



HOUSE OF LORDS

European Union Committee

2nd Report of Session 2008–09

Enhanced scrutiny of EU legislation with a United Kingdom opt-in

Report

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The European Union Committee of the House of Lords considers EU documents and other matters relating to the EU in advance of decisions being taken on them in Brussels. It does this in order to influence the Government's position in negotiations, and to hold them to account for their actions at EU level.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

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CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Introduction	1	5
Background	2	5
An enhanced scrutiny process	6	6
The Home Secretary's letter	11	6
Appendix 1: Statement on JHA Opt-ins by the Rt Hon the Baroness Ashton of Upholland, Leader of the House of Lords on 9 June 2008		8
Appendix 2: Letter from the Rt Hon Jacqui Smith MP, Home Secretary, to Lord Roper on Enhanced Scrutiny of Opt-In Proposals, 20 January 2009		10

Enhanced scrutiny of EU legislation with a United Kingdom opt-in

Introduction

1. We referred in our Annual Report for 2008 to the possibility of enhanced scrutiny of proposals for EU legislation with a United Kingdom opt-in—that is, legislation requiring a decision from the Government as to whether the United Kingdom wishes to be bound by it.¹ In this report we inform the House of developments.

Background

2. Title IV of the Treaty establishing the European Community (TEC) deals with visas, asylum, immigration, other policies on freedom of movement and civil justice. With the exception of family law measures, measures under Title IV—first pillar measures—are adopted by qualified majority voting (QMV). Under the terms of the Protocol on the position of the United Kingdom and Ireland, measures adopted under Title IV do not apply to the United Kingdom unless the Government notifies the President of the Council within 3 months of the proposal being presented to the Council that it wishes to take part in the measure—i.e. it opts in to the measure. (What is sometimes described as an opt-out is simply a decision by the Government not to opt in, and requires no action by the United Kingdom.) An opt-in is also possible once the measure has been adopted, but in this case the United Kingdom can play no formal part in the negotiations.
3. Title VI of the Treaty on European Union (TEU) is the third pillar, dealing with police and judicial cooperation in criminal matters. Measures under Title VI are adopted by unanimity, and there is thus no need for an opt-in provision.
4. The Treaty of Lisbon provides for the merger of the first and third pillars. TEC Title IV and TEU Title VI would become Title V of the Treaty on the Functioning of the European Union (TFEU), and almost all these matters would be dealt with by QMV. The Government negotiated a revised Protocol on the position of the United Kingdom in respect of the whole area of Freedom, Security and Justice (FSJ),² extending the TEC Title IV opt-in procedure to what are now TEU Title VI matters.
5. Until now Parliament has dealt with proposals for Title IV (first pillar) measures under the normal scrutiny process. The normal practice has been for the Minister's Explanatory Memorandum (EM) to say that the Government is considering whether to opt in, without more. The Government's decision is usually reached a matter of days, or even hours,

¹ *Annual Report 2008* (32nd Report, Session 2007–08, HL Paper 191), paragraphs 57–59 and Appendix 4

² The Treaty of Lisbon refers to the matters currently in TEC Title IV and TEU Title VI jointly as the area of Freedom, Security and Justice (FSJ). The Commission Directorate-General dealing with these is called Justice, Freedom and Security (JLS—the French acronym). Councils dealing with these matters are called Justice and Home Affairs (JHA).

before expiry of the 3 month period. This Committee has in the past not been informed of that decision until after the period has expired.

An enhanced scrutiny process

6. In anticipation of the entry into force of the Treaty of Lisbon it became all the more important to improve the scrutiny process for FSJ legislation. In April 2008 this Committee invited its then Chairman, Lord Grenfell, to discuss with the then Leader of the House, Baroness Ashton of Upholland, a procedure for improving the scrutiny of opt-in legislation which would allow this Committee to give its view on whether the United Kingdom should opt in to a particular measure well before the 3 month period had expired. Matters came to a head during the Report Stage of the European Union (Amendment) Bill, and on 9 June 2008 Baroness Ashton placed in the Library of the House a “Statement on JHA Opt-ins” agreeing on behalf of the Government to an enhanced scrutiny process for opt-in legislation. That Statement is printed at Appendix 1.
7. Two undertakings by the Government were of particular value. The first was that the Government would not as a general rule notify the Council of a decision to opt in during the first 8 weeks of the 3 month period, and that if within those 8 weeks this Committee expressed an opinion on whether or not the United Kingdom should opt in, that opinion would be taken into account.
8. The second useful undertaking was that if the Select Committee published a report recommending a debate, the Government would make time for the debate; unlike current motions to take note of reports, the debate would be on an amendable motion (hence allowing a vote, if an amendment was tabled); and the Government, although not bound by the views expressed, would take note of them.
9. There were other undertakings which, though useful, were not strictly relevant to the scrutiny of legislation: for example that the Government would table a report each year on the Government’s approach to Justice and Home Affairs policy, and make a Minister available to appear before this Committee in advance of every Justice and Home Affairs Council.
10. Once it became clear that the Treaty of Lisbon would not be coming into force in the near future, Lord Grenfell wrote to Baroness Ashton asking if the Government’s undertakings would apply to current opt-ins in first pillar matters. She replied that the undertakings were specifically linked to the Lisbon Treaty changes, so that the Government would not regard itself as bound by the undertakings unless and until the Treaty came into force.

The Home Secretary’s letter

11. On 20 January 2009 the Home Secretary wrote to Lord Roper a letter which we print at Appendix 2. The undertakings in this letter are not dependent on the Treaty of Lisbon being in force; they apply from now, but of course only in relation to TEC Title IV measures, since these for the present are the only ones where the United Kingdom has an opt-in.
12. The Home Secretary repeats that the Government will not as a general rule opt in during the first 8 weeks, and if within those 8 weeks this Committee expresses an opinion on whether or not the United Kingdom should opt in, that opinion would be taken into account. We assume that this does not

mean that our views will be disregarded if expressed after 8 weeks; only that less weight may at that stage be given to them if the Government is close to reaching its own decision.

13. The second undertaking is in rather different terms. If this Committee makes a recommendation for a debate, the Government no longer undertake “to seek to arrange a debate through the usual channels”, only “to be flexible in principle regarding making time available for debates”. The Home Secretary does not repeat Baroness Ashton’s undertaking that any motion for debate should be amendable.
14. We nevertheless welcome the Government’s position. The entry into force of the Treaty of Lisbon will bring into play the full undertakings given by the Government in June 2008 and set out in Appendix 1, including the undertaking that any motion for debate should be amendable. Until then, the arrangements set out in the Home Secretary’s letter constitute a useful enhancement of the scrutiny process, giving this Committee an opportunity to put forward its views at a time when they can still influence the Government’s thinking.

APPENDIX 1: STATEMENT ON JHA OPT-INS BY THE RT HON THE BARONESS ASHTON OF UPHOLLAND, LEADER OF THE HOUSE OF LORDS ON 9 JUNE 2008

For the benefit of Peers who intend to speak during the Report Stage of the EU Treaty (Amendment) Bill (2nd Day), I am writing to place the attached statement on JHA Opt-Ins in the Library of the House of Lords.

Statement on JHA Opt-ins

The Government believes that it is important for the EU Scrutiny Committees, and Parliament as a whole to have a clear idea of the Government's approach to JHA; individual JHA measures should be seen in this context. The Government is keen to ensure that the views of the Scrutiny Committees, benefiting from expertise in the area and having a strategic overview of the UK policy on the EU and our engagement on Justice and Home Affairs business, inform the Government's decision making process. As such, the Government therefore commits:

- To table a report in Parliament each year and make it available for debate, both looking ahead to the Government's approach to EU Justice and Home Affairs policy and forthcoming dossiers, including in relation to the opt-in and providing a retrospective annual report on the UK's application of the opt-in Protocol;
- To place an Explanatory Memorandum (EM) before Parliament as swiftly as possible following publication of the proposal and no later than ten working days after publication of the proposal. That EM would set out the main features of the proposal, as now, and, in particular, to the extent possible, an indication of the Government's views as to whether or not it would opt-in. Where the Government is in a position to provide them at that stage, the EM will also cover the factors affecting the decision. The European Scrutiny Committees of the two Houses will then be able to fully review the proposal and, where it has been possible to give a view, the Government's approach to the opt-in;
- Provided that any such views are forthcoming within 8 weeks of publication, to take into account any opinions of the Committees with regard to whether or not the UK should opt-in;
- The Committees, as with all proposals, can call a Minister to give evidence and can make a report to the House, if they wish with a recommendation for debate, on a motion that would be amendable (other debates in the Lords to take note of Committee reports are not usually amended).
- For the Commons, such a debate would usually be in Committee. In the Lords, where a Committee determines that a decision on whether or not to opt-in to a measure should be debated, the Government will undertake to seek to arrange a debate through the usual channels.
- As a general rule, except where an earlier opt-in decision is necessary, not to override the scrutiny process, by making any formal notification to the Council of a decision to opt-in within the first 8 weeks following

publication of a proposal³. Where the Government considers an early opt-in to be essential, it will explain its reasons to the Committee as soon as is possible. The Government will continue to keep the Committees fully informed as negotiations develop;

- To ensure that a Minister is regularly available to appear before the Scrutiny Committees in advance of every Justice and Home Affairs Council.

This package of measures will be reflected in a Code of Practice, to be agreed with the Scrutiny Committees, setting out the Government's commitment to effective scrutiny. The Government believes that the Scrutiny Reserve Resolution should also be amended, or a new resolution brought forward, to incorporate these commitments.

This will be reviewed three years after the entry into force of the Treaty to ensure that the enhanced scrutiny measures are working effectively.

We believe that this package, in addition to the strengthened role for national parliaments in the Treaty, strikes the right balance between ensuring that the Government can exercise the opt-in effectively within the Treaty deadline, whilst ensuring that Parliaments views are fully considered.

³ An example of where an early opt-in may be necessary is on the opt-in to the final text of a readmission agreement. These are often concluded very close to meetings with the third states concerned, to be signed at the meeting. In order to allow signature at the meeting, the Government undertakes to EU partners to complete the domestic opt-in process quickly.

**APPENDIX 2: LETTER FROM THE RT HON JACQUI SMITH MP,
HOME SECRETARY, TO LORD ROPER ON ENHANCED SCRUTINY
OF OPT-IN PROPOSALS, 20 JANUARY 2009**

I am writing to confirm Ministerial agreement on the following enhanced arrangements for the scrutiny of proposals for EU legislation based on Title IV of the Treaty establishing the European Union which deals with asylum and immigration and judicial cooperation in civil matters. This reflects our desire to continue to look at ways to improve the scrutiny of European business in conjunction with the Scrutiny Committees in both Houses.

- We will endeavour to include in Explanatory Memoranda a list of factors that we expect will be taken into account when coming to an opt-in decision and where possible, an indication as to whether the Government expects to opt-in.
- We are content to take the views of the Committee into account in the case of Title IV TEC opt-in decisions if they are forthcoming within 8 weeks of the publication of proposals and therefore not to opt-in within that 8 week period unless it is essential. The final decision as to whether to opt-in will continue to rest with Ministers.
- The Government is content to be flexible in principle regarding making time available for debates on policy on which opt-in decisions will need to be made, if the Committees recommend such questions for debate. This will only be possible however, if there is early informal communication with you, the Clerks to the Committees, to forewarn us when a debate might be desirable and on the condition that the 8 week period for giving a view on the opt-in decision cannot be extended even if it proves impossible to hold a debate before that deadline.