

Justice and Home Affairs

With reference to the European Union (Amendment) Bill Debates – House of Commons

Background:

With regard to Justice and Home Affairs, the Treaty moves what was previously an intergovernmental agreement on Police Cooperation and Judicial Cooperation on Criminal Matters into a mainstream EU competence, alongside Asylum, Immigration and Civil Justice (which had already been moved to the EU under the Amsterdam Treaty). This means that the matters covered under the Area of Freedom Security and Justice become subject to EU legislation by QMV and under the jurisdiction of the ECJ. These include the harmonisation of both civil and criminal laws and regulations for cross-border cases, and minimum rules on areas such as admissibility of evidence, rights of individuals and criminal sanctions (Articles 65-69 TEU).

The Government is very clear that these Treaty provisions, if they applied to the UK, would represent an unacceptable transfer of sovereignty over judicial matters. The UK has a different common law legal tradition to those continental countries which have based their legal system on the Napoleonic Code, and in any case the Government accepts that these matters are ones which should be subject to national democratic control.

The Government's claimed safeguard is that, for the UK, these new areas are covered by a special Protocol that enables the UK to decide whether or not to opt in to new legislation in any area of Justice and Home Affairs. They also claim this safeguard is reinforced by the so-called 'emergency brake' provisions which allow a country to object to QMV being applied to legislation that would affect 'fundamental' aspects of its criminal justice system.

Major points to consider:

- Qualified Majority Voting becomes the voting procedure, removing veto power for Justice and Home Affairs. The 'emergency brake' is still applicable.
- All Justice and Home Affairs legislation is ultimately under the jurisdiction of the European Court of Justice, which will become the highest court 'in the land'.
- The Labour Government fought and failed to have the jurisdiction of the ECJ removed.
- The Treaty provides harmonising measures for civil and criminal law on cross-border cases, but can this be kept separate from purely domestic cases?
- Will the Protocol 'opt-out' override the high level Treaty objectives of cooperation, consistency and mutual solidarity at the start of the Treaty?
- The UK will be unable to stop the development of Eurojust or the European Public Prosecutor's extension of powers, which ultimately could see British citizens tried and prosecuted for criminal offences in other EU states.
- UK courts will reference ECJ case law in domestic legal cases, thus enforcing the creep of European law and standards into areas the UK has supposedly opted-out from.
- Historically, the EU institutions have followed a consistent pattern of trying to circumvent previous UK opt-outs (i.e. Social Chapter, Working Time Directive). Thus the present 'opt-outs' are likely to be only temporary respites.
- Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice:
 - If the Council of Ministers decides that the UK's non-participation in a piece of legislation makes the "application of that measure inoperable for other Member States or the Union"¹, the UK will have to either:
 - Opt-in to the legislation against our wishes, or;
 - Stay out, and "bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure".²
 - The UK's ability to opt-out is compromised by the risk of receiving heavy and unlimited fines for preserving our own interests, and the loss of that measure altogether.
- Michael Connarty MP said that the Protocol opt-out "*appear(s) to be designed to dissuade Ireland or the United Kingdom from exercising a right not to opt in*".

¹ Protocol Article 4a, paragraph 2

² Protocol Article 4a, paragraph 3

- Once opted-in, there is no opt-out again. Where the UK agrees or is pressured into participating in what seems a modest and genuine new measure, the UK will not be able to prevent that measure subsequently being extended and enforced by QMV – and we would be subject to unspecified penalties defined by other Member States if we then tried to opt out (under Article 4a of the UK protocol). Again, Michael Connarty MP said that the UK needed the ability to opt in and opt out (*Today Programme*, 9th October).
- There is confusion in the meantime about what happens when existing measures are amended. Do the existing measures stay outside of the ECJ, but the amendments move inside? Will the UK be able to opt out of the amendment, but stay in the original? Is this practical? Or will any amendment end the transition period and pull the whole measure through to full ECJ jurisdiction (Pillar 1)?
- Since the Treaty extends the role of the ECJ into the police and judicial cooperation aspects of the area of Freedom, Security and Justice, the ECJ will have an immediate role in interpreting any new measure (or amendment) that the UK opts to accept following the Treaty. However, under the Transition protocol, after a 5 year period the UK will also either have to accept the role of the ECJ in ruling on any of the 70 or so measures already in place at the time the Treaty comes into force, or opt out from these agreements too. If we decide to opt out at that time the other members of the Council will again be able to decide on financial penalties to impose on us.
- On immigration and asylum measures to which we have signed up, the ECJ will in future be able to refer to the relevant Article of the Charter of Fundamental Rights in reviewing our practices, including Article 21 of the Charter which forbids different treatments based on nationality.

ANALYSIS OF KEY STEPS IN THE PROGRESSION OF EU POWERS: Justice and Home Affairs

Treaty of Rome 1957	Single European Act 1986	Maastricht 1992	Amsterdam 1997	Nice 2001	Lisbon Reform Treaty 2007
	<p>Provided for 'common measures' on police cooperation, visas, extradition and immigration.</p>	<p>Established 3 pillar EU.</p> <p>JHA becomes intergovernmental Pillar 3.</p>	<p>Transferred free movement of persons, asylum, immigration & judicial cooperation to Pillar 1 (<i>i.e. part of community competence</i>).</p> <p>UK protocol provided for opt-in to Pillar 1 initiatives in JHA.</p> <p>Further developed Police and judicial cooperation in Pillar 3.</p> <p>Subsequent meeting (1999) agreed to set up Eurojust to combat cross border organised crime.</p>		<p>No longer a separate pillar – remaining areas of old Pillar 3 JHA (<i>Police and Judicial Cooperation in Criminal matters</i>) becomes subject to normal EU legislative procedure (<i>i.e. QMV subject to 'emergency brake' on some matters of vital national importance</i>), but with UK right to opt in or out.</p> <p>Consequently brings all of the 'Area of Freedom, Security and Justice' under the jurisdiction of the ECJ.</p> <p>Enables Eurojust to be extended and EU public prosecutor to be set up by sub group.</p> <p>Transition period for moving existing legislation into the ambit of EU institutions, including ECJ.</p>