



## Parliamentary scrutiny of opt-in decisions to the EU Area of Freedom, Security and Justice

Standard Note: SN/IA/5660  
Last updated: 27 July 2010  
Author: Vaughne Miller  
Section IADS

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The UK has an opt-in arrangement to measures in the “Area of Freedom, Security and Justice” (formerly the ‘Third Pillar’ covering justice and home affairs matters), in the *Treaty on the Functioning of the European Union*. The measures concern mainly immigration and asylum, border control, judicial cooperation in civil law, policing and criminal law.

This Note looks at parliamentary scrutiny of the opt-in arrangement.

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### 1 Introduction

The UK secured an opt-in arrangement to measures in the then ‘third pillar’ area (Justice and Home Affairs) in the *Treaty of Amsterdam*, which came into effect in 1999. A Protocol was agreed on the relationship of the UK and Ireland to the new title IV on free movement of persons, asylum and immigration. The basic provision was that the UK and Ireland would not take part in this title and that nothing agreed under it would apply to them. This exemption explicitly encompassed any relevant decisions of the European Court of Justice (ECJ), which would not apply to the UK or Ireland; nor would they enter into the *acquis communautaire* as far as the UK and Ireland were concerned. Thus the UK and Ireland were not only to remain outside the existing Schengen arrangements, but they would also be fenced off from the future development of these arrangements under the new Community title.

The Protocol allowed the UK and Ireland to opt in to measures adopted under this title on a selective basis. This meant, for example, that the UK and Ireland could choose to opt in to measures concerning the EU external border and asylum, while remaining outside any future arrangements made for EU internal frontiers. Article 3 allowed both countries to take part in the negotiation of measures provided that they gave notice of their intention to do so within three months of a proposal being presented to the Council. Since all measures under the new title (other than short term visa measures) were to be adopted by unanimity, at least for the first five years, the UK and Ireland acquired a veto during the negotiation process, but only for "a reasonable period of time" (Article 3(2)). After this period, if agreement was not reached with the UK and Ireland taking part, but was reached with the unanimous agreement of the other then 13 Member States, the measure was adopted for the 13 only and did not apply in any way to the UK and Ireland. The UK and Ireland had a right to opt in at a later date if they wished. Whenever the UK and Ireland chose to adopt a measure under the new title they had to accept also the jurisdiction of the ECJ.

Between 2003 and 2005 qualified majority voting (QMV) was introduced for decision-making in most areas of immigration, asylum and civil law, while unanimous voting applied to legislation on legal immigration and family law.

### 2 The Lisbon Treaty Protocol

The *Treaty of Lisbon* moved all the remaining Third Pillar matters into the renamed Community Treaty, the *Treaty on the Functioning of the European Union* (TFEU) and extended QMV to include criminal law and police cooperation, now in Title V.

The Protocol secured by the UK and Ireland in former Title IV TEC extended the opt-in arrangement to cover policing and criminal law in Title V TFEU, the “Area of Freedom, Security and Justice”.. It provides that decisions in these areas will not apply to the UK, but that in general that the UK Government may notify the President of the Council in writing, within three months of a proposal or initiative being presented to the Council that it wishes to take part in the adoption and application of a proposed measure.

The default presumption in the Protocol is that legislation proposed under Title V does not apply to the UK. The Government can choose to participate in a proposal at the start of negotiations, in which case it participates in negotiating the draft proposal, perhaps with a view to adopting it, but it is under no obligation to adopt it. The Government “may” notify the Council President that it wishes to participate in the adoption of a Title V proposal (Protocol Article 3) or in an adopted measure (Protocol Article 4) or in an amendment to an existing measure the UK has already adopted (Protocol Article 4a). This is a unilateral choice on the part of the UK (see Protocol Article 3.2). However, in the latter case, if the UK has not notified an intention to participate, the Council can decide by QMV to make the UK “bear the direct financial consequences” if any are caused by it no longer participating in the measure. It is still the UK’s unilateral decision not to opt in, but the Council may exert pressure on the Government to adopt a proposal (Protocol Article 4a).

Ministerial Correspondence in 2009-10 at <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf> refers to recent Government decisions to opt in to JHA measures. The previous Labour Government listed the 47 measures it had opted into in Deposited Paper 2010-0154 in January 2010.

In reply to a parliamentary question in March 2010, the Government announced one further measure to which it had opted in: a proposal for a Directive on Interpretation and Translation in Criminal Proceedings [16 March 2010 c 792W](#)

There has been no evidence of pressure being applied on the UK to opt in to measures in former Title IV or new Title V.

### 3 The scrutiny procedure for opt-in proposals

In 2008 Baroness Ashton, then Leader of the House of Lords, set out the Government’s commitment to the EU Scrutiny Committees on the scrutiny of opt-in proposals:

- 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 proposal<sup>[3]</sup>. 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.<sup>1</sup>

In 2009 the then Home Secretary, Jacqui Smith, described the mechanics of the enhanced scrutiny process for proposed Title V opt-ins:

- 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.<sup>2</sup>

In Ministerial correspondence on 11 January 2010 the then Minister for Europe, Chris Bryant, wrote that it was up to the Committees to “seek scrutiny of a decision of the Government to opt in to a JHA measure”, but that “if the Committee seeks a debate on the floor of the House for every opt-in, this will likely cause real difficulties for the manageable conduct of legislative business in the House”.<sup>3</sup> He did not think the eight-week period should apply to opt-in decisions taken by the Government after the legislation had been adopted, because the proposal would already have been “the subject of detailed negotiation in its pre-adoption stages”.

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<sup>1</sup> House of Lords European Union Committee - First Report “Asylum directives: scrutiny of the opt in decisions”, 2 December 2009 at <http://www.publications.parliament.uk/pa/ld200910/ldselect/lducom/6/605.htm>

<sup>2</sup> Lords European Union Committee, “Enhanced scrutiny of EU legislation with a United Kingdom opt-in” 2<sup>nd</sup> Report 2008-09

<sup>3</sup> <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf>

The Scrutiny Committee was not satisfied with aspects of the Government's proposals, insisting in a reply on 27 January 2010 that it was up to the Government and not the Committee, "to ensure that any European document, including one subject to an opt-in decision, was cleared from parliamentary scrutiny". The Committee also wanted to ensure that it would be able to scrutinise decisions to opt into adopted legislation, as well as draft legislation.<sup>4</sup> It called for a new, separate scrutiny reserve resolution on opt-ins.

**William Hague:** They will certainly demand a lot of examination in the House. In the coalition agreement, we have committed to approaching further criminal justice legislation on a case-by-case basis. The UK has the right to decide whether to participate in new EU justice and home affairs measures, so we will give careful consideration to whether to opt-in to new measures in those areas while at the same time ensuring that the UK's security is maintained and our civil liberties are protected, and that the integrity of our criminal justice system is preserved.

We recognise the importance of Parliament having adequate time to scrutinise those opt-in decisions. In all but the most exceptional cases, that means that we will not opt-in to any new measure in the first eight weeks following its publication, to give Parliament time to give a considered opinion.

[HC Deb 3 June 2010, c610](#)

The previous Government agreed that the EU Committees could make a report to the House and recommend an opt-in proposal for debate, and undertook to seek to arrange debates on such reports through the Usual Channels, on a motion that would be amendable.<sup>5</sup>

Lords [European Union Committee Progress of Scrutiny](#)

... in relation to notification to the President of the Council of the European Union of the wish of the United Kingdom to take part in the adoption and application of a measure following from a proposal or initiative presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union:

(1) No Minister of the Crown may authorise such notification within 8 weeks after the proposal or initiative has been presented to the Council.

(2) A Minister may however authorise such notification sooner than provided by paragraph (1) if he decides that for special reasons this is essential; but he should explain his reasons-

(a) in every such case, to the European Union Committee at the first opportunity after giving that authorisation; and

(b) in the case of a proposal awaiting debate in the House, to the House at the opening of the debate.

Where the European Union Committee is scrutinising the question of notification independently of the substance of the measure to which it relates, scrutiny of the substance of the measure will continue to be governed by the Resolution of the House of 30 March 2010, as amended.

At the moment the Government deposits opt-in draft proposals in Parliament in the usual way and allows eight weeks for parliamentary scrutiny, unless they are subject to an expedited timetable. In this case the Government must explain to the two European scrutiny committees as soon as possible their reasons for opting in without clearing scrutiny.<sup>6</sup>

There is as yet no enhanced scrutiny procedure for opt-in proposals. In June 2010 the Foreign Secretary, William Hague, said he recognised the importance of giving Parliament time to "give a considered opinion" on proposed opt-in measures.<sup>7</sup> The Committee is negotiating with the Government on how to proceed.

The Lords European Union Committee

<sup>4</sup> <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf>

<sup>5</sup> See, for example, the motion in the Lords on the Asylum Qualifications and Asylum Procedures documents at [HL Deb 12 January 2010 c 475](#)

<sup>6</sup> See Standard Note 5331, "Implementing the Lisbon Treaty" for an example of an expedited procedure.

<sup>7</sup> [HC Deb 3 June 2010 c610](#)

reported on enhanced scrutiny of opt-ins in February 2009.<sup>8</sup> A new [scrutiny resolution on opt-in](#) decisions was agreed on 30 March 2010.

## 4 Devolved parliamentary scrutiny

Foreign policy issues are not devolved, so the Government in Westminster generally represents the whole of the UK in the EU. UK Government Departments liaise with their devolved counterparts and the Foreign and Commonwealth Office has responsibility for policy at the EU institutional level, including UKRep.

### Scottish Parliament

The UK opt-in presents particular issues for Scotland, which has its own legal system. In its summary of conclusions and recommendations the Scottish Parliament European and External Relations Committee thought the opt-in system could have “difficult and complex consequences for Scotland” and that Scotland may be “forced to adopt legislation that does not suit its own legal system, or, conversely, may be unable to take advantage of EU legislation that would be beneficial”. The Committee called on the Scottish Government to “ensure that Scotland’s unique situation is represented in the formulation of the UK negotiating line in freedom, security and justice issues” and to ensure that Scotland’s interests were taken into account. It recommended that the Scottish Parliament’s Justice Committee should consider “the requirement for inter-parliamentary procedures to ensure that in relation to any decision to exercise the UK opt-in the views of the Scottish Parliament are taken into account.”<sup>9</sup>

### Northern Ireland Assembly

The NI Assembly does not have a committee which routinely scrutinises EU draft legislation with relevance to Northern Ireland. The Northern Ireland Assembly Committee for the Office of the First Minister and Deputy First Minister is responsible for European issues. This Committee published a Report on its “Inquiry into Consideration of European Issues” in January 2010, in which it recommended that the Assembly “enhance its focus on European issues and relationships with the various European institutions”.<sup>10</sup> The Assembly’s statutory committees, which include a [Justice Committee](#), would be responsible for the scrutiny of all European issues of relevance to the committee.

### Welsh Assembly

Under Standing Order 18 of the Standing Orders of the National Assembly, the European and External Affairs Division of the Welsh Assembly Government takes the lead in co-ordinating the Assembly Government’s approach to EU issues, but each Division leads on its individual policy areas. The Assembly’s procedures for EU scrutiny are set out in an Assembly report called “[Assembly Committees: scrutinising and engaging with the European Union’s decision-making process](#)”, January 2006. The European and External Affairs Committee [has reported](#) on the Protocol on Subsidiarity and Proportionality, but not specifically on the opt-in arrangement.

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<sup>8</sup> [2<sup>nd</sup> Report 2008–09 “Enhanced scrutiny of EU legislation with a United Kingdom opt-in”](#), 6 February 2009

<sup>9</sup> European and External Relations Committee Report SP Paper 469 EU/S3/10/R4 Report, 2010 (Session 3) “[Inquiry into the Impact of the Treaty of Lisbon on Scotland](#)”

<sup>10</sup> Committee for the Office of First Minister and Deputy First Minister, “[Report on its Inquiry into Consideration of European Issues](#)”, 13 January 2010