



How the EU is watching you: The rise of Europe's surveillance state



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26 October 2009

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How the EU is watching you: the rise of Europe's surveillance state

As ratification of the EU Lisbon Treaty draws closer, new research from Open Europe warns that the Treaty will help accelerate moves towards an EU surveillance state.

The Lisbon Treaty marks a significant shift of power from national governments to the EU in the field of justice and home affairs. It will lead to an increase in the volume and scope of EU legislation, which is already having a profound impact on EU citizens' civil liberties and privacy.

As well as measures on asylum and immigration policy, EU ministers and the European Commission are currently negotiating a raft of controversial new proposals, which are set to radically increase the EU's role in policing, criminal, and security matters. EU leaders hope to reach formal agreement on many controversial new initiatives by the end of the year.

They include: a target to train a third of all police officers across the EU in a "common culture" of policing; the mass collection and sharing of personal data including DNA records into an EU-wide database; controversial surveillance techniques including 'cyber patrols'; the creation of a fledgling 'EU Home Office' with powers to decide on cooperation on police, border, immigration and criminal justice issues; an EU "master plan" on information exchange; the transfer of criminal proceedings among EU member states; a three-fold increase in the number of controversial EU arrest warrants; access to other member states' national tax databases; and EU laws on citizens' right to internet access, among many other things.

However, despite these significant plans, the current Swedish EU Presidency has said that, with the Lisbon Treaty nearly in place, the current proposals are too "modest" and that the EU should increase its "level of ambition" in the field of justice and home affairs policy.

Under Lisbon, national governments will lose their veto power to block legislation in the field of justice and home affairs, while the European Commission will be given greater power to draw up new laws, and the European Court of Justice (ECJ) will be responsible for enforcing them.

The UK Government's claim that under Lisbon the UK will maintain independence and can 'pick and choose' which justice and home affairs policies it opts into is a smokescreen. In practice, the UK has often been a key driver of policy, and has in some instances even exported domestic initiatives to the rest of the EU, particularly those that increase the power of the state over the individual. The most prominent examples of where the UK has pushed the agenda include the Data Retention Directive, the use of Passenger Name Records collected by travel companies and the European Arrest Warrant.

This method of 'exporting' UK initiatives to the EU is akin to policy making via the back door, circumventing adequate democratic controls.

Open Europe Analyst Stephen Booth said:

"Ratification of the Lisbon Treaty will see powers over justice and home affairs policy almost completely shifted to the EU level. How can citizens expect their fundamental rights to liberty and independence from the state to be protected by unaccountable institutions which have a vested interest in creating more laws?"

“With its talk of the UK’s ‘opt-ins’ on justice and home affairs, the Government has attempted to hood-wink its citizens into thinking they will somehow be unaffected by the Lisbon Treaty. The reality is that the UK has often been at the forefront of the EU’s most invasive and controversial laws in this field, using the EU to bypass the democratic scrutiny of the UK Parliament.”

“We are fast approaching a situation where the EU will have the full coercive machinery of a state but without the proper democratic controls or robust checks on power that citizens should expect.”

1. EXECUTIVE SUMMARY

The ever increasing scope of justice and home affairs (JHA) legislation being agreed at the EU level, often pushed by the UK Government, represents a mounting threat to civil liberties in both the UK and across the EU.

The Lisbon Treaty marks a significant shift of power from national governments to the EU in the field of JHA. Under Lisbon, national governments will lose their veto power to block legislation in the field of justice and home affairs, while the European Commission will be given greater power to draw up new laws, and the European Court of Justice (ECJ) will be responsible for enforcing them.

JHA is one of the 'growth areas' of the EU budget. According to the European Commission's website, this is the part of the 2010 budget to receive the biggest boost in spending, increasing by 13.5% to almost €1bn.¹

National ministers are currently negotiating a raft of new proposals based on the recommendations of the informal and shadowy "Future Group", which was made up of ministers from a select group of member states and first met in 2007 under Germany's EU Presidency. Jacques Barrot, the EU's Justice and Security Commissioner, has publicly declared that the aim is to "develop a domestic security strategy for the EU", adding that, "National frontiers should no longer restrict our activities"².

Other EU legislation is also of concern for civil liberties. EU plans to develop access to national tax databases as well as regulations that could impact on rights to internet access are currently being debated and could have a significant impact on citizens' daily lives.

Citizens across the EU must ask themselves whether an increasing curtailment of civil liberties is a fair price to pay for 'increased security' and bureaucratic efficiency. National governments' loss of control in these areas reduces citizens' ability to hold decision makers to account and therefore shape the laws that govern their daily lives. Furthermore, the growing number of measures being agreed at the EU level means citizens risk irreversibly losing civil liberties, since EU law is virtually impossible to unpick once it is agreed.

1.1. The impact of the Lisbon Treaty

In its report on the Lisbon Treaty, the House of Lords EU Committee noted that "Some of the most controversial changes introduced by the Treaty of Lisbon are in the area of freedom, security and justice."³ The Committee noted that the effect of the loss of national vetoes in this area "will be an increase in Union activity and the volume of legislation agreed in this area."

Following Ireland's Yes vote on the Treaty there have already been calls to push for more ambitious proposals in the field of JHA. Anders Hall, Assistant to Swedish Justice Minister Beatrice Ask, said that the Commission's current proposals were "too

¹ See Commission website, 'EU budget at a glance – Next year'; http://ec.europa.eu/budget/budget_detail/next_year_en.htm

² *Telegraph*, 10 June 2009; <http://www.telegraph.co.uk/news/worldnews/europe/eu/5496912/EU-security-proposals-are-dangerously-authoritarian.html>

³ *House of Lords EU Committee*, 'The Treaty of Lisbon: An impact assessment', 13 March 2008, p110; <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldecom/62/62.pdf>

modest” given that the Lisbon Treaty scraps the vetoes in JHA. He said that under the Lisbon Treaty,

“The level of ambition will increase to a certain extent. But exactly how this will play out is unclear as talks and negotiations are currently taking place between the member states.”⁴

The Treaty will also give the European Commission greater power to initiate JHA legislation and the European Court of Justice (ECJ) greater power to enforce it⁵. The House of Lords EU Committee noted that: “For the first time, Member States will be able to be taken to the Court for failure to implement properly EU legislation in the area of criminal law and policing.”⁶ As with other areas of EU policy, the ECJ, through its rulings, is likely to push for further integration and harmonisation in this field.

1.2. The UK Government’s tough talk of ‘independence’ and ‘opt ins’ is a smokescreen

The Government’s tough rhetoric and assertion that the UK can ‘pick and choose’ which policies it opts into in this area is a smokescreen. In practice, the UK Government’s record has been mixed to say the least. While at times it has failed to even engage in negotiations, at others, it has driven policy by exporting domestic initiatives to the rest of the EU, particularly those that increase the power of the state over the individual. This method of ‘exporting’ UK initiatives to the EU is akin to policy making via the back door.

Below is a summary of some of the most significant measures already in place, followed by those in the pipeline.

MEASURES ALREADY AGREED OR IN FORCE:

- **Access to the UK’s DNA database, which is five times larger than the EU average**

The 2005 Prüm Treaty, which became EU law in 2007 and was described by the European Data Protection Supervisor as “a laboratory for cross border exchange of information”⁷, allows the exchange of all DNA, fingerprint and vehicle data between national police authorities between member states. This is of particular concern to UK citizens because around 5.2 percent of the UK population’s DNA data is held on record, compared with an EU average of only 1.1 percent⁸.

This is likely to lead to the UK being subject to a great deal more requests for DNA data than other member states. The huge cost of the operation will be funded directly by UK taxpayers.

⁴ Svenska Dagbladet, 7 October 2009; http://www.svd.se/nyheter/inrikes/artikel_3610705.svd

⁵ See Brian Donnelly, Justice and Home Affairs in the Lisbon Treaty: A constitutionalising clarification?, *European Institute of Public Administration*, 2008, 1-2;

http://www.eipa.eu/files/repository/eipascope/20080509184107_SCOPE2008-1-4_BrendanDonnelly.pdf

⁶ House of Lords EU Committee, ‘The Treaty of Lisbon: An impact assessment’, 13 March 2008, p127; <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62.pdf>

⁷ Evidence to House of Lords’ European Select Committee: ‘Prüm: An effective weapon against terrorism and crime’, 9 May 2007, Minutes of Evidence, p32:

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/90/90.pdf>

⁸ Home Office, ‘DNA Expansion Programme 2000–2005: Reporting Achievement’, p5, October 2005: <http://police.homeoffice.gov.uk/publications/operational-policing/DNAExpansion.pdf?view=Binary>

The UK had been invited to take part in negotiations for the Prüm Treaty but declined to do so because it contained provisions which the Government found 'unacceptable'⁹. However, it signed up to the Treaty when it was later incorporated into EU law in 2007.

- **EU-funded research in 'Orwellian' security technologies**

The EU, through the Commission and its European Security Research programme¹⁰, is actively involved in the development of new technologies for the purposes of security. Projects currently funded¹¹ by the Commission's research programme include the Orwellian-sounding "INDECT" project which includes the "monitoring of various people clusters and detection of abnormal behaviour and situations of danger"¹². The project, at a total cost of €14,863,988, is two-thirds funded by EU taxpayers, via the EU budget.

- **EU rules on the mandatory storing of citizens' communications data are now out of the hands of national governments**

The EU's Data Retention Directive, which was fast-tracked under the UK's EU Presidency in 2005, requires telephone operators and internet service providers to store data regarding every phone call, text message, email and website that their users access and make it available to government authorities. Sir Paul Kennedy, the UK's Interception of Communications Commissioner, has revealed that in 2008 a total of 504,073 requests were made to access communications data, the equivalent of one request every minute¹³.

This law was passed in the UK Parliament with minimal debate. The Conservatives' Shadow Security Minister Baroness Pauline Neville-Jones said, "The Government cannot expect us to support an instrument where there is such uncertainty over what it will do and how it will work in practice."¹⁴

Crucially, the UK lost its veto on data retention. Due to a decision by the European Commission, and upheld by the ECJ, the legal base of the legislation was altered, allowing the proposal to be passed by qualified majority vote rather than by unanimity. The UK could therefore in future be outvoted on any changes to the legislation.

- **Biometric passports: a blueprint for an EU-wide ID card?**

The use of biometric passports, which includes data on fingerprints, the iris of the eye, and other facial features, is now a standard EU requirement following a European Council Regulation in 2004. The EU Regulation requires that biometric identifiers for EU citizens are compatible with the EU's key databases for sharing information between member states and their police forces. So, while the data is

⁹ *House of Lords' European Union Select Committee*, 'Prüm: An effective weapon against terrorism and crime', 9 May 2007, p12: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/90/90.pdf>

¹⁰ See http://ec.europa.eu/enterprise/security/index_en.htm

¹¹ For a full list of projects currently funded by the EU, see http://cordis.europa.eu/fp7/projects_en.html

¹² See 'Intelligent information system supporting observation, searching and detection for security of citizens in urban environment'; http://ec.europa.eu/enterprise/security/doc/fp7_project_flyers/indect.pdf

¹³ *Telegraph*, 10 August 2009:

<http://www.telegraph.co.uk/news/newstoppers/politics/lawandorder/6001357/A-request-to-snoop-on-public-every-60-seconds.html>

¹⁴ *Hansard*, 24 March 2009, Column 627:

<http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90324-0011.htm>

currently held nationally, in effect, an EU-wide system for the wholesale sharing of biometric data of all EU citizens is only one step away.

- **Granting authorities and the public access to information about people's health**

In 2007, the EU's so-called Inspire Directive¹⁵ entered into force. The Directive includes common provisions for data on public health, including requirements for authorities to make information about citizens' personal health available to both authorities in other member states and the public¹⁶.

The Swedish Data Inspection Board – a governmental agency set up to protect the individual's privacy in the information society – has warned that this provision could seriously threaten individuals' right to privacy¹⁷.

- **EU-US data exchange and extradition treaties lacking national democratic accountability**

The EU has recently renewed an agreement with the US to allow its officials access to private banking data contained in a database operated in Europe by SWIFT¹⁸. The secrecy surrounding the decision has been subject to widespread criticism. EU JHA ministers decided to ignore their own legal experts' advice which said that the European Parliament should have co-legislative powers on the issue. The Swedish EU Presidency was left to conduct negotiations on behalf of the whole EU.

The Swedish Parliament's EU Scrutiny Committee – which must give its assent before the Swedish government signs up to an EU decision – was given only 30 minutes notification via a text message to prepare a decision on the agreement, and was given no documents to inform it on what the decision was about¹⁹.

Meanwhile, in June this year the EU agreed a new extradition agreement with the US²⁰, which allows for speedier processing of extradition requests. The EU-US agreement allowed member states to agree their own more far-reaching extradition arrangements, and the UK has a bilateral deal with the US that does so²¹, but as the Liberal Democrats' Shadow Home Secretary Chris Huhne warned, "If this becomes an EU-wide arrangement, it could be even more difficult for any future government to unpick. This would do nothing to prevent more cases like the unfair extradition of Gary McKinnon."²²

¹⁵ Directive 2007/2/EC of the European Parliament and of the Council, see <http://inspire.jrc.ec.europa.eu/>

¹⁶ *Dagens Nyheter*, "DI varnar för direktiv från EU", 17 March 2009, see <http://www.dn.se/fordjupning/europa2009/di-varnar-for-direktiv-fran-eu-1.823201>

¹⁷ *Datainspektionen*, "Genomförande av Inspire-direktivet i svensk lagstiftning; förslag till ny miljöinformationslag och – förordning m.m.", 13 March 2009, see <http://www.datainspektionen.se/Documents/remissvar/2009-03-16-inspire.pdf>

¹⁸ See *Euobserver*, 23 November 2006: <http://euobserver.com/9/22937>

¹⁹ *Swedish Television*, 31 July 2009

²⁰ *The Parliament*, 8 July 2009: <http://www.theparliament.com/policy-focus/justice/justice-article/newsarticle/eu-us-extradition-agreement-set-to-boost-international-law-enforcement-cooperation/>

²¹ For an analysis of the UK-US extradition agreement see, *Justice*, 'Briefing on Extradition to the USA: The UK-US Treaty of March 2003 and the EU-US Agreement of June 2003', July 2003: <http://www.justice.org.uk/images/pdfs/extraditionusa2.pdf>

²² Press release, 6 July 2009: http://chrishuhne.org.uk/news/000727/government_must_renegotiate_lopsided_us_extradition_treaty_huhne.html

Parliamentary scrutiny of this important decision was virtually non-existent. The UK Government originally said that it would only be able to present the UK's Parliament's EU committees with a confidential text of the agreement, excluding the possibility of full scrutiny from the rest of Parliament.

After putting pressure on the Government and the EU Presidency the committees were eventually given less than a month to review it publicly but by that time, the negotiations between the EU and the US had been concluded. The House of Lords Committee said:

“The decision of the Presidency to retain the ‘confidential’ classification on these Agreements after the negotiations between the EU and the US had been concluded and their content had been agreed both by the EU Member States and by the US was unnecessary and contrary to the democratic accountability that ought to inform decisions by EU institutions regarding access to documents.”²³

WHAT TO EXPECT NEXT:

- **The harnessing of all available technology and data to create an “EU master plan on information exchange”**

Beatrice Ask, Swedish Minister for Justice, has said that, “There is distinct need to work out an ‘EU master plan on information exchange between law enforcement authorities’”.²⁴

The EU plans to make all member states share passenger name record (PNR) data collected by travel companies, which includes 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. It can also include age, fare details, form of payment, home address, passenger phone number and special meal requirements.

The EU already has a data-sharing agreement with the US on PNRs, and the European Commission website makes clear that the US Department of Homeland Security can access passenger data including on such sensitive areas as racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information concerning the health or sex life of the individual²⁵.

While the current proposal envisages using the PNRs as part of efforts to combat terrorism and organised crime, the UK wants to see the use of PNR data across the EU extended beyond terrorism and organised crime to any “serious crime” as well as immigration control. The UK Government is also seeking to extend the proposal’s scope from just air travel to cover other forms of travel, such as by train or sea.

- **Controversial surveillance techniques including ‘cyber patrols’**

²³ House of Lords EU Select Committee, ‘EU/US agreements on extradition and mutual legal assistance’, 15 July 2003, p8:

<http://www.publications.parliament.uk/pa/ld200203/ldselect/ldEUcom/153/153.pdf>

²⁴ Speech at the College of Europe, Brussels, 4 March 2009:

<http://www.sweden.gov.se/sb/d/10959/a/122436>

²⁵ European Commission, ‘The Passenger Name Record (PNR): FREQUENTLY ASKED QUESTIONS’, MEMO/07/294, 13 July 2007:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/294&format=HTML&aged=0&language=EN>

One of the more controversial surveillance techniques being promoted within the EU is the use of remote computer searches or 'Trojan Horses' which record users' computer activity and relay it to security agencies. In November 2008, the European Commission announced an EU Cyber Crime Strategy agreed with the Council²⁶ which called on the use of "remote searches, cyber patrols for online tracking of criminals and joint investigations across borders."²⁷

- **Allowing people to be tried in UK courts for offences that aren't crimes in the UK?**

15 member states, (not including the UK), have proposed a common set of rules within the EU for the transfer of criminal proceedings between member states. The aim of the proposal is to "concentrate criminal proceedings" in a particular country for offences that are committed in more than one member state or where one member state has jurisdiction.

However, the proposal contains a controversial provision which appears to allow someone to be tried in the UK courts for an offence that isn't a crime under UK law. Article 5 states:

"(1) For the purpose of applying this Framework Decision, any Member State shall have competence to prosecute, under its national law, any offence to which the law of another Member State is applicable.

"(2) The competence conferred on a Member State exclusively by virtue of paragraph 1 may be exercised only pursuant to a request for transfer of proceedings."²⁸

The House of Commons European Scrutiny Committee remarked:

"Article 5 is both novel and far-reaching: it gives national courts competence to try a criminal offence that is not prescribed by UK law – or, put another way, that the Government has not proposed nor Parliament agreed should be a crime. Instead, jurisdiction comes from the EU Member State that is transferring the proceedings."²⁹

- **The creation of a committee on EU "internal security" – a fledgling EU Home Office?**

The Lisbon Treaty allows for the creation of a new EU Committee on Internal Security (COSI), which will be established under the European Council. The EU's three JHA bodies, Eurojust, Europol and Frontex, would all be represented on the Committee, and the decision to set this up would be taken by a simple majority of those states that decide to participate (the UK is expected to do so).

²⁶ See Council's conclusions here: <http://www.statewatch.org/news/2009/jan/eu-remote-computer-access-15569-08.pdf>

²⁷ European Commission press release, 27 November 2008: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1827&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁸ Draft framework decision on the transfer of proceedings in criminal matters, available at: <http://register.consilium.europa.eu/pdf/en/09/st11/st111119.en09.pdf>

²⁹ European Scrutiny Committee, 'Transfer of criminal proceedings', 2 July 2009: <http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv10.htm>

The Lisbon Treaty is very vague about what role this Committee could take on in future, but a Memo from the UK Government reveals that the Committee would effectively decide how police, border, immigration and criminal justice authorities would deal with cross-border matters, meaning this could be the beginnings of what is effectively an 'EU Home Office'.³⁰

The Committee would not produce legislative decisions, but could propose legislation to the Council. The Committee is also to become involved in applying the controversial 'solidarity clause', another innovation of the Lisbon Treaty creating an obligation on member states to help other member states in times of terrorist attack or natural or man-made disasters, and also to prevent the "terrorist threat" (Article 222 TFEU).

Despite the fact that the Lisbon Treaty is not yet in force, negotiations are ongoing about how the Committee will look and work in practice. According to the UK Government Memo in September 2009, the decision to establish COSI could be taken "as early as within a few weeks of the Lisbon Treaty entering into force." The paper says that discussions about the role and remit of the Committee have taken place in Government departments including the FCO, CO, HMRC and MoJ, as well as departmental agencies such as SOCA.

- **A target to train one third of European police officers in "European affairs" in order to create a "common culture"**

The Commission argues that in order to foster a common culture of EU policing it should aim "to train one third of European police officers and border guards in European affairs over the next five years."³¹

In addition, member states are increasingly relying on the EU's policing and judicial bodies, Europol and Eurojust. In 2007 over 1000 cases were referred to Eurojust, compared to 192 in 2002³². However, this is only part of the story as evidence suggests that for the majority of cases member states circumvent the formal EU agencies. In 2008, the House of Lords' EU Select Committee noted that: "The vast majority of information exchanges between liaison bureaux occurs outside the formal systems...It is reported that up to 80% of bilateral engagement occurs this way."³³

- **A potential three-fold increase in the number of UK citizens extradited under the European Arrest Warrant**

The controversial European Arrest Warrant (EAW) means that member states can no longer refuse to surrender their own nationals to other member states, removing ministerial power over the extradition of UK citizens. Member states' legal and judicial systems still differ substantially and, as a result, the EAW has led to extradition in cases that would have been unlikely to lead to prosecution in the UK. For example,

³⁰ Home Office, 'Explanatory memorandum on EU documents: Council Decision on setting up the standing committee on operational cooperation on internal security', 2 September 2009

³¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: An area of freedom, security and justice serving the citizen, p15; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF>

³² European Commission, "Justice, Freedom and Security in Europe since 2005: An evaluation of the Hague programme and action plan", p25, June 2009: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0263:FIN:EN:PDF>

³³ House of Lords EU Select Committee, 'EUROPOL: Co-ordinating the fight against organised crime', p22-3, November 2008: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/183/183.pdf>

in one recent case, a person was successfully extradited following the alleged purchase of a stolen mobile phone in Poland worth about £20.³⁴

The extradition of UK citizens to face trial in states that may not enforce the same standards of legal and judicial procedure is set to be an increasing occurrence. The implementation of a new data sharing system across member states will see the use of EAWs greatly increased. The Home Office estimates that it will see arrests under the EAW in the UK “rise to between 1050 and 1700” from the “504 EAW arrests made in the UK in 2007”.³⁵

- **Greater harmonisation of legal and judicial systems**

With more and more cooperation between member states’ law enforcement agencies and judicial bodies, the next ‘logical step’ is for greater harmonisation of legal systems and processes. The Commission has called for judgements on civil matters which are “essential to everyday life”, such as “succession and wills, matrimonial property rights and the property consequences of the separation of couples” to be subject to ‘mutual recognition’, whereby a judicial decision taken in another member state should be recognised and executed in all other member states.

The Lisbon Treaty sets out a legal basis to legislate for the mutual recognition of legal judgments in both civil and criminal cases. The problem is that mutual recognition is intended to lead to legal harmonisation. In 2004, the House of Common cross-party European Scrutiny Committee said:

“We draw attention to the danger that measures which are ostensibly concerned with mutual recognition will have the effect of creating uniform rules which will then apply to all cases...Commission proposals on the ‘area of freedom security and justice’ have appeared to treat this ‘area’ as synonymous with a unitary State, with only one legal system.”³⁶

The proposal to extend the principle of mutual recognition to more civil matters therefore poses a potentially fundamental challenge to the independence of member states’ legal systems, which have evolved over lengthy periods of time.

- **A centralised EU database of personal data that increases the risk of mistakes, abuse and corruption**

The Commission has proposed a huge central database, bringing together three existing databases³⁷. They contain information about, for example, people wanted for arrest and extradition, third country nationals to be denied entry to any of the Schengen states, missing people and stolen property. The database would also include the use of “biometric data, in particular fingerprint and photographic data, but

³⁴ Cited in *Liberty*, ‘Liberty’s Second Reading Briefing on the Policing and Crime Bill in the House of Lords – Part 6, Extradition’, p12: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/policing-and-crime-2nd-reading-lords-on-extradition.pdf>

³⁵ *Home Office*, ‘Impact Assessment of Schengen amendments to Extradition Act 2003’, 16 December 2008, p3: <http://www.homeoffice.gov.uk/documents/ia-police-crime-bill-08/ia-schengen-amendments?view=Binary>

³⁶ *House of Commons EU Scrutiny Committee*, ‘Twenty-eighth report’, 14 July 2004, p16, Section 42: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-xxviii/42-xxviii.pdf>

³⁷ *Computing.co.uk*, 25 June 2009: <http://www.computing.co.uk/computing/news/2244822/eu-agency-manage-security>

probably also in due course DNA profiles and retina scans”³⁸ and store “data on up to 70 million people”.³⁹

A major concern with such a large centralised database is that it will be open to abuses or unintentional errors that result in either the data falling into the wrong hands or, more worryingly, miscarriages of justice. Former Swedish Justice Minister Thomas Bodstrom has warned that, "It is commonly known that databases are abused. The bigger they are and the more people who have access to them, the greater the risk of mistakes, abuse and corruption."⁴⁰

- **The expansion of a joint EU intelligence agency**

Since 2005, the EU’s so-called Joint Situation Centre (SitCen), made up of intelligence analysts, has increasingly been used to share national intelligence and counter-terrorism information, giving it a greater role in JHA. SitCen, which reports directly to the EU High Representative for Foreign and Security Policy, is a highly secretive body which operates out of the public eye and away from parliamentary scrutiny.⁴¹

A report by the shadowy ‘Future Group’ in 2008 mentioned the SitCen and suggested its role should be developed.⁴²

And Javier Solana, the EU’s current High Representative for Common Foreign and Security Policy has said,

“The threats we are facing today are not national threats terrorism they are international threats. Therefore, to put together the intelligence which is international with intelligence which is national will be a very important step forward in the coordination of the European Union.”⁴³

The expansion of what is effectively the beginning of an EU ‘secret service’ raises fundamental questions of political oversight in the member states.

³⁸ House of Lords EU Select Committee, ‘Schengen Information System II’, March 2007, p20:

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/49/49.pdf>

³⁹ Commission press release, 12 June 2007:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/802&format=HTML&aged=0&language=EN&guiLanguage=en>

⁴⁰ See Svenska Dagbladet, 16 August 2009: http://www.svd.se/nyheter/inrikes/artikel_3359699.svd

⁴¹ See here for more: Secret Truth, the EU Joint Situation Centre, Jelle van Buuren, 2009,

<http://www.statewatch.org/news/2009/aug/SitCen2009.pdf>

⁴² <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

⁴³ EUBusiness, 9 June 2004, http://www.eubusiness.com/topics/European_Council/EUNews.2004-06-09.3325

2. Introduction

The EU now plays an increasingly active role in policing, judicial and security matters and this is leading to a fundamental tension in the balance between respecting citizens' civil liberties and privacy and safeguarding public security. Justice and home affairs (JHA) ministers are currently negotiating, with the hope of formal agreement by the end of the year, a raft of new proposals in this area to add to the various measures that are already in place and which are starting to take effect.

The so-called "Stockholm Programme", which will be formally agreed in December, is the third in a succession of five-year plans for EU JHA policy. Its themes are not a radical new shift in policy but rather a progression from EU policies already in force and those already in the pipeline.

In addition to JHA, there are other areas of policy where the EU is impacting on citizens' civil liberties and daily lives. The access of copyrighted material on the internet is causing some to call for tough restrictions and punishment for users who access such material illegally. In addition, the European Commission is seeking an agreement to allow member states' tax authorities access to tax records in other member states.

2.1. The impact of the Lisbon Treaty

2.1.1. Loss of the national veto and more legislation

The Lisbon Treaty will mean that all but a few decisions in the area of justice and home affairs will be subject to qualified majority voting rather than unanimity, meaning even less national control over the process. The European Parliament will also gain a greater role in the process through its power to 'co-decide' with national governments⁴⁴.

In its report on the Lisbon Treaty, the House of Lords EU Committee noted that "Some of the most controversial changes introduced by the Treaty of Lisbon are in the area of freedom, security and justice."⁴⁵ The Committee noted that the effect of the loss of national vetoes in JHA "will be an increase in Union activity and the volume of legislation agreed in this area."

Following Ireland's Yes vote on the Treaty there have already been calls to push for more ambitious proposals. Anders Hall, Assistant to Swedish Justice Minister Beatrice Ask, said that the Commission's current proposals were "too modest" given that the Lisbon Treaty scraps the vetoes in JHA. He said,

*"Given that the Stockholm Programme will work in a Lisbon-context, the will level of ambition will increase to a certain extent. But exactly how this will play out is unclear as talks and negotiations are currently taking place between the member states."*⁴⁶

The Lords Committee also noted,

⁴⁴ For an overview see, *Open Europe*, A guide to the Constitutional Treaty, 2008:

<http://www.openeurope.org.uk/research/guide.pdf>

⁴⁵ *House of Lords EU Committee*, "The Treaty of Lisbon: An impact assessment", 13 March 2008, p110:

<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldecom/62/62.pdf>

⁴⁶ *Svenska Dagbladet*, 7 October 2009: http://www.svd.se/nyheter/inrikes/artikel_3610705.svd

“The change will remove Member States’ vetoes in respect of criminal law and policing and legal migration. This means that it will be possible for the UK, in some cases, to be bound by a measure in the area of criminal law or policing against its will”⁴⁷

The Committee qualified this by noting that the UK has negotiated ‘opt-ins’ in JHA, which, in theory, allows the UK more flexibility than other member states to choose what policies to agree to on a case by case basis.

However, the UK’s opt-in comes with some strong caveats: Firstly, it is important to note that an opt-in is not the same as a national veto and that other member states are free to progress without the UK on specific proposals, which could undermine the UK’s negotiating position.

Secondly, the UK could in practice opt in to a proposal only for it to later change substantially as it moves through the EU decision-making process. Once the UK has opted in to a measure, it cannot then opt out again should it decide that the direction of negotiations is not to its liking – a decision to opt in is irreversible. In the words of the House of Lords Committee, “the UK may end up bound by a measure with which it does not fully agree.”⁴⁸

Thirdly, the ‘opt-in’ arrangement in the Lisbon Treaty has been described by the Labour Chairman of the Commons EU Scrutiny Committee as a “bullying clause”, because it forces a country to accept amendments to existing legislation it has already opted in to, or to cease its participation in the legislation altogether. In other words - keeping the status quo will not be an option for the UK.

This is certain to mean tough future choices for the UK. For example, the Commission has announced that it will propose to update the “Dublin II” agreement on asylum (which the UK has opted into) by building “burden sharing” arrangements into it. The UK is opposed to this but would not wish 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.

Committee Chairman Michael Connarty said to David Miliband:

“Do not pretend that this is not a bullying tactic by whoever proposed it to pressurise the UK. If the UK had such a good case for opting in and those who were proposing the measures wanted us in them, they would convince us; they would not bully us. These are bullying clauses and I am shocked that you try to defend them. Honestly, I really am.”

He continued, saying that the new Lisbon Treaty arrangement “puts massive pressure and there are now penalties for not opting in that were not there before.”⁴⁹

⁴⁷ House of Lords EU Committee, ‘The Treaty of Lisbon: An impact assessment’, 13 March 2008, p115: <http://www.publications.parliament.uk/pa/ld200708/ldselect/lducom/62/62.pdf>

⁴⁸ House of Lords EU Committee, ‘The Treaty of Lisbon: An impact assessment’, 13 March 2008, p168: <http://www.publications.parliament.uk/pa/ld200708/ldselect/lducom/62/62.pdf>

⁴⁹ See, European Scrutiny Committee, UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE RT HON DAVID MILIBAND MP, MR PATRICK REILLY, MR MIKE THOMAS and MR KEVAN NORRIS, Q246 Chairman, 16 October 2007: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc1015-ii/uc101502.htm>

A further point to note is that the UK's right to opt in could allow UK governments to take part in the various measures that are more focussed on security and favour the control of the state without taking part in the EU measures designed to safeguard citizens' rights and privacy.

2.1.2. The ECJ will be able to overrule the UK in policing, judicial and security policy

The Treaty will also give the European Commission greater powers to initiate JHA legislation and the European Court of Justice (ECJ) unprecedented new powers to enforce it⁵⁰. The House of Lords EU Committee noted that: "For the first time, Member States will be able to be taken to the Court for failure to implement properly EU legislation in the area of criminal law and policing."⁵¹

The Committee added, "The expansion of the ECJ's jurisdiction over criminal and civil matters is over time bound to be matched by an expansion in the range of the legal issues coming before it." As with other areas of EU policy, the ECJ, through its rulings, is likely to further integration and harmonisation in this field.

The Lisbon Treaty therefore marks a significant shift of powers away from national governments to the EU in the field of justice and home affairs. Despite increased powers for the European Parliament in this field, the lack of public engagement with this institution, as evidenced by the increasingly poor voter turnout in elections to the Parliament, makes it much more difficult for citizens to safeguard their civil liberties and rights under the Lisbon Treaty because it allows more and more EU legislation to be passed in this area.

Citizens across the EU must ask themselves whether curtailing their civil liberties is a fair price to pay for increased 'security' or bureaucratic efficiency. The growing number of measures being agreed at the EU level means that citizens run the risk of ceding an irreversible level of power to the state. The nature of EU legislation – a political compromise reached by 27 member states – means that it is virtually impossible to change legislation once it has been agreed.

2.2. JHA will receive the highest percentage budget increase in 2010

JHA is also one of the 'growth areas' of the EU budget. According to the European Commission's website, "The part of the 2010 budget to receive the biggest boost in spending (in line with the EU's seven-year financial programming) will be projects to fight crime, terrorism and manage migration flows, increasing by 13.5% to almost €1bn."⁵²

This reflects a clear intention to bolster the EU's powers and action in this area in the near future – and all at the expense of the taxpayer.

	2008	2009	2010
Budget appropriations (euros)	705,706,470	923,429,198	1,034,555,601
% increase on previous year	-	18.5%	12.1%

⁵⁰ See Brian Donnelly, Justice and Home Affairs in the Lisbon Treaty: A constitutionalising clarification?, *European Institute of Public Administration*, 2008, 1-2:

http://www.eipa.eu/files/repository/eipascope/20080509184107_SCOPE2008-1-4_BrendanDonnelly.pdf

⁵¹ House of Lords EU Committee, 'The Treaty of Lisbon: An impact assessment', 13 March 2008, p127:

<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldecom/62/62.pdf>

⁵² See Commission website, 'EU budget at a glance – Next year':

http://ec.europa.eu/budget/budget_detail/next_year_en.htm

2.3. The UK Government's tough talk of 'independence' is a cover-up

The Government has been keen to give the impression that the UK is removed from EU cooperation in JHA. For example, after negotiating the Lisbon Treaty Gordon Brown told Parliament that "we have negotiated to protect the British national interest" and that:

*"Legally binding protocols which prescribe in detail our sovereign right to opt-in on individual justice and home affairs measures where we consider it in the British interest to do so, but alternatively to remain outside if that is in our interests."*⁵⁴

However, the Government's tough rhetoric and assertion that the UK can 'pick and choose' which policies it opts into is in fact a smokescreen.

In practice, the UK Government's record in this area has been mixed to say the least. While at times it has failed to even engage in negotiations, at others, it has driven policy by exporting domestic initiatives to the rest of the EU, particularly those that increase the power of the state over the individual. This method of 'exporting' UK initiatives to the EU is akin to policy making via the back door, and circumvents proper democratic scrutiny.

Much of the EU's foreseen cooperation in the field of JHA will centre on the sharing of data, ranging from citizens' DNA to records of communication by telephone and email. This is particularly important for UK citizens because the UK Government holds so much more data on its citizens than other EU governments do.

The UK is in a complicated position when it comes to EU justice and home affairs policy. Firstly, the UK is not part of the Schengen area, the borderless zone of the EU, which forms the basis for much of the EU cooperation in cross-border policing, visa requirements and so on. In addition, for the purposes of its domestic audience, the UK Government has been keen to appear less 'integrated' in such a sensitive area of policy.

However, at the same time, the UK Government has become increasingly active in using the state to 'improve security' and fight crime and terrorism, both domestically and within the EU.

2.4. Making decisions at the EU level reduces citizens' ability to protect their rights

The recent pace of justice and home affairs policymaking highlights some important issues with respect to how decisions are made and negotiated, how proposals become law in the EU and the UK, and whether policy-makers are accountable to their citizens.

⁵³ See EU budget on-line, Volume 4 (Section 3) Title 18: http://eur-lex.europa.eu/budget/data/AP2010_VOL4/EN/nmc-titleN18280/index.html#top. Figures differ from Commission website because this includes appropriations for EU citizenship programmes

⁵⁴ European Council statement to the Commons, 17 December 2007: <http://www.number10.gov.uk/Page14070>

The problem with JHA legislation at the EU level is the lack of accountability and openness. But member states have been known to use the EU as a means of bypassing domestic institutions and public scrutiny in order to legislate.

A House of Lords report in 2006 noted that when interior ministers from the EU's six largest member states – also known as the G6 – met at the German Baltic resort of Heiligendamm on 22 and 23 March 2006:

“They discussed almost every aspect of EU policy of interest to them, and in many cases reached firm conclusions on the action which should be taken, and the timetable for it. However in the United Kingdom the meetings went almost entirely unnoticed. The Home Office did not issue a press notice, and the then Home Secretary, the Rt Hon Charles Clarke MP, who had attended the meeting on behalf of the United Kingdom, did not make an oral or written statement to Parliament. So far as we have been able to discover there was no contemporaneous comment in the broadcast media, and only minimal comment in any of the broadsheets.”⁵⁵

In addition, growing EU cooperation with the US on ‘homeland security’ issues has led to a number of transatlantic agreements ranging from fast-track extradition to granting access to confidential financial data. Such decisions are taking place without any effective scrutiny and without any genuine democratic accountability.

In the Council of Ministers, which is the forum for national ministers and where the majority of JHA policy is currently discussed and agreed, documents are often unpublished. This makes it impossible for the public and the media to hold governments to account if they choose the EU as a vessel for controversial legislation.

⁵⁵ *House of Lords European Union Select Committee*, ‘Behind closed doors: the meeting of the G6 Interior Ministers at Heiligendamm’, 19 July 2006, p5:
<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldcom/221/22102.htm>

3. The state of play: Measures already agreed or in force

3.1. The Data Retention Directive – the mass collection and storage of citizens' communications data

The EU Data Retention Directive, agreed in 2006 and implemented in 2009, is a prime example of a UK Government initiative which has been exported to the EU.

The Directive was tabled after the Madrid bombings in March 2004 and then fast-tracked under the British EU Presidency after the London terrorist attacks in July 2005.

The Directive⁵⁶ requires telephone operators and internet service providers to store data regarding every phone call, text message, email and website that their users access and make it available to government authorities. Although this does not include the content of e-mails or a recording of a phone call, it tracks the correspondence between citizens.

UK authorities, including local councils as well as the police, can access this data under the Regulation of Investigatory Powers Act (RIPA). A report compiled by Sir Paul Kennedy, the Interception of Communications Commissioner, has revealed that in 2008 a total of 504,073 requests were made to access communications data, the equivalent of one request every minute⁵⁷.

The report also disclosed that hundreds of errors had been made in these "interception" operations, with the wrong phone numbers or emails being monitored⁵⁸.

There is already evidence of breaches of privacy within UK Government databases. Nine local authority staff were recently arrested for accessing personal records of celebrities and personal acquaintances held on the core database of the Government's National Identity Scheme⁵⁹.

Because the data retention legislation is derived from the EU it was allowed to pass through Parliament as secondary legislation, as a Statutory Instrument (SI), rather than as primary legislation. SIs are subject to little or no scrutiny by MPs, practically handing the Government a blank cheque to legislate.

The Conservatives' Shadow Security Minister Baroness Pauline Neville-Jones, who failed in her attempt to force the Government to introduce EU rules on data retention through primary legislation, has said:

"The Government cannot expect us to support an instrument where there is such uncertainty over what it will do and how it will work in practice. The Government promised – I am sure it was a promise that was seriously meant

⁵⁶ See Directive 2006/24/EC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF>

⁵⁷ *Telegraph*, 10 August 2009: <http://www.telegraph.co.uk/news/newstoppers/politics/lawandorder/6001357/A-request-to-snoop-on-public-every-60-seconds.html>

⁵⁸ Report of the Interception of Communications Commissioner for 2008, July 2009, p7: <http://www.official-documents.gov.uk/document/hc0809/hc09/0901/0901.pdf>

⁵⁹ See *Computer Weekly*, 4 August 2009: <http://www.computerweekly.com/Articles/2009/08/04/237162/council-workers-sacked-for-snooping-personal-details.htm>

*– a well informed debate, characterised by openness, reason and reasonableness. The Home Secretary wants us to achieve consensus, and we would like to be able to join that. I hope that the Government will withdraw the regulations today and enable us to have a proper debate on primary legislation.*⁶⁰

The Data Retention Directive eventually passed through Parliament largely unnoticed by the media and the public. It was only when the Government attempted to ‘gold plate’ the Directive, by introducing measures over and above the EU requirements, that it hit the headlines. The Government’s plan to build a central database to hold all the communications data, which would have required primary legislation, was greeted with sufficient public outrage⁶¹ that the proposal was eventually shelved⁶².

The second issue with the Data Retention Directive is its legal base in EU law. Ireland, supported by Slovakia, took a case to the ECJ claiming that the Directive should only be implemented under the EU’s justice and home affairs provisions (as opposed to under its single market provisions), thereby requiring unanimous agreement between member states and giving each country a final veto over the proposal.⁶³ The Irish government feared that allowing the Directive to be decided on under the single market provisions, and therefore by qualified majority voting, would allow a precedent to be set which would result in the introduction of more laws in the sensitive area of justice and policing by qualified majority voting and co-decision with Members of the European Parliament, rather than by unanimous agreement between member states’ governments.⁶⁴

The UK Government, desperate to get its legislation, was apparently willing to give up its national veto in order to get it through. According to the Government’s impact assessment:

“Having established good foundations for retention of communications data in the UK, the Government pursued agreement across Europe by co-sponsoring a Framework Decision along with Ireland, France and Sweden in 2004. Later, the legal basis changed to First Pillar Article 95 of the EC Treaty, resulting in this Directive in 2006. Ireland – along with Slovakia – opposed this change in legal basis, although the outcome of this legal challenge is unlikely to be known in advance of the implementation deadline.”⁶⁵

3.2. The Prüm Treaty – sharing DNA and fingerprint data across the EU

While the UK played a leading role in the Data Retention Directive it was alarmingly absent from negotiations determining the shape of the Prüm Treaty. It was the Prüm Treaty⁶⁶ also known as the Prüm Convention, originally signed by Belgium, Germany, Spain, France, Luxembourg, Netherlands and Austria in May 2005, which first

⁶⁰ Hansard, 24 March 2009, Column 627:

<http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90324-0011.htm>

⁶¹ See *Independent*, 21 October 2008; <http://www.independent.co.uk/news/uk/politics/big-brother-database-threatens-to-break-the-back-of-freedom-967673.html>

⁶² See *Telegraph*, 28 April 2009: <http://www.telegraph.co.uk/news/newstopics/politics/5230459/National-database-dropped-but-all-our-communications-will-still-be-monitored.html>

⁶³ *EUobserver*, 9 February 2009: <http://euobserver.com/9/27573>

⁶⁴ See *Irish Independent*, 11 February 2009: <http://www.independent.ie/national-news/european-court-rules-against-ireland-in-data-row-1635176.html>

⁶⁵ See Regulatory Impact Assessment for the Data Retention (EC Directive) Regulations 2007, p5: http://www.opsi.gov.uk/si/si2007/em/uksiem_20072199_en.pdf

⁶⁶ For a copy of the Treaty, see here:

<http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf>

allowed for the exchange of all DNA, fingerprint and vehicle data between national police authorities amongst member states.

In 2004, after a meeting of EU JHA ministers from the UK, Spain, Italy, France and Germany, Home Secretary David Blunkett said:

*"The larger EU countries have a particular role to play in developing DNA and fingerprint databases and tracking systems and encouraging other member states to focus on key measures to help us share intelligence. The new borders created by enlargement of the EU earlier this year mean it is even more important to play our part to help the accession countries be as effective as they can be in protecting us from terrorism and organised crime like drug and people trafficking. This goes hand in hand with the development of biometrics, which is aimed at clamping down on identity and document fraud."*⁶⁷

The UK signed up in 2007 at the same time as the Treaty was incorporated into EU law⁶⁸, and many of its effects are due to come into force within the next two years⁶⁹.

The House of Lords' European Select Committee suggested that the Treaty was rushed through into EU law under the German EU Presidency. Highlighting the secrecy in which JHA legislation is often agreed, the Committee stated: "We put on record our regret that the German Presidency should have been unwilling to discuss with the Committee of a national Parliament an initiative to which we, like them, attach great importance"⁷⁰.

Joan Ryan MP, Parliamentary Under-Secretary of State at the Home Office, told the Lords Committee that the UK had been invited to take part in negotiations for the Prüm Treaty but declined to do so because it contained provisions which the Government found unacceptable. The Lords' report remarks:

*"We were perplexed by this reply, and pressed the Minister to explain why, if there were provisions in the draft which were unacceptable, the Government had not taken part in the negotiations and attempted to have those provisions amended or deleted when there was an opportunity to do so, rather than waiting until the Treaty was signed."*⁷¹

An earlier report from the Lords Committee remarked that the negotiation of the Prüm Treaty "is a perfect illustration of the dangers of a small group of Member States taking steps which pre-empt negotiations already taking place within the EU institutions." It added that:

"Any Member State wishing to join the Convention must take it as it finds it. If the Convention does become part of the legal framework of the EU, that framework will for practical purposes have been imposed by seven Member

⁶⁷ Home Office press release, 6 July 2004: http://press.homeoffice.gov.uk/press-releases/European_Co-Operation_To_Secure_?version=1

⁶⁸ European Commission, press release, 12 June 2007: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/803>

⁶⁹ For implementation, see COUNCIL DECISION 2008/615/JHA, Article 36: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0001:0011:EN:PDF>

⁷⁰ House of Lords' European Union Select Committee, 'Prüm: An effective weapon against terrorism and crime', 9 May 2007, p7: <http://www.publications.parliament.uk/pa/ld200607/ldselect/lducom/90/90.pdf>

⁷¹ House of Lords' European Union Select Committee, 'Prüm: An effective weapon against terrorism and crime', 9 May 2007, p12: <http://www.publications.parliament.uk/pa/ld200607/ldselect/lducom/90/90.pdf>

*States on the other eighteen; and those eighteen include the United Kingdom.*⁷²

Controversially, in signing the Treaty, the Government chose to ‘override’ Parliament’s ‘scrutiny reserve’, which allows the EU committees in the Lords or the Commons to request more information before the Government signs up to EU agreements. This meant that there could only be a Parliamentary debate about the various elements of the Prüm Treaty after the UK had already agreed to them in the EU Council⁷³.

Peter Hustinx, the European Data Protection Supervisor, suggested that “the Prüm Convention has been set up as a ‘laboratory’ for cross border exchange of information, in particular DNA and fingerprints.”⁷⁴

British Conservative MEP Syed Kamall described the Prüm Treaty as:

*“A dangerous pet project of the German presidency. In forcing it through, the Germans have ignored the views of the European Parliament and the concerns of the EU data protection chief. We are sleepwalking into a Big Brother Europe while our government stands idly by.”*⁷⁵

The Lords’ Committee noted that the exchange of DNA data among the 27 member states is problematic because of the differing standards of data collection and retention in the member states. In the UK, since January 2006 it has been possible for persons arrested to have their DNA and fingerprints taken compulsorily even if they are not charged⁷⁶, a policy challenged by the European Court of Human Rights⁷⁷.

As a result, around 5.2 percent of the UK population’s DNA data is held on record, while in the US it is only 0.5 percent and the EU average is 1.1 percent⁷⁸. This is likely to lead to the UK being subject to a great deal more requests for DNA data than other member states. Besides the fact that UK citizens’ data will be disproportionately available, the huge cost of the operation will be funded directly by UK taxpayers. The EU Framework Decision clearly states: “Each Member State shall bear the operational costs incurred by its own authorities in connection with the application of this Decision.”⁷⁹

⁷² House of Lords European Union Select Committee, ‘Behind closed doors: the meeting of the G6 Interior Ministers at Heiligendamm’, 19 July 2006, p9:

<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/221/22102.htm>

⁷³ See Letter from Joan Ryan MP, Parliamentary Under Secretary of State, Home Office, to the Chairman of the House of Lords European Union Select Committee, 11 June 2007:

<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/92/92214.htm>

⁷⁴ Evidence to House of Lords’ European Union Select Committee: ‘Prüm: An effective weapon against terrorism and crime’, 9 May 2007, Minutes of Evidence, p32:

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/90/90.pdf>

⁷⁵ Euractiv, 13 June 2007: <http://www.euractiv.com/en/justice/eu-adopts-dna-data-sharing-system-crime-crackdown/article-164547>

⁷⁶ House of Lords’ European Union Select Committee: ‘Prüm: An effective weapon against terrorism and crime’, 9 May 2007, p17: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/90/90.pdf>

⁷⁷ See *Guardian*, 4 December 2008: <http://www.guardian.co.uk/uk/2008/dec/04/law-genetics>

⁷⁸ Home Office, ‘DNA Expansion Programme 2000–2005: Reporting Achievement’, p5, October 2005:

<http://police.homeoffice.gov.uk/publications/operational-policing/DNAExpansion.pdf?view=Binary>

⁷⁹ COUNCIL DECISION 2008/615/JHA: [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0001:0011:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0001:0011:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0001:0011:EN:PDF)

No impact assessment was undertaken before the UK signed up to the Treaty in order to assess its costs and benefits⁸⁰.

3.3. Biometric passports – the blueprint for an EU-wide ID card?

The use of biometric passports, which includes data on fingerprints, the iris of the eye, and other facial features, is now a standard EU requirement following a European Council Regulation in 2004⁸¹. All new passports are now issued with the data. Currently, the data is stored by national authorities in the member states, which are responsible for the protection of the data⁸².

However, the EU Regulation requires biometric identifiers for EU citizens to be compatible with the EU's Visa Information System (VIS) and Schengen Information System (SIS II). It says:

“The European Council of Thessaloniki, on 19 and 20 June 2003, confirmed that a coherent approach is needed in the European Union on biometric identifiers or biometric data for documents for third country nationals, European Union citizens’ passports and information systems (VIS and SIS II).”⁸³

These systems allow personal data to be shared throughout the EU and are increasingly being used by national police forces. While it may remain a distant possibility, an EU-wide system for the wholesale sharing of biometric data of all EU citizens is essentially only one step away.

3.4. European Security Research programme – developing mass surveillance technologies with taxpayers’ money

The EU, through the Commission and its European Security Research programme⁸⁴, is actively involved in the development of new technologies for the purposes of security. The programme, which uses funds from the EU budget, is run under the stewardship of the European Security Research Advisory Board, which is comprised of “high level strategists”, including security industry representatives as well as the European Defence Agency and Europol⁸⁵.

Projects currently funded⁸⁶ by the Commission’s research programme include the “INDECT” project whose main aim is:

“the elaboration of a concept, method and technology for intelligent monitoring of objects and urban areas for the purpose of automatic detection of threats related to crime, terrorism and violence acts.”

⁸⁰ House of Lords’ European Union Select Committee: ‘Prüm: An effective weapon against terrorism and crime’, 9 May 2007, p18: <http://www.publications.parliament.uk/pa/ld200607/ldselect/lducom/90/90.pdf>

⁸¹ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:385:0001:0006:EN:PDF>

⁸² COUNCIL REGULATION (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, (4), p1

⁸³ COUNCIL REGULATION (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, (1), p1

⁸⁴ See http://ec.europa.eu/enterprise/security/index_en.htm

⁸⁵ For a detailed discussion of the European Security Research programme see Ben Hayes, ‘Arming Big Brother: The EU’s Security Research Programme’, *Transnational Institute Briefing Series No 2006/1*, 2006: <http://www.statewatch.org/news/2006/apr/bigbrother.pdf>

⁸⁶ For a full list of projects currently funded by the EU, see http://ec.europa.eu/enterprise/security/articles/article_2009-05-06_en.htm

This includes the “monitoring of various people clusters and detection of abnormal behaviour and situations of danger” through “Intelligence gathering from the web and monitoring of suspicious activities in the internet”⁸⁷. The project, at a total cost of €14.8 million, is more than two-thirds funded by European taxpayers via the EU budget, with an EU contribution of €10.9m.

A separate project, “Automatic Detection of Abnormal Behaviour and Threats in crowded Spaces” (ADABTS)⁸⁸, is seeking to develop models of “suspicious behaviour” so these can be automatically detected using CCTV and other surveillance methods. The system would analyse the pitch of people's voices, the way their bodies move and track individuals within crowds. The project has received €3.2 million of EU funding and has the cooperation of the UK's Home Office.

The ADABTS system “will communicate results to the various kinds of identified actors: Security stakeholders like European and national authorities, police organisations or event organizers; Security system operators and security service companies; Security system integrators; Technology developers; the Research communities for psychology, human factors, and signal processing communities.”

Similarly, the “suspicious and abnormal behaviour monitoring using a network of cameras and sensors for situation awareness enhancement” (SAMURAI)⁸⁹ project aims to “Develop an abnormal behaviour detection system based on a heterogeneous sensor network consisting of both fix-positioned CCTV cameras and mobile wearable cameras with audio and positioning sensors.” SAMURAI has received €2.48 million of EU funding.

There is little or no democratic accountability about the funding of these types of projects, with citizens unable to even find out who has given them approval.

3.5. The Inspire Directive – granting authorities and the public access to information about people's health

In 2007, the EU's so-called Inspire Directive⁹⁰ entered into force. The Directive will be implemented in various stages, with full implementation required by all member states by 2019. “Inspire” stands for “infrastructure for spatial information in Europe”. It sets out common EU rules for information and information sharing, primarily relating to environmental and geographical data.

However, the Directive also includes common provisions for data on public health, including requirements for authorities to make information about citizens' personal health available to both authorities in other member states and the public⁹¹.

⁸⁷ See ‘Intelligent information system supporting observation, searching and detection for security of citizens in urban environment’:

http://cordis.europa.eu/fetch?CALLER=FP7_SECURITY_PROJ_EN&ACTION=D&DOC=22&CAT=PROJ&QUERY=012452b3390d:40fc:0a5d21a8&RCN=89374

⁸⁸ See

http://cordis.europa.eu/fetch?CALLER=FP7_SECURITY_PROJ_EN&ACTION=D&DOC=36&CAT=PROJ&QUERY=012452b3390d:40fc:0a5d21a8&RCN=91158

⁸⁹ See:

http://cordis.europa.eu/fetch?CALLER=FP7_SECURITY_PROJ_EN&ACTION=D&DOC=21&CAT=PROJ&QUERY=01244e0de484:60bb:773c0d03&RCN=89343

⁹⁰ Directive 2007/2/EC of the European Parliament and of the Council, see

<http://inspire.jrc.ec.europa.eu/>

⁹¹ *Dagens Nyheter*, “DI varnar för direktiv från EU”, 17 March 2009, see

<http://www.dn.se/fordjupning/europa2009/di-varnar-for-direktiv-fran-eu-1.823201>

The Swedish Data Inspection Board – a governmental agency set up to protect the individual's privacy in the information society – has warned that this provision could seriously threaten individuals' right to privacy⁹². The Board warned that the Directive could "have far reaching consequences for individuals' right to privacy since both authorities and the public can gain access to information about people's health."

It also criticised the law for not having been subject to a proper impact assessment, and said that the law "does not fulfil the requirements that one reasonably can expect from a legal matter with such potentially significant implications for the right to privacy." The Board therefore said it could not support the proposal but is powerless to do anything about it because it has been agreed by the EU.

3.6. EU-US cooperation – concluding international agreements without the approval of national parliaments

Since the terrorist attacks of 9/11 there has been an increasing tendency for the EU to cooperate with the US in security, policing and immigration issues. The Future Group's report recognised that EU-US cooperation has reached a critical point and that:

"By 2014 the European Union should also make up its mind with regard to the political objective of achieving a Euro-Atlantic area of cooperation with the United States in the field of Freedom, Security and Justice."⁹³

EU-US cooperation in this field is particularly problematic in terms of democratic accountability and civil liberties, because these agreements are being made without any effective scrutiny: on the European level the European Parliament is often excluded and on the member state level national parliaments have little or no influence on agreements made between the US and the European Council, which represents national governments.

3.6.1. The EU-US extradition agreement

In June this year the EU agreed a new extradition agreement with the US⁹⁴. The EU-US agreement allowed member states to agree more far-reaching extradition arrangements, and the UK has a bilateral with the US that does so⁹⁵, but as the Liberal Democrats' Shadow Home Secretary Chris Huhne warned, "If this becomes an EU-wide arrangement, it could be even more difficult for any future government to unpick. This would do nothing to prevent more cases like the unfair extradition of Gary McKinnon."⁹⁶

⁹² *Datainspektionen*, "Genomförande av Inspire-direktivet i svensk lagstiftning; förslag till ny miljöinformationslag och – förordning m.m.", 13 March 2009, see:

<http://www.datainspektionen.se/Documents/remissvar/2009-03-16-inspire.pdf>

⁹³ *Future Group*, 'Freedom, Security, Privacy – European Home affairs in an open world', June 2008, p27. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

⁹⁴ *The Parliament*, 8 July 2009: <http://www.theparliament.com/policy-focus/justice/justice-article/newsarticle/eu-us-extradition-agreement-set-to-boost-international-law-enforcement-cooperation/>

⁹⁵ For an analysis of the UK-US extradition agreement see, *Justice*, 'Briefing on Extradition to the USA: The UK-US Treaty of March 2003 and the EU-US Agreement of June 2003', July 2003:

<http://www.justice.org.uk/images/pdfs/extraditionusa2.pdf>

⁹⁶ Press release, 6 July 2009:

http://chrishuhne.org.uk/news/000727/government_must_renegotiate_lopsided_us_extradition_treaty_huhne.html

Therefore if a subsequent UK Government wished to fundamentally renegotiate the UK's extradition agreement with the US it would also need to unravel the EU-US agreement – a practically impossible task.

Parliamentary scrutiny of this decision was virtually non-existent. The UK Government originally said that it would only be able to present the UK's Parliament's EU committees with a confidential text of the agreement, excluding the possibility of full scrutiny from the rest of Parliament.

After putting pressure on the Government and the EU Presidency the committees were eventually given less than a month to review it publicly but by that time, the negotiations between the EU and the US had been concluded. The House of Lords Committee welcomed the de-classification of the documents but said that it regretted "the tight deadlines imposed on the Committee, which left limited time to examine the complex issues arising from them."⁹⁷

The Committee commented that:

"The decision of the Presidency to retain the 'confidential' classification on these Agreements after the negotiations between the EU and the US had been concluded and their content had been agreed both by the EU Member States and by the US was unnecessary and contrary to the democratic accountability that ought to inform decisions by EU institutions regarding access to documents."⁹⁸

3.6.2. Granting US officials access to sensitive financial data

The EU has recently renewed an agreement with the US to allow its officials access to private banking data. The agreement allows SWIFT, a huge inter-bank network based in Belgium, to disclose to law enforcers data including bank account numbers, addresses and names of senders and recipients of financial transactions, as well as the amount transferred. SWIFT holds the data of some 8,000 banks and operates in 200 countries⁹⁹.

The agreement was mired in secrecy. EU JHA ministers decided to ignore their own legal experts' advice which said that the European Parliament should have co-legislative powers on the issue. Instead, the Council of Foreign Ministers decided to give the Swedish Presidency the exclusive rights to handle the talks with the US¹⁰⁰.

The Swedish Parliament's EU Scrutiny Committee – which must give its assent before the Swedish government signs up to an EU decision – was given only 30 minutes notification via a text message to prepare a decision, and was given no documents to inform it on what the decision was about¹⁰¹.

⁹⁷ House of Lords EU Select Committee, 'EU/US agreements on extradition and mutual legal assistance', 15 July 2003, p7:

<http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/153/153.pdf>

⁹⁸ House of Lords EU Select Committee, 'EU/US agreements on extradition and mutual legal assistance', 15 July 2003, p8:

<http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/153/153.pdf>

⁹⁹ See BBC, 28 July 2009: <http://news.bbc.co.uk/1/hi/world/europe/8172035.stm>

¹⁰⁰ EUobserver, 29 July 2009: <http://euobserver.com/22/28506>

¹⁰¹ Swedish Television, 31 July 2009

4. What to expect next: Pending proposals

4.1. The “Stockholm Programme” – a new five year strategy for JHA

Much of the Stockholm Programme will be based on the recommendations of the informal ‘Future Group’, which was made up of ministers from previous, current and future EU presidencies, which first met in 2007 under German stewardship¹⁰².

The UK was represented by Baroness Scotland, who had observer status to assess the implications for Britain, whose legal system, unlike that of continental Europe, is based on the common law¹⁰³.

The Stockholm Programme will be the EU’s most ambitious foray in this field, with Swedish Justice Minister Beatrice Ask saying, “Our aim should be a holistic objective in law enforcement information management, comprising data security, data protection and law enforcement needs.”¹⁰⁴

Jacques Barrot, the European Justice and Security Commissioner, has publicly declared that the aim is to “develop a domestic security strategy for the EU”. He added, “National frontiers should no longer restrict our activities”¹⁰⁵. In its document on the Stockholm Programme, the Commission has said that “In criminal matters such as terrorism, organised crime and attacks on the Union’s financial interests, only action at European level can deliver effective results.”¹⁰⁶

The Stockholm Programme is not a defined set of legislative proposals but a broad ‘strategy’ encompassing a number of the policy areas under the EU’s ‘competence’. Nonetheless, this strategy will determine the areas and types of proposals that will emerge from the EU over the next five years, with the European Data Protection Supervisor noting that it will have “considerable impact on the policy that the institutions will develop in the area concerned, as many of the concrete legislative and non legislative actions will stem from the programme.”¹⁰⁷

The opaque nature of the negotiating process and the lack of tangible policy proposals at this stage is an important issue in itself. National ministers are currently determining the contours of the EU’s role in one of the most sensitive areas of citizens’ lives for the next five years with little or no public scrutiny.

The Swedish EU Presidency devoted the informal meeting of JHA ministers in Stockholm on 15-17 July 2009 entirely to the Stockholm Programme. The Programme will next be dealt with formally in the JHA Council on 30 November to 1 December and in the General Affairs and External Relations Council (GAERC) on 7-

¹⁰² See,

http://www.eu2007.bmi.bund.de/nn_1052590/EU2007/EN/ServiceNavigation/PressReleases/content_Pressemitteilungen/Eltville_en.html

¹⁰³ *Guardian*, 7 August 2008: <http://www.guardian.co.uk/world/2008/aug/07/eu.uksecurity>

¹⁰⁴ Speech at the College of Europe, Brussels, 4 March 2009:

<http://www.sweden.gov.se/sb/d/10959/a/122436>

¹⁰⁵ *Telegraph*, 10 June 2009: <http://www.telegraph.co.uk/news/worldnews/europe/eu/5496912/EU-security-proposals-are-dangerously-authoritarian.html>

¹⁰⁶ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: An area of freedom, security and justice serving the citizen, p12; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF>

¹⁰⁷ Opinion of the European Data Protection Supervisor, 10 July 2009:

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2009/09-07-10_Stockholm_programme_EN.pdf

8 December, before it is adopted by European leaders at the European summit on 10-11 December¹⁰⁸.

The European Commission and national ministers have been keen to present the Stockholm Programme as an attempt to 'rebalance' the EU's current emphasis on security with greater rights for the individual. Swedish Justice Minister Beatrice Ask said:

"The last years of activity in the area have [for] many reasons been focused on repressive instruments. Therefore we can see an increased need to balance these measures with initiatives securing the rule of law and the rights of the individual. Individual rights in criminal proceedings, rules on international protection and rules of data protection are issues to work with."¹⁰⁹

It remains to be seen whether this intention will translate into substantial results. But the evidence suggests that any renewed emphasis on the individual should be seen as compensation for greater state interference rather than as a genuine attempt to redress the balance between the need for security and individuals' rights. For example, the emphasis on greater data protection merely compensates for the growing stock-piles of personal data stored by and shared among member states.

There are various proposals in the pipeline, including:

4.1.1. Collecting and sharing surveillance data across the EU

The advent of more and more sophisticated technologies and surveillance techniques is offering policymakers greater incentives to monitor and access sensitive personal and communications data. The Future Group's report recognised this saying that:

*"Balancing citizens' expectations of privacy against their expectations of proactive protection is not a new dilemma for public security organisations, but it is taking on an ever more acute form."*¹¹⁰

The 'Principle of Availability', whereby law enforcement authorities in one member state grant access to the information they hold to authorities in other member states, was first established under the 'Hague Programme', the predecessor to the Stockholm Programme.

However, the Stockholm Programme looks set to go further with the Future Group suggesting that:

"It seems clear that in formulating a future EU policy on the exchange of information, this is an opportune moment to go beyond the limited perspective

¹⁰⁸ Swedish Presidency press release, 10 June 2009; see, http://www.se2009.eu/en/meetings_news/2009/6/10/swedish_ministers_welcome_commission_communication_on_the_stockholm_programme

¹⁰⁹ Speech at the College of Europe, Brussels, 4 March 2009: <http://www.sweden.gov.se/sb/d/10959/a/122436>

¹¹⁰ *Future Group*, 'Freedom, Security, Privacy – European Home affairs in an open world', June 2008, p43. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-ija-report.pdf>

*of a case-by-case approach and aim for a holistic objective in law enforcement information management”.*¹¹¹

The Future Group's report describes the amounts of data now available to state agencies as a “digital tsunami”¹¹². Rather than evaluating the benefits of various technological developments on their merits, the EU and its member states seem intent on harnessing all that is available. The report suggested that member states need to ensure that “all data streams are digital and capable of being meshed together”.¹¹³

Similarly, Beatrice Ask, Swedish Minister for Justice, has said that, “There is distinct need to work out an ‘EU master plan on information exchange between law enforcement authorities’”.¹¹⁴

Proposals also include the continued extension of the European Border Surveillance System (Eurosur) and the EU's border agency Frontex, “in order to share surveillance data” between member states¹¹⁵. The increased use of technology is again a feature, such as “an electronic system for recording entry to and exit from Member States' territory” and the increased use of biometric data.

4.1.2. Sharing sensitive personal data collected from travel operators

The EU plans to make all member states share Passenger Name Record (PNR) data collected by travel companies, which includes 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. It can also include age, fare details, form of payment, home address, passenger phone number and special meal requirements.

The EU already has a data-sharing agreement with the US on PNRs, and the European Commission website makes clear that the US Department of Homeland Security can access passenger data including on such sensitive areas as racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information concerning the health or sex life of the individual¹¹⁶. It may use the data “exceptional cases where life is at risk.”

The proposal to share PNRs among EU member states, which is still being discussed by JHA Ministers in the Council, envisages using the data as part of efforts to combat terrorism and organised crime. However, some governments, including

¹¹¹ *Future Group*, ‘Freedom, Security, Privacy – European Home affairs in an open world’, June 2008, p44. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

¹¹² *Future Group*, ‘Freedom, Security, Privacy – European Home affairs in an open world’, June 2008, p43. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

¹¹³ *Future Group*, ‘Freedom, Security, Privacy – European Home affairs in an open world’, June 2008, p43. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

¹¹⁴ Speech at the College of Europe, Brussels, 4 March 2009:
<http://www.sweden.gov.se/sb/d/10959/a/122436>

¹¹⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: An area of freedom, security and justice serving the citizen, p18; see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF>

¹¹⁶ *European Commission*, ‘The Passenger Name Record (PNR): FREQUENTLY ASKED QUESTIONS’, MEMO/07/294, 13 July 2007:
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/294&format=HTML&aged=0&language=EN>

the UK, want to extend the use of the data for offences beyond terrorism and organised crime to any “serious crime”, and also immigration control.

The Government is also seeking to extend the proposal’s scope from just air travel to cover other forms of travel, such as by train or sea or at least make sure the EU legislation does not prevent the UK from doing so. The UK has also called for the proposal to cover intra-EU flights as well as domestic flights rather than just EU flights to third countries¹¹⁷.

In May 2006, the European Court of Justice annulled the EU-US arrangement to share PNR data, ruling that it failed to meet EU data privacy standards. The European Parliament, backed by the European Data Protection Supervisor, had applied to the ECJ for annulment of both decisions¹¹⁸.

The EU and the US reached a new agreement in 2007¹¹⁹, which the European Parliament again criticised as “substantially flawed” in a resolution¹²⁰. The Parliament’s Rapporteur, Dutch MEP Sophie in ’t Veld, said:

“The Agreement is supposed to provide a legal basis for carriers to transfer personal data to US authorities, as well as ensure adequate protection of personal data and rights of EU citizens. On the latter it fails miserably.”¹²¹

In addition, the US demanded that documents relating to the negotiations of the deal remain secret for ten years. In a letter to the Presidency of the European Council, Paul Rosenzweig, Acting Assistant Secretary for Policy at the US Department for Homeland Security wrote:

“The documents and negotiations are to be provided only to (1) government officials or (2) persons outside government who participate in the party’s internal consultation process and who have a need to review or be advised of the information in these documents.”¹²²

The secrecy surrounding the negotiations not only excludes the European Parliament but effectively bars national parliaments from scrutinising the international agreements made by their own governments.

4.1.3. The use of ‘special investigative techniques’ including ‘remote computer searches’

The Future Group’s report argued that:

¹¹⁷ House of Lords European Union Select Committee, ‘The Passenger Name Record (PNR) Framework Decision’, 11 June 2008, p15: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/106/106.pdf>. For the latest on the negotiations see, *House of Commons EU Scrutiny Committee*, Twenty-third report, 24 June 2009, Section 3: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxi/1905.htm>

¹¹⁸ See *European Court of Justice*, press release, 30 My 2006: <http://curia.europa.eu/en/actu/communiqués/cp06/aff/cp060046en.pdf>

¹¹⁹ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:298:0029:0031:EN:PDF>

¹²⁰ *European Parliament*, press release, 12 July 2007: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20070709IPR08968>

¹²¹ *Euractiv*, 13 July 2007: <http://www.euractiv.com/en/justice/parliament-slams-pnr-deal-substantively-flawed/article-165524>

¹²² For a copy of the letter, see <http://www.statewatch.org/news/2007/sep/eu-usa-pnr-12307-07.pdf>

“Special investigative techniques should be placed higher on the agenda of the European Union. As regards video surveillance, further measures should be discussed in the light of pending analyses.”¹²³

One of the more controversial surveillance techniques is the use of remote computer searches or ‘Trojan Horses’ which record users’ computer activity and relay it to security agencies. In November 2008, the European Commission announced an EU Cyber Crime Strategy agreed with the Council¹²⁴ which called on both the private sector and member states to:

“Respond quickly to information requests, resort to remote searches, cyber patrols for online tracking of criminals and joint investigations across borders. The strategy also calls for the setting up of an alert platform in the short term, where reports on crime committed on the Internet, such as posting of illegal content, in EU member states would be pooled for cross-checking by Europol.”¹²⁵

4.1.4. Creation of a committee on EU “internal security”

The Lisbon Treaty allows for the creation of a new EU Committee on Internal Security (COSI), which will be established under the European Council. The EU’s three JHA bodies, Eurojust, Europol and Frontex, would all be represented on the Committee, and the decision to set this up would be taken by a simple majority of those states that decide to participate (the UK is expected to do so).

The Lisbon Treaty is very vague about what role this Committee could take on in future, but a Memo from the UK Government reveals that the Committee would effectively decide how police, border, immigration and criminal justice authorities would deal with cross-border matters, meaning this could be the beginnings of what is effectively an ‘EU Home Office’.¹²⁶

The Committee would not produce legislative decisions, but could propose legislation to the Council. The Committee is also to become involved in applying the controversial ‘solidarity clause’, another innovation of the Lisbon Treaty creating an obligation on member states to help other member states in times of terrorist attack or natural or man-made disasters, and also to prevent the “terrorist threat” (Article 222 TFEU).

Despite the fact that the Lisbon Treaty is not yet in force, negotiations are ongoing about how the Committee will look and work in practice. According to the UK Government Memo in September 2009, the decision to establish COSI could be taken “as early as within a few weeks of the Lisbon Treaty entering into force.” The paper says that discussions about the role and remit of the Committee have taken

¹²³ *Future Group*, ‘Freedom, Security, Privacy – European Home affairs in an open world’, June 2008, p26. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

¹²⁴ See Council’s conclusions here: <http://www.statewatch.org/news/2009/jan/eu-remote-computer-access-15569-08.pdf>

¹²⁵ *European Commission* press release, 27 November 2008: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1827&format=HTML&aged=0&language=EN&guiLanguage=en>

¹²⁶ *Home Office*, ‘Explanatory memorandum on EU documents: Council Decision on setting up the standing committee on operational cooperation on internal security’, 2 September 2009

place in Government departments including the FCO, CO, HMRC and MoJ, as well as departmental agencies such as SOCA.

4.1.5. Allowing people to be tried in UK courts for offences that aren't crimes in the UK

15 member states (not including the UK) have proposed an EU Framework Decision to establish a common set of rules within the EU for the transfer of criminal proceedings between member states. The aim of the proposal is to “concentrate criminal proceedings” in a particular country for offences that are committed in more than one member state, such as people trafficking, or where one member state has jurisdiction because the suspect is a national of that member state, and another because the offence was committed on its territory.

However, the proposal¹²⁷ contains a controversial provision which appears to allow someone to be tried in the UK courts for an offence that isn't a crime under UK law. Article 5 states:

"(1) For the purpose of applying this Framework Decision, any Member State shall have competence to prosecute, under its national law, any offence to which the law of another Member State is applicable.

"(2) The competence conferred on a Member State exclusively by virtue of paragraph 1 may be exercised only pursuant to a request for transfer of proceedings."

The House of Commons European Scrutiny Committee has recently remarked:

"Article 5 is both novel and far-reaching: it gives national courts competence to try a criminal offence that is not prescribed by UK law — or, put another way, that the Government has not proposed nor Parliament agreed should be a crime. Instead, jurisdiction comes from the EU Member State that is transferring the proceedings."

This raises serious practical questions about how UK courts could actually prosecute on the basis of the law of another country, not to mention the precedent this sets for creating an EU-wide legal system.

Furthermore, the Committee noted that the basis for the transfer of proceedings is a 1972 Council of Europe Convention which the UK has never signed:

"The Council's Explanatory Report states that this transfer of competence is taken from the 1972 Council of Europe Convention on the transfer of Criminal Proceedings. We note, however, that the UK did not ratify this convention."¹²⁸

The Committee came to the conclusion that:

"Suffice it to say at this stage that we find it hard to conceive of situations in which transferring jurisdiction to prosecute from one Member State to another

¹²⁷ Draft framework decision on the transfer of proceedings in criminal matters, available at: <http://register.consilium.europa.eu/pdf/en/09/st11/st111119.en09.pdf>

¹²⁸ House of Commons EU Scrutiny Committee, 'Twenty-seventh report', 21 July 2009, Section 8.35: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv10.htm>

in the manner prescribed by this Article would 'improve the efficient and proper administration of justice'".¹²⁹

The Swedish EU Presidency aims to reach political agreement on the proposal at the JHA Council on 30 November¹³⁰.

4.1.6. Greater cross-border police cooperation and a target to train a third of member states' police officers

The Future Group called for much greater cooperation between national police forces, as well as strengthening the role of the EU's own law enforcement agencies Europol and Eurojust. The Group's report reads:

"Police forces in the Union belong to member states' field of competence. In the years to come, these law enforcement services should, however, get closer to each other. There is a need for improving the environment of police cooperation, especially by reinforcing Europol, exchanging knowledge and integrating police file management and security technologies"¹³¹.

The Future Group also called for the European Police College to be used to create a "common culture of all European Union police forces". The Commission argues that in order to foster this "common culture" the EU should aim to train a third of all European police officers in the next five years:

"If national players are gradually to come to regard Europe as the natural theatre for their operations, there will have to be greater mutual trust. To achieve this, all the professionals concerned must intensify the exchange of experiences and good practice, particularly on ethical issues. Joint training courses and exercises will also be needed. Ambitious targets must be set here, e.g. to train one third of European police officers and border guards in European affairs over the next five years."¹³²

Member states are increasingly relying on the EU's policing and judicial bodies, Europol and Eurojust. In 2007 over 1000 cases were referred to Eurojust, compared to 192 in 2002¹³³. However, this is only part of the story as evidence suggests that for the majority of cases member states circumvent the formal EU agencies. In 2008, the House of Lords' EU Select Committee noted that:

"The vast majority of information exchanges between liaison bureaux occurs outside the formal systems, and thus while providing very significant benefit to the participating countries the main loser is Europol, which is denied the opportunity to access the information. It is reported that up to 80% of bilateral engagement occurs this way."

¹²⁹ House of Commons EU Scrutiny Committee, 'Twenty-seventh report', 21 July 2009, Section 8.38: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv10.htm>

¹³⁰ House of Commons EU Scrutiny Committee, 'Twenty-seventh report', 21 July 2009, Section 8.1: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv10.htm>

¹³¹ Future Group, 'Freedom, Security, Privacy – European Home affairs in an open world', June 2008, p4. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

¹³² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: An area of freedom, security and justice serving the citizen, p15; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF>

¹³³ European Commission, "Justice, Freedom and Security in Europe since 2005: An evaluation of the Hague programme and action plan", p25, June 2009: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0263:FIN:EN:PDF>

It is therefore far from clear whether Europol and Eurojust represent value for money. The Lords' EU Select Committee noted that:

“Even if such a comparison is over-simplistic, it is still the case that 80% of the information is obtained directly through liaison officers at a cost to the United Kingdom of approximately €2 million a year, while the remaining 20% which comes through Europol costs this country €9.6 million.”¹³⁴

4.1.7. A central EU database including the “largest fingerprint system in the world”

There are proposals for a huge central database, bringing together management of three key systems – the Schengen Information System II (SIS II), the Visa Information System (VIS) and Eurodac¹³⁵. The database would be managed by a single EU agency with start-up costs between 2010 and 2013 of €113 million¹³⁶.

The **EURODAC** database stores asylum seekers' fingerprints and is used to help decide which member state is responsible for processing an asylum application. It is also meant to prevent asylum seekers from making multiple applications across the EU.

The Schengen Information System (**SIS II**), expected to be fully operational by 2010, will contain information about people wanted for arrest and extradition, third country nationals to be denied entry to any of the Schengen states, missing people and stolen property. In 2007, the House of Lords' EU Select Committee noted that the upgrade from SIS to SIS II would incorporate the use of “biometric data, in particular fingerprint and photographic data, but probably also in due course DNA profiles and retina scans.”¹³⁷

The UK and Ireland have opted in to SIS II for the purposes of law enforcement but not for the aspects relating to immigration, such as third country nationals denied access to the Schengen area.

In December 2008, the Home Office carried out an impact assessment of the upgrade from SIS to SIS II and concluded that arrests under the European Arrest Warrant (EAW) in the UK “will rise to between 1050 and 1700” from the “504 EAW arrests made in the UK in 2007”.¹³⁸

The Visa Information System (**VIS**) will store records of all Schengen visa applications received in participating member states' missions overseas, together with the applicant's photograph and fingerprints. VIS will make it easier for member states to exchange visa information so as, for example, to detect visa fraud. VIS may be consulted not only by immigration authorities but also by Europol and member

¹³⁴ House of Lords European Union Select Committee, 'EUROPOL: Co-ordinating the fight against organised crime', p22-3, November 2008:

<http://www.publications.parliament.uk/pa/ld200708/ldselect/lddeucom/183/183.pdf>

¹³⁵ Computing.co.uk, 25 June 2009: <http://www.computing.co.uk/computing/news/2244822/eu-agency-manage-security>

¹³⁶ House of Commons European Scrutiny Committee, Twenty-seventh report, Section 7.8, 21 July 2009: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv09.htm>

¹³⁷ House of Lords European Union Select Committee, 'Schengen Information System II', March 2007, p20: <http://www.publications.parliament.uk/pa/ld200607/ldselect/lddeucom/49/49.pdf>

¹³⁸ Home Office, 'Impact Assessment of Schengen amendments to Extradition Act 2003', 16 December 2008, p3: <http://www.homeoffice.gov.uk/documents/ia-police-crime-bill-08/ia-schengen-amendments?view=Binary>

states' law enforcement authorities for the purposes of the prevention and detection of terrorist and other serious offences¹³⁹.

The UK is currently excluded from VIS because it is not within the Schengen area. But the Government is challenging, in the European Court of Justice, the UK's exclusion from the Council Decision which gives law enforcement authorities access to VIS. The outcome of that case will affect whether the UK could take part. The UK is also yet to decide whether to opt into participation in the central managing agency¹⁴⁰.

The Commission has announced that:

*"The Visa Information System will store data on up to 70 million people concerning visas for visits to or transit through the Schengen Area. This data will include the applicant's photograph and their ten fingerprints. The VIS will become the largest ten fingerprint system in the world."*¹⁴¹

Europol and Eurojust would both be represented on the proposed centralised EU agency, further integrating the EU's various JHA bodies.

A central concern with such a large centralised database is that it will be open to abuses or unintentional errors that result in either the data falling into the wrong hands or, more worryingly, miscarriages of justice. Former Swedish Justice Minister Thomas Bodstrom has warned that, "It is commonly known that databases are abused. The bigger they are and the more people who have access to them, the greater the risk of mistakes, abuse and corruption."¹⁴²

4.1.8 A potential three-fold increase in the number of UK citizens extradited under the European Arrest Warrant

Under the Stockholm Programme, the implementation of a new data sharing system across member states (SIS II) will see the use of the controversial European Arrest Warrant greatly increased, with the result that more people could be extradited from the UK to face trial or punishment in other member states.

The Home Office estimates that it will see arrests under the EAW in the UK "rise to between 1050 and 1700" from the "504 EAW arrests made in the UK in 2007".¹⁴³

According to a public opinion survey conducted on behalf of the Commission, less than one in five UK citizens (18 percent) are aware of the European Arrest Warrant (EAW)¹⁴⁴. This is despite the fact that it significantly alters the judicial process and subsequently the rights of citizens. It has proved very controversial for many reasons.

¹³⁹ House of Commons European Scrutiny Committee, Twenty-seventh report, Section 7.1, 21 July 2009: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv09.htm>

¹⁴⁰ House of Commons European Scrutiny Committee, Twenty-seventh report, Section 7.13, 21 July 2009: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv09.htm>

¹⁴¹ European Commission, press release, 12 June 2007:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/802&format=HTML&aged=0&language=EN&guiLanguage=en>

¹⁴² See Svenska Dagbladet, 16 August 2009: http://www.svd.se/nyheter/inrikes/artikel_3359699.svd

¹⁴³ Home Office, 'Impact Assessment of Schengen amendments to Extradition Act 2003', 16 December 2008, p3: <http://www.homeoffice.gov.uk/documents/ia-police-crime-bill-08/ia-schengen-amendments?view=Binary>

¹⁴⁴ Flash Eurobarometer 274, 'Attitudes towards the EU in the UK', July 2009, p20: http://ec.europa.eu/unitedkingdom/pdf/fl274_uk_reps_analyticalreport_final.pdf

The EAW is based on the principle of mutual recognition of judicial decisions. An extradition offence includes offences punishable by 12 months imprisonment or more and which are offences in both countries, but it also includes a list of 32 very broadly defined offences which do not have to be subject to the principle of dual criminality, including 'computer-related crime', 'racism and xenophobia'; 'swindling'; 'racketeering and extortion', 'piracy of products' and 'sabotage'.

A UK court cannot refuse to extradite someone even if the offence, or part of it, took place in the UK. And with significant differences remaining between member states' legal and judicial procedures, UK citizens risk being tried in states that may not enforce the same standards of procedure in the UK.

Furthermore, a 2009 change to the European Arrest Warrant says that member states may no longer reject a request for extradition if the person concerned has been tried in their absence. It has become compulsory to hand over people who have been tried in their absence, perhaps without even knowing they were being tried. This represents a big change in the UK, where trials in absentia are not usually permitted and can only be allowed under very strict circumstances.¹⁴⁵

According to Statewatch, controversially, when judges are considering the decision whether to extradite or not, they can only look at the procedural elements of the case. The "hearing" which occurs under the European Arrest Warrant system does not consider the allegations against the defendant or examine evidence, as opposed to the procedure foreseen by regular extraditions.¹⁴⁶

One of the most high-profile and controversial cases involving the EAW is the ongoing case of Andrew Symeou, a British student extradited to Greece following the death of another British man in a nightclub in Zante, where Symeou was holidaying at the time. The case has been taken up by Fair Trials International, which says it "has grave concerns over the conduct of the police investigation, which was built on mistaken identity, conflicting evidence, and violent intimidation of witnesses."¹⁴⁷

The EAW was agreed in June 2002 in the aftermath of the 9/11 terrorist attacks in the US, and came into force in the UK in January 2004. The UK Government strongly supported the move, with Prime Minister Tony Blair saying:

*"It is manifestly in this country's interest to have a procedure that is a fast-track procedure for extraditing people to this country from European countries... what this will do is simplify the procedure enormously."*¹⁴⁸

The EAW was designed to facilitate extradition between member states for terrorist and serious crimes. Announcing the move, Antonio Vitorino, then-EU Commissioner for Justice and Home Affairs, said at the time:

"Terrorist acts are committed by international gangs with bases in several countries, exploiting loopholes in the law created by the geographical limits on investigators and often enjoying substantial financial and legal treatment

¹⁴⁵ See here for more details: <http://www.openeurope.org.uk/research/tia.pdf>

¹⁴⁶ See here: <http://www.statewatch.org/news/2004/jan/01euro-arrest-warrant.htm>

¹⁴⁷ See here for more details: http://www.fairtrials.net/cases/spotlight/andrew_symeou/

¹⁴⁸ http://news.bbc.co.uk/1/hi/uk_politics/1708571.stm

*between states".*¹⁴⁹

However, it is now routinely used for offences which were never discussed when it first came off the books. There are a couple of instances where the EAW has been used to expedite the extradition of terror suspects across the EU and ensure they stand trial. But there is increasing evidence to suggest the legislation is taking on something of a life of its own.

Looking at an EAW case involving the alleged purchase of a stolen mobile phone in Poland worth about £20, which would be highly unlikely to lead to a custodial sentence in the UK, Lord Justice Maurice Kay noted:

*"One is becoming used to European extradition cases for less serious offences than used to come before the courts for extradition, but in my reasonable experience of cases under the 2003 Act I have never seen one quite as low down the calendar as this."*¹⁵⁰

4.1.9. Extending 'mutual recognition' in civil and criminal matters

With more and more cooperation between member states' law enforcement agencies and judicial bodies, the next 'logical step' is for greater harmonisation of legal systems and processes. The Commission has called for judgements on civil matters which are "essential to everyday life", such as "succession and wills, matrimonial property rights and the property consequences of the separation of couples" to be subject to 'mutual recognition', whereby a judicial decision taken in another member state should be recognised and executed in all other member states.

There are plans to extend this to criminal matters as well. An example would be the ability to implement fines received in another member state. The Commission's communication gives the example of a speeding fine levied in another member state:

*"It should be possible to implement certain fines, which can be criminal or administrative according to the Member State, between countries, with a view to ensuring compliance with EU policies in general and, more specifically, improving road safety."*¹⁵¹

The Lisbon Treaty sets out a legal basis to legislate for the mutual recognition of legal judgments in both civil and criminal cases. Mutual recognition of judgments is intended to end existing barriers to successful prosecution of cross-border crimes. The article in the Treaty 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 evidence¹⁵².

The problem is that mutual recognition is intended to lead to legal harmonisation. In 2004, the House of Common cross-party European Scrutiny Committee said:

¹⁴⁹

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1284&format=HTML&aged=0&lg=en&ujL_language=en

¹⁵⁰ Cited in *Liberty*, 'Liberty's Second Reading Briefing on the Policing and Crime Bill in the House of Lords – Part 6, Extradition', p12: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/policing-and-crime-2nd-reading-lords-on-extradition.pdf>

¹⁵¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: An area of freedom, security and justice serving the citizen, p10; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF>

¹⁵² For a further discussion see *Open Europe*, 'A guide to the Constitutional Treaty', 2008, p57-60: <http://www.openeurope.org.uk/research/guide.pdf>

"We draw attention to the danger that measures which are ostensibly concerned with mutual recognition will have the effect of creating uniform rules which will then apply to all cases, whether they have any cross-border implications or not. As we have commented before, Commission proposals on the 'area of freedom security and justice' have appeared to treat this 'area' as synonymous with a unitary State, with only one legal system."¹⁵³

The proposal to extend the principle of mutual recognition to more civil matters therefore poses a potentially fundamental challenge to the independence of member states' legal systems, which have often evolved over lengthy periods of time.

Home Secretary Alan Johnson has said that while the Government would support the extension of mutual recognition of judicial decisions it believes that "it is essential that the differences in Member States' justice systems are respected and the Government will seek to ensure that this continues in the coming years".¹⁵⁴

4.1.10. Joint EU intelligence under the guise of SitCen

The EU's so-called Joint Situation Centre (SitCen), made up of intelligence analysts, was originally established in order to monitor and assess worldwide events and situations on a 24-hour basis with a focus on potential crisis regions, terrorism and WMD-proliferation.

However, since 2005, SitCen has been used to share counter-terrorism information, giving it a greater role in JHA policy. Charles Clarke, the Home Secretary at the time, said, "SitCen's priorities had hitherto largely focused on Common Foreign and Security Policy issues and did not serve to provide the necessary JHA input."¹⁵⁵

Javier Solana, the EU's High Representative for Common Foreign and Security Policy, to whom SitCen reports, said,

"The threats we are facing today are not national threats – terrorism – they are international threats. Therefore, to put together the intelligence which is international with intelligence which is national will be a very important step forward in the coordination of the European Union."¹⁵⁶

A report by the 'Future Group' in 2008 mentioned the SitCen and suggested its role should be developed.¹⁵⁷ This is controversial, since SitCen is a highly secretive body which operates out of the public eye and away from parliamentary scrutiny.¹⁵⁸

4.2. EU proposals outside of JHA

¹⁵³ House of Commons EU Scrutiny Committee, 'Twenty-eighth report', 14 July 2004, p16, Section 42: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-xxviii/42-xxviii.pdf>

¹⁵⁴ House of Commons EU Scrutiny Committee, 'Twenty-fifth report', 8 July 2009, Section 1.26: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxiii/1903.htm>

¹⁵⁵ Parliamentary Answer. Hansard source: Deb, 27 June 2005, c1249W: http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo050627/text/50627w19.htm#50627w19.html_wqn2

¹⁵⁶ EUBusiness, 9 June 2004, http://www.eubusiness.com/topics/European_Council/EUNews.2004-06-09.3325

¹⁵⁷ Future Group, 'Freedom, Security, Privacy – European Home affairs in an open world', June 2008, p4. A copy of the report can be found here: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>

¹⁵⁸ See here for more: Secret Truth, the EU Joint Situation Centre, Jelle van Buuren, 2009, <http://www.statewatch.org/news/2009/aug/SitCen2009.pdf>

4.2.1. EU laws on citizens' right to internet access

The EU is currently trying to agree a new 'telecoms package' aimed at increasing competition but it has been stalled by a row between the European Parliament and national governments over internet access. MEPs inserted an amendment in to the package underlining that Internet access cannot be restricted "without prior ruling by the judicial authorities". This was in direct response to a French law, passed earlier this year, which proposed that national authorities could cut off internet access after two warnings and without a judicial hearing¹⁵⁹.

National governments represented by the EU Council have, along with the Commission, proposed a compromise that includes "the right to effective judicial protection, in compliance with the principles of Community Law", which underlines the principles of "fair and impartial procedures, including the right to be heard".

However, the European Parliament has stressed that this is not satisfactory, with one negotiator saying, "At the moment we maintain our position."¹⁶⁰

4.2.2. Access to other member states' national tax databases

The Commission is proposing a controversial system to boost the fight against tax fraud by allowing national authorities to directly access taxpayer data in other countries, called "Eurofisc". EU Taxation Commissioner Laszlo Kovacs has said he wants to provide national tax officers with "all technical and legal means to take action" and protect other states' tax revenue "as effectively as their own."¹⁶¹

In documents drawn up last year an EU Council working party suggested that:

*"Administrations of Member States on whose territory targeted operators were established would place them under surveillance and, if they deemed it necessary, would collect information additional to that available in their national data bases."*¹⁶²

This implies that UK tax authorities could be asked to collect information through "surveillance" over and above what is usually the case on 'operators' under suspicion of tax fraud. The concern is that such operations would not only occur after an offence had occurred but it is envisioned that Eurofisc would act as an "early warning system", which could mean sharing data on innocent parties across the EU that are never subject to prosecution.

¹⁵⁹ BBC, 13 May 2009: <http://news.bbc.co.uk/1/hi/technology/8046564.stm>

¹⁶⁰ Euractiv, 14 October 2009: <http://www.euractiv.com/en/infosociety/eu-nears-breakthrough-telecoms-package/article-186345>

¹⁶¹ EUobserver, 19 August 2009: <http://euobserver.com/9/28564>

¹⁶² See Working Party on Tax Questions - Indirect Taxation (VAT), "Combating VAT fraud – Eurofisc", p5: <http://register.consilium.europa.eu/pdf/en/08/st11/st11714.en08.pdf>