any new asylum policies should be governed by the principle of solidarity and fair sharing. This paves the way for what the Commission calls “corrective” burden sharing. This would mean physically transferring successful asylum seekers from one member state to another or sharing out the financial burden. The Commission is already talking about producing legislative proposals for burden sharing later in the year, once the Treaty has been ratified.

The Government called for changes to these new powers. It tabled an amendment to rule out the possibility that the cost of processing asylum and immigration claims would be funded from the EU budget.

“The intention of writing the principle of solidarity into the Treaty is... presumably not that the European Union budget should bear the entire cost of Member States’ asylum and immigration systems, or to develop a mechanism for sharing the full costs between the Member States, which would not be realistic. The Union’s role is to promote solidarity. Our amendments make this clear.”⁸

Again, the article was not changed.

The end of the veto on legal migration

The UK Government also had clear reservations about the section on legal migration. Amongst other things, in an amendment the Government argued that the free movement rights of third country nationals should be brought back under unanimity.

New powers allow the Council to decide by majority vote on the “definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing the freedom of movement and of residence in other Member States.”

The UK wanted to change this to “The Council *acting unanimously* on a proposal from the Commission after consulting the European Parliament shall adopt laws and framework laws defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.”⁹ However, this change was not made.

Social security implications

The Government called for the deletion of a new EU power which would have implications for migrants’ access to labour markets and social security.

Peter Hain wrote, “Article 2(b) allows for decisions on all aspects of the rights of third country nationals including access to the labour market and social security - this is a considerable extension of the Union’s competence from that in the current treaty.”¹⁰ When the article was not deleted the UK Government called for any such powers at least to be kept under unanimous voting. But the article was not changed.

⁸ <http://european-convention.eu.int/Docs/Treaty/pdf/848/Art%20III%20164%20Hain%20EN.pdf>

⁹ <http://european-convention.eu.int/Docs/Treaty/pdf/848/12Hain.pdf>

¹⁰ <http://european-convention.eu.int/Docs/Treaty/pdf/848/Art%20III%20163%20Hain%20EN.pdf>

(3) How the UK opt-in arrangement is undermined

There is an arrangement under the current treaties which allows the UK to opt-out of asylum measures on a case by case basis. However, under a provision created by Lisbon (article 4a of the UK protocol), when amendments to an existing piece of legislation are proposed where the UK has opted in already, it must either go along with the amended version or be thrown out of the existing legislation. In other words - keeping the status quo will not be an option for the UK.

The Labour Chairman of the European Scrutiny Committee, Michael Connarty, has described the clause setting up this unpalatable choice as a "bullying" clause. He told David Miliband: "Do not pretend that this is not a bullying tactic by whoever proposed it to pressurise the UK. These are bullying clauses to cajole and pressurise us into opting in and I am shocked that you try to defend them. Honestly, I really am.... I do not think anyone with a bit of principle would sign up to them... It interferes in a great way because it puts massive pressure and there are now penalties for not opting in that were not there before." (ESC hearing, 16 October)

In evidence to the Lords EU Committee, Professor Steve Peers noted that: "For the first time there is a possibility of pressure that could be placed on the UK to opt in to something, whereas at the moment there is not any mechanism to place pressure on us to opt in to something." (21 November). James Flynn QC told the Lords that the clause was a way of other member states "applying a certain amount of pressure." (12 December)

What will this mean in practice?

(a) Burden sharing on asylum?

The Commission plans to update the "Dublin II" agreement to build "burden sharing" arrangements into it. The UK Government wants to remain part of Dublin II - which allows the UK to deport 100 asylum claimants a month back to the country where they first entered the EU.

In a speech in November last year, Justice Commissioner Franco Frattini said: "There seems to be a consensus among stakeholders about the need to support those Member States whose reception capacities cannot deal with the number of asylum-seekers and refugees who are in their territories. Different ideas about the form of such support are proposed in the contributions and will need to be examined. To mention just three of them: transfers of asylum-seekers or refugees from one Member State to another, financial support and assistance of asylum expert teams." He said: "in the summer of 2008, I will present proposals for amending the Dublin regulation." (7 November 2007)

The UK Government is sceptical about burden sharing and does not want to take part - but then again, it would definitely not want to be thrown out of the Dublin system.

(b) Changes to the Reception conditions directive

The Commission also plans to amend the Reception Conditions Directive - which sets minimum standards on what benefits and other welfare rights asylum seekers should get while their applications are processed.

The Commission argues that the Directive, which the UK has opted into - gives member states far too much discretion in the running of their asylum systems. In particular, the Commission is determined to "create a level playing field." This will mean increasing the rights of claimants.

Franco Frattini has said: "Creating a level playing field in the area of reception conditions is a priority for the Commission: therefore, I intend to propose amendments to the Directive, in order to limit the discretion allowed with regard to the level and form of material reception conditions, access to employment, health care, free movement rights and identification and care of vulnerable persons." (7 November 2007)

The UK Government is particularly opposed to giving asylum seekers the right to work, as it believes that this encourages false claims. However, under the Lisbon Treaty, if the UK did not agree to opt into the amended version, it could be threatened with being "thrown out" of the existing rules.