



## UK Government opt-in decisions in the Area of Freedom, Security and Justice

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The Lisbon Treaty created the *Area of Freedom, Security and Justice* (AFSJ), which incorporated into the body of the Treaty the former intergovernmental Justice and Home Affairs areas. The UK retained an opt-in facility granted to the UK and Ireland under the Amsterdam Treaty in 1997.

To mid-October 2011 the Government has opted into (or not opted out in respect of Schengen matters) around 17 EU proposals/measures, and has not opted into 12.

The EU scrutiny committees in both Houses of Parliament asked for enhanced scrutiny procedures to ensure their involvement before any Government decision to opt into an AFSJ proposal or adopted measure. The Government endorsed the continued application of the commitments made by the previous Government, adding further commitments, including:

- A written statement to Parliament reporting all opt-in decisions on new EU measures in the area of JHA; where appropriate making this statement orally;
- In the case of particularly strong Parliamentary interest in an opt-in decision, a debate and vote in both Houses, in Government time, on the Government's recommended approach on the opt-in

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## 1 The Lisbon Treaty removes the ‘Third Pillar’

### 1.1 Justice and Home Affairs: from Amsterdam to Lisbon

The creation of the Area of Freedom, Security and Justice is based on the Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes. It derives from the pre-Lisbon Title IV TEC (Visas, asylum, immigration and other policies related to free movement of persons) and Title VI TEU (Provisions on police and judicial cooperation in criminal matters) and is now Title V of the *Treaty on the Functioning of the European Union*, the “Area of freedom, security and justice” (AFSJ). The AFSJ therefore comprises policies relating to border controls, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters and police cooperation.

Title IV TEC was created by the 1997 *Treaty of Amsterdam*. It gave the EU powers to adopt legislation on immigration and asylum, by moving these areas out of the inter-governmental Justice and Home Affairs (JHA) “Third Pillar” into the Community “First Pillar”.<sup>1</sup> Immigration and asylum were therefore no longer matters for inter-governmental coordination but subject to EU decision-making procedures. Under the *Protocol on the position of the United Kingdom and Ireland*, annexed to the pre-Lisbon TEU and the TEC, the UK did not participate in and was not bound by measures under Title IV TEC unless it exercised its right to opt in. Title VI contained what remained of the Third Pillar, which was subject to unanimity and the right of veto. This was consolidated into Lisbon Title IV TFEU, representing a collapsing of the pillar structure in this area and the general application of Qualified Majority Voting (QMV). The previous TEU category of “framework decisions” disappeared as a result of this transfer.

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<sup>1</sup> For further background see House of Commons Library standard note SN/HA/1843, *EU Immigration and Asylum Law and Policy*, 27 February 2003

Lisbon changed the legislative procedure to the Ordinary Legislative procedure (OLP with QMV) for most measures on border controls, asylum and immigration. According to the Foreign Secretary at the time, the British Government supported the extension of QMV to the area of asylum and immigration.<sup>2</sup> The emergency brake in criminal matters, whereby a Member State may refer a matter to the European Council if a proposal poses a particularly serious difficulty, remained.

## 1.2 The JHA 'opt-in' Protocol

The UK's participation in EU legislation in JHA areas is governed by Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Under the *Protocol on the position of the United Kingdom and Ireland*, annexed to the pre-Lisbon *Treaty on European Union* (TEU – the intergovernmental part) and the TEC, the UK did not participate in and was not bound by measures under Title IV TEC unless it exercised its right to opt in.

Under the Lisbon Treaty, Protocol 21, the *Protocol on the Position of the United Kingdom and Ireland* is now in respect of "the Area of Freedom, Security and Justice", containing the former 'Third Pillar' areas. The Protocol provides that decisions in these areas will not apply to the UK (the default position), but the UK, and separately Ireland, may choose, within three months of a proposal being presented to the Council pursuant to Title V, Part Three TFEU, whether it wishes to participate in the adoption and application of any such proposed measure. If the UK notifies the President of the Council of its intention to participate within that three-month period, there is no possibility of opting out later. If the measure is adopted, the UK is bound by it, the European Court of Justice (ECJ) has jurisdiction over the matter, and the Commission has the power to enforce in respect of any failure to implement it properly. If the UK does not opt in by the three-month point, it is still entitled to a seat at the negotiating table, but has no vote and therefore has a reduced negotiating weight with which to shape the proposal. The UK may at any stage after a measure has been adopted indicate its wish to participate, although the Commission has to approve this and the Commission and Council can impose conditions.

## 1.3 The Schengen 'opt-out' Protocol

Article 4 of Protocol 19 to the TEU and TFEU, on the *Schengen acquis integrated into the Framework of the European Union*, provides that the UK and Ireland may request to take part in some or all provisions of the *Schengen acquis*.<sup>3</sup> The UK participates in some parts of Schengen,<sup>4</sup> police and judicial cooperation elements, for example, but does not participate in the border control elements. The Protocol Article 5 provides that the UK is deemed to be participating in any measures which build on those parts of the *Schengen acquis* in which it already takes part, unless, within three months of the publication of the proposal or initiative, it notifies the Council that it does not wish to take part in the measure – an opt-out. If the UK does not opt out within that three-month period, it is automatically bound by the measure. If

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<sup>2</sup> Jack Straw, HC Deb 9 July 2003 c 1208

<sup>3</sup> The Schengen acquis comprises the EU laws on the lifting of internal border controls between those countries that form the Schengen area (this includes all EU States except Ireland the UK plus Norway, Iceland, Switzerland and Lichtenstein).

<sup>4</sup> See Council Decision 2000/365/EC, OJ L 131, 1.6.2000, pp 43–47

the UK opts out, the Commission and Council can decide to eject the UK from all or part of the rest of Schengen to the extent considered necessary if its non-participation seriously affects the practical operability of the system. However, the Protocol states explicitly that it must seek to retain the UK's widest possible participation.

## **2 European Court of Justice**

### **2.1 Court of Justice Jurisdiction before Lisbon**

Before Lisbon there were different jurisdiction rules for measures on immigration, asylum and civil law, compared with criminal law and policing, and both sets of rules were different from the normal rules on the jurisdiction of the European Court of Justice (now just the Court of Justice). For immigration, asylum and civil law, the normal jurisdiction of the Court applied, except regarding references from national courts to the ECJ on the validity and interpretation of EU acts (under former Article 234 TEC, now 267 TFEU). In these areas only the final courts could send questions to the ECJ.

With regard to policing and criminal law, Member States had an option of allowing their national courts to send references for preliminary rulings to the ECJ by making a declaration under former Article 35(2) TEU. 17 Member States did so, not including the UK, Ireland, Denmark and some newer States.<sup>5</sup> The ECJ had no automatic jurisdiction over actions brought by the Commission against Member States for alleged breach of EU law in these areas (infringement actions).

### **2.2 Court of Justice jurisdiction since Lisbon**

Under Lisbon the Court has normal jurisdiction in all former JHA areas except for a restriction on ruling on national police operations. Member States can no longer opt out of the Court's jurisdiction with regard to references from national courts in the areas of policing and criminal law, and any Member State court or tribunal can send questions to the Court on JHA matters. This also applies to the UK once it has decided to opt into legislation in policing and criminal justice.

The Lisbon Treaty move gave rise to the question of ECJ jurisdiction for measures in policing and criminal justice, where Member States had had the option (outlined above) to opt out of the full jurisdiction of the Court. Under Article 10 of the Lisbon Protocol on transitional issues, the former ECJ jurisdiction over policing and criminal matters is retained for pre-existing measures in these areas for the first five years after the Treaty comes into force – so until December 2014. These measures apply to the ten EU Member States, including the UK and Ireland, which did not allow national courts to make preliminary ruling references to the ECJ. Furthermore, the Commission cannot use its powers under Article 258 TFEU (infringement action) against Member States in these areas for five years after Lisbon. During this five-year period the Court's normal jurisdiction applies once a pre-existing measure is amended, although identifying an amendment might not always be straightforward. The UK and Ireland

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<sup>5</sup> The following States were the first to accept the Court of Justice's jurisdiction in matters relating to policing and criminal justice: Austria, Belgium, Germany Greece, Luxembourg, the Netherlands, Sweden, Finland, Spain, Portugal, Italy, France, the Czech Republic and Hungary (Hungary and Spain limited this to courts of final appeal). In 2008 Hungary decided to allow all courts to refer and Latvia, Lithuania and Slovenia accepted the jurisdiction of the Court (OJL 70, 14 March 2008 p. 23). Cyprus and Romania accepted jurisdiction in 2010 (see [OJL 056, 6 March 2010](#)). The Note to their declarations gives information on the preceding declarations.

have an opt-in option to these amendments under their Protocol and Denmark has an opt-out from them under a separate Protocol.

### 2.3 The 2014 jurisdiction decision

In 2014 the UK can decide not to accept the normal jurisdiction of the Court, in which case all former legislation in the third pillar which has not been amended since Lisbon came into force will no longer apply to the UK. The Council will decide on transitional rules (e.g. the validity of UK-issued EU arrest warrants) and any financial consequences the UK will have to meet. The UK can decide to opt back into any of these measures, but will then have to accept the Court's jurisdiction. This must be approved by the Council or Commission, which must seek the "widest possible measure of participation" of the UK in the AFSJ, while respecting its coherence.

The Government has said there will be a vote in both Houses on the 2014 decision on JHA measures adopted before Lisbon and which have not subsequently been amended or repealed. The ESC asked in April 2011 how decisive that vote would be in influencing the Government's decision, to which the Government said that it seemed "completely implausible that a Government could go ahead with a decision to opt in en masse to these if there had been an adverse vote in the House of Commons against them. I do not see how that is politically sustainable for any Government of any political colour".<sup>6</sup>

## 3 UK concerns

A number of concerns were raised about the JHA moves when the then 'Reform Treaty' (which became the Lisbon Treaty) was being negotiated. In its [3<sup>rd</sup> Report, Session 2007-08](#), the European Scrutiny Committee (ESC) was concerned that the UK might lose out by not being able to retain its (then) current position in JHA areas if it decided not to opt in to the unamended instruments. During the evidence session with the Foreign Secretary, James Clappison was particularly worried about the UK possibly losing the existing benefits of the European Arrest Warrant (it would not be realistic to have a measure for which European Court jurisdiction was applicable for most Member States but not for all), and about the possibility of the UK having to pay penalties for the financial inconvenience UK non-participation would cause.<sup>7</sup> The Foreign Secretary thought most of the measures in question would be transposed within the five-year period, allowing the UK to use its Lisbon opt-in arrangement on a case-by-case basis.<sup>8</sup>

The Justice Select Committee published a report on "[Justice Issues in Europe](#)" (7<sup>th</sup> Report, 2009-10), in which it considered the role of the Court of Justice in the transposed JHA matters and the implications of this for UK courts:

31. First, UK courts are responsible for interpreting EU law and cannot resort to the Court except for basic advice. This has had limited impact in the field of justice to date as the Court had no jurisdiction in this area previously. As such there have been few mechanisms for the enforcement of legislation which has

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<sup>6</sup> David Lidington, Minutes of Evidence to European Scrutiny Committee, "[Opting into international agreements and enhanced Parliamentary scrutiny of opt-in decisions](#)", 27 April 2011

<sup>7</sup> "For instance, in the unlikely event that the UK were to cease to participate in Eurojust (the EU's agency responsible for coordinating investigations into serious crime), it would be reasonable to expect the UK to bear the costs of bringing UK staff home from Eurojust, and settling their contracts". [European Scrutiny Committee, 3<sup>rd</sup> Report 2007-08, Ev 49](#)

<sup>8</sup> [ESC 3<sup>rd</sup> Report 07-08, Ev 30](#)

operated on the basis of mutual trust. Yet, we also heard that standards, for example in terms of adherence to the principles of data protection or the safeguards afforded to suspects under the European arrest warrant, vary considerably (as we discuss further in chapter 3). For instance, if the UK courts were able to refer complex questions to the European Court of Justice regarding the operation of the European arrest warrant, they could receive greater clarification on issues around proportionality.[50] Mrs Nuala Mole, Director of the AIRE Centre[51], explained that decisions of the European Court which interpret European legislation are binding on all member states, including the UK and expressed her disappointment that the UK was not taking the opportunity to allow its expert lawyers, who tend to have greater experience than their equivalents in some other member states, to present clear cases to the Court.[52] The potential implications of this are discussed in chapter 2.

32. Secondly, the UK Government cannot be held to account for failure to implement EU legislation except by resort to the Court by other member states, which is a very rare occurrence.[53] While this limits judicial control over the UK (as it cannot be sued by the Commission) it potentially has considerable implications for UK citizens. For example, Victim Support has drawn our attention to the failure of the Government to implement, or fully transpose, a number of articles in the *Framework decision on the standing of victims in criminal proceedings*. [54] According to Professor Peers there have been some references to the Court of Justice on this framework decision, where it is the prosecution that has been trying to use it, in the interests of victims of crime, to toughen up national law from the prosecution's point of view.[55]

33. We were told that Government has also adopted a "wait and see" position on whether it will opt-in to the jurisdiction of the Court within the five-year timeframe, to take the opportunity to observe how the Stockholm programme influences the direction of EU measures and the repeal or replacement of existing measures.[56] One potential motivation for the Government in not favouring resort to legislation under the Stockholm programme is that it would open the measure to the jurisdiction of the Court of Justice. Therefore, if the UK subsequently opts-in to this jurisdiction, the Commission would be able to sue the Government if it has failed to implement effectively.[57] The House of Lords Committee concluded that the new rules on the Court's jurisdiction are clearer than the previous position; however, they may have issues for national sovereignty, particularly for the UK and its common law system.[58]

**34. Some of the practical consequences of the Lisbon Treaty and the opt-in arrangements that the UK has negotiated remain matters of contention.**

## 4 The Coalition Government's opt-in decisions

The Home Office and Ministry of Justice have a [website](#) dedicated to UK opt-ins in justice and home affairs proposals or adopted measures. To mid-October 2011 the Government has opted into (or not opted out of in Schengen matters) around 17 EU proposals/measures, and has not opted into 12. The following table, using Home Office data, provides information on the coalition Government's opt-in decisions.

No	Title	Lead Department	Reference	Date of publication	Decision
1	Proposal for a Directive of the European Parliament and of the Council on the right to interpretation and	Ministry of Justice	8000/10	09/03/2010	Did not opt in

	translation in criminal proceedings (Commission proposal): <a href="#">Link to proposal</a>				
2	Arrangement between the European Union and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen acquis: <a href="#">Link to proposal</a>	Home Office	7688/10 (conclusion)	18/03/2010	Did not opt out (Schengen)
3	Amending Proposal for a Regulation (EU) No .../... of the European Parliament and of the Council on establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice: <a href="#">Link to proposal</a>	Home Office	8151/10	30/03/2010	Did not opt out (Schengen)
4	Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA: <a href="#">Link to original proposal to which UK did not opt in</a>  <a href="#">Link to adopted Directive to which the UK opted in</a>	Home Office	8157/10	30/03/2010	Did not opt in at the 3 month point but subsequently opted in when the measure had been adopted: <a href="#">Link to Oral Ministerial Statement</a>
5	Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA: <a href="#">Link to proposal</a>	Ministry of Justice	8155/10	30/03/2010	Opted in
6	Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the	Treasury	11222/1/10 REV 1 + COR 1 + COR 4 (conclusion)	REV 1 and COR 1 published on 24/06/2010 COR 4 published on	Opted in

	European Union to the United States for purposes of the Terrorist Finance Tracking Program (TFTP): <a href="#">Link to proposal</a>			12/07/2010	
7	Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part: <a href="#">Link to final Agreement</a>	Department for Business Innovation and Skills	8502/10 (conclusion)	15/04/2010	Opted in
8	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters: <a href="#">Link to proposal</a>	Home Office	9145/10	29/04/2010	Opted in: <a href="#">Link to Oral Ministerial Statement</a>
10	Agreement between the European Union and Georgia on the facilitation of the issuance of visas: <a href="#">Link to proposal</a>	Home Office	9471/10 (conclusion)	05/05/2010	Opted in
11	Proposal for a Council Decision on the position to be adopted on behalf of the Union in the Joint Committee established by the Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons as regards the replacement of Annex II on the coordination of social security schemes: <a href="#">Link to proposal</a>	Department for Work and Pensions	11630/10	29/06/2010	Did not opt in
12	Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment: <a href="#">Link to proposal</a>	Home Office	12208/10	15/07/2010	Did not opt in

13	Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer: <a href="#">Link to proposal</a>	Home Office	12211/10	15/07/2010	Did not opt in
14	Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings: <a href="#">Link to proposal</a>	Ministry of Justice	12564/10	23/07/2010	Opted in
15	Proposal for a Council Decision on the position to be taken by the European Union in EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement: <a href="#">Link to proposal</a>	Department for Work and Pensions	13493/10	10/09/2010 (English version)	Did not opt in
16	Proposal for a Directive of the European Council and of the Parliament on attacks against information systems, repealing Council Framework Decision 2005/222/JHA: <a href="#">Link to proposal</a>	Home Office	14436/10	30/09/2010 (English version)	Opted in: <a href="#">Link to Oral Ministerial Statement</a>
17	Proposal to recast the EURODAC Regulation concerning the comparison of fingerprints for the effective application of the Dublin Regulation: <a href="#">Link to proposal</a>	Home Office	14919/10	11/10/2010 (English version)	Opted in
18	Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety: <a href="#">Link to proposal</a>	Department for Transport	17409/10	02/12/2010 (date of Transport Council)	Did not opt in: <a href="#">Link to Written Ministerial Statement</a>
19	Proposal to amend and replace the current EC Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: <a href="#">Link to proposal</a>	Ministry of Justice	18101/10	17/12/2010 (final language version)	Opted in: <a href="#">Link to Written Ministerial Statement</a>
20	Proposal for a Council	Department for	18126/10	22/12/2010	Opted in

	Decision on the signing and conclusion of the European Convention on the legal protection of services based on, or consisting of, conditional access: <a href="#">Link to proposal</a>	Culture, Media and Sport	(conclusion)	(final language version)	
21	Proposal for a directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime: <a href="#">Link to proposal</a>	Home Office	6007/11	09/02/2011 (final language version)	Opted in: <a href="#">Oral Ministerial Statement</a>
22	Proposal for a Council Regulation on Jurisdiction, Applicable Law, and the Recognition and Enforcement of Decisions in the Matters of Matrimonial Property Regimes: <a href="#">Link to proposal</a>	Ministry of Justice	8160/11	29/03/2011 (final language version)	Did not opt in: <a href="#">Link to Written Ministerial Statement</a>
23	Proposal for a Council Regulation on Jurisdiction, Applicable Law, and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships: <a href="#">Link to proposal</a>	Ministry of Justice	8163/11	29/03/2011 (final language version)	Did not opt in: <a href="#">Link to Written Ministerial Statement</a>
24	Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service: <a href="#">Link to proposal</a>	Home Office	9823/11 (conclusion)	20/05/2011 (final language version)	Opted in: <a href="#">Link to Written Ministerial Statement</a>
25	Directive on establishing minimum standards on the rights, support and protection to victims of crime: <a href="#">Link to proposal</a>	Ministry of Justice	10610/10	24/05/2011 (final language version)	Opted in: <a href="#">Link to Written Ministerial Statement</a>
26	EU Regulation on the mutual recognition of Protection Measures in Civil Matters: <a href="#">Link to proposal</a>	Ministry of Justice	10613/11	25/05/2011 (final language version)	Opted in: <a href="#">Link to Written Ministerial Statement</a>
27	Proposal for a Directive of the European Parliament	Home Office	11214/11	21/06/2011 (final language version)	Did not opt in: <a href="#">Link to</a>

	and of the Council laying down minimum standards for the reception of asylum seekers (Recast): <a href="#">Link to proposal</a>			version)	<a href="#">Ministerial Correspondence</a>
28	Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast): <a href="#">Link to proposal</a>	Home Office	11207/11	21/06/2011 (final language version)	Did not opt in: <a href="#">Link to Ministerial Correspondence</a>
29	Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest: <a href="#">Link to proposal</a>	Ministry of Justice	11497/11	28/06/2011 (final language version)	Did not opt in: <a href="#">Link to Written Ministerial Statement</a>
30	Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. <a href="#">Link to proposal</a>	Ministry of Justice	11497/11	08/06/2011	Did not opt in. <a href="#">Link to ministerial statement</a>

Prospective EU proposals on which the Government expects either a JHA opt-in or a Schengen opt-out decision are listed below, with links to any relevant select committee report or government view.

- EU-US Passenger Name Records Agreement (Home Office lead). [Government has decided to opt in to the negotiating mandate.](#)
- EU-Canada Passenger Name Records Agreement (Home Office lead). [Government has decided to opt in to the negotiating mandate.](#)
- EU Internal Security Fund (Home Office lead)
- Migration funding programme (Home Office lead)
- Readmission agreements with Armenia and Azerbaijan (Home Office lead)
- Minimum rules and penalties for confiscation of criminal assets (Home Office lead) Government is opposed to further EU legislation on this. See European Scrutiny Committee report on Commission Communication: "[The EU Internal Security Strategy in Action: Five steps towards a more secure Europe](#)", 8 December 2010.
- Mutual recognition of confiscation orders (Home Office lead)

- Proposal creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (Ministry of Justice lead)
- Recommendation on Interpretation and Translation (Best Practice Guidance) (Ministry of Justice lead)
- Proposal to amend the current EC Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II) (Ministry of Justice lead)
- A new comprehensive legal framework for the protection of personal data in the EU (Ministry of Justice lead)
- Proposal for an instrument establishing an optional system of European Contract Law (Ministry of Justice lead). See [European Scrutiny Committee report](#), 30 March 2011, and [European Committee B debate](#), 24 May 2011 on Commission Green Paper on contract law for consumers and business and Proposal to amend the current EC Regulation No 593/2008 on the law applicable to contractual obligations (Rome I)
- Council Decision on Customs 2020 (Her Majesty's Revenue and Customs lead)
- EU-Andean Free Trade Agreement (Business, Innovation and Skills lead)
- EU-Central America Free Trade Agreement (Business, Innovation and Skills lead)

The Government's [Command Paper](#) (Cm 8000) of 21 January 2011 provided information on forthcoming dossiers over the next 12 months. Most of these are now in the table above and those listed below are pending. Government support for a proposal is indicated.

- Proposal for a Council Decision on the position to be taken by the European Union in EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement (13493/10). See [European Scrutiny Committee report](#), 10 November 2010. Government did not opt in to this proposal in December 2010. Amended proposal put forward March 2011, but not based on Title V, so opt-in not relevant. Government argued that there was a Title V legal base, as with the similar EU-Swiss agreement (see table above). In August 2011 Government said it had not opted into the Decision and that it had initiated on 16 August an application to the Court of Justice challenging the Article 48 TFEU legal base. Legal uncertainty remains as Government has used opt-in where no opt-in currently applies.
- Mutual recognition of Identification and e-Authentication. ESC reported on Commission Communication, April 2011. The Commission launched a consultation on how e-Signatures and e-Identification can enhance EU Digital Single Market, which ended in mid-April 2011. [ESC reported](#) on this 18 May 2011. Government is "not convinced that mutual recognition of e-identification systems is practical or desirable".

## 5 Scrutiny of AFSJ proposals

All EU proposals are subject to scrutiny by both Houses of Parliament before the Government can agree them in the Council. The Government must provide a copy of the proposal to both Committees within 48 hours of publication, and an Explanatory Memorandum (EM) setting out the Government's position within 10 working days. The Committees can ask questions in writing, invite Ministers to give oral evidence, or recommend the proposal to be debated in Committee or on the floor of the House.

On 9 June 2008 the Rt Hon Baroness Ashton, then Leader of the House of Lords, made a statement setting out additional government commitments to Parliament in respect of the scrutiny of JHA opt-in decisions to be taken by the Government. These included:

- A commitment to lay a measure in Parliament on the day of publication, and to lay an EM within 10 working days.
- A commitment not to make a decision whether or not to opt-in to a measure (except where there is an overriding national interest) within the first 8 weeks, to allow the Committees to opine and inform the Governments position.
- A commitment to make a Government Minister available to participate in a debate on the proposal recommended by the Committee

With the entry into force of the Lisbon Treaty, the European Scrutiny Committee asked the Government to improve the scrutiny mechanism for opt-in decisions<sup>9</sup> and the House of Lords looked at enhanced parliamentary scrutiny procedures for the opt-ins in its report “Enhanced scrutiny of EU legislation with a United Kingdom opt-in”.<sup>10</sup>

On 20 January 2011 David Lidington MP, the Europe Minister, made a [statement to Parliament](#) committing the Government to a package of measures to strengthen further Parliamentary scrutiny of EU business, including in the area of JHA. The package endorsed the continued application of the commitments made by the previous administration but added further commitments, including:

- A written statement to Parliament reporting all opt-in decisions on new EU measures in the area of JHA; where appropriate making this statement orally;
- In the case of particularly strong Parliamentary interest in an opt-in decision, a debate and vote in both Houses, on Government time, on the Government’s recommended approach on the opt-in

In [Ministerial Correspondence on 3 March 2011](#) David Lidington set out the Government’s envisaged “twin-track” approach to enhancing parliamentary scrutiny of opt-ins:

[...] the strict 3 month timetable for opt-in decisions means it is unlikely that we will be able simply to overlay the new commitments on top of those that already exist under Ashton. Instead we envisage that a twin-track approach is likely to be needed whereby, for each proposal, there will need to be a point at which we agree whether the opt-in decision is subject to the Ashton arrangements or the enhanced arrangements set out in my statement. In either case, the commitment to table an Explanatory Memorandum within 10 working days of publication of the proposal will remain. The commitment not to opt in within the 8 week period unless there are exceptional reasons for doing so will also remain. However, among the practical questions discussed at the meeting was how, where a debate is offered by the Government, to reconcile the need to schedule the debate and agree the motion setting out the Government’s recommended approach with the need to allow adequate time for Government analysis of the proposal, including consultation with stakeholders and consideration of the Committees’ views. I can assure you that our intention will be to reach workable arrangements that enhance scrutiny and enable the Government to opt in when it is in the national interest and supported by Parliament.

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<sup>9</sup> [Ministerial correspondence, European Scrutiny Committee](#)

<sup>10</sup> HL Paper 25, 2<sup>nd</sup> Report, 2008–09

David Lidington also spoke about opt-in scrutiny during the recess periods:

The commitment of the Committees to September sittings will certainly help to deal with the long summer recess. However, we will still need to decide how to deal with opt-in decisions where the deadline falls in late July or August or during other recess periods. It is important that the Government should still be able to opt in to such measures, if it is in our national interest to do so. One option might be that if there were an opt-in decision of particular controversy or interest to Parliament where the deadline fell during a recess period, the Government would commit to an earlier debate on a take note motion, to give the Committees the chance to express their views in advance of the Government's decision. However, the disadvantage of this approach is that the debate might have to be held before there had been time for a full analysis of the proposal. Another idea would be the possibility of offering a debate to a joint committee of both Houses established for the purpose, which would sit during recess. I am open to any constructive solutions to this problem and would be interested in your views on these ideas or possible alternative approaches.

Under the new arrangements, Parliament will have far greater powers to influence the eventual opt-in decision. I very much hope that the new commitments will also enhance the ability of both Houses to hold the Government to account and retain the best elements of the current system, including detailed scrutiny of new proposals. The Committees' views will continue to be extremely influential, for example in signalling whether the level of parliamentary interest in a decision means that it should be subject to a debate on Government time.

There has also been some interest in post-adoption opt-in decisions, which the January Ministerial Statement did not touch on, but which the ESC considered in its 30<sup>th</sup> Report, 18 May 2011, "[Opting into international agreements and enhanced scrutiny of opt-in decisions](#)". The Committee asked the Government about scrutiny of this type of opt-in decision, to which David Lidington replied that if the Government were to apply for a post-adoption opt-in, not having opted in at the initial stage, this would be subject to the enhanced scrutiny arrangements.

## **6 *European Union Act 2011***

The [European Union Act 2011](#) provides for enhanced parliamentary approval of provisions in Title V TFEU in relation to three Treaty Articles:

- Article 81(3) TFEU (Judicial Cooperation in Civil Matters) allows the Council to decide by unanimity to move from a special legislative procedure (unanimity) to the OLP (QMV) with regard to measures on family law with cross-border implications (e.g. divorce and child custody) in this Title. Such a proposal would be subject to a national parliamentary veto if opposition is notified within six months of receiving the proposal.
- Article 82(2)(d) TFEU (Judicial Cooperation in Criminal Matters) allows the EP and Council to adopt by unanimity and with EP consent minimum rules on aspects of criminal procedure in addition to those set out in the Treaty, which the Council had already identified in a decision.
- Article 83(1) TFEU allows the EP and Council to adopt by the OLP minimum rules on the definition of criminal offences and sanctions in the areas of "particularly serious crime with a cross-border dimension" where there is a need to combat such crime on a common basis. The

crimes included in the current definition are terrorism, drug, arms and people trafficking, money laundering, corruption, counterfeiting, computer crime and organised crime.

The third indent of this Article provides for the Council to adopt by unanimity and with the EP's consent, a decision identifying other areas of crime to add to this list with regard to which the EU would be able to specify minimum rules and sanctions.

If the legal basis of the measure is Article 82(2) and Article 83(1) TFEU, a two-stage parliamentary approval procedure applies:

1. before the Government can participate in the negotiations or the decision, or in any decision drawing on a previous use of such a decision, and
2. before it can give final agreement to the decision.

Both Houses must pass a motion tabled by a Minister without amendment, which would constitute "parliamentary approval" for the purpose of approving the Government's notification of its wish to opt in to a proposal and to participate in the EU negotiations.

The Government may not give notification of an intention to participate in an AFJS measure under Articles 81(3), 82(2) or 83(1) or any subsequent decision unless this has been approved by an Act of Parliament.

## 7 Further reading

- European Scrutiny Committee, 30<sup>th</sup> Report, 18 May 2011, [Opting into international agreements and enhanced scrutiny of opt-in decisions](#)
- [Ministerial correspondence, European Scrutiny Committee](#)
- Home Affairs Committee - Tenth Report, "[Implications for the Justice and Home Affairs area of the accession of Turkey to the European Union](#)", 18 July 2011
- *European Integration Studies*, Miskolc, Vol 7, No. 1 (2009) pp. 3-28, Judit Fazekas, [Development of justice and home affairs cooperation between 2004 and 2009 in the European Union](#)
- Commission DG for Justice, Freedom and Security, [consolidated list of the pre-Lisbon Acquis in Title IV TEC and Title VI TEU](#) (Police and Judicial Cooperation in Criminal Matters, now Title V chapter 4 TFEU).
- [The Stockholm Programme – An open and secure Europe serving and protecting the citizens](#): aims to implement JHA measures from 2010 to 2014, including those drawn up and implemented under the earlier Tampere (1999-04) and Hague (2004-09) Programmes. Annex to the Commission Communication, "[Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme](#)" (COM(2010) 171 final, 20 April 2010, contains a timetable for the adoption of all AFSJ measures up to 2014.