

## **Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions in Justice and Home Affairs Matters (JHA)**

### **Following Implementation of the Lisbon Treaty on 1 December 2009 and further enhanced during 2011 and 2012.**

This Annex outlines the actions Government Departments will take to ensure opt-in and Schengen opt-out decisions take into account the views of Parliament. Its publication emphasises Departments' commitment to existing Cabinet Office scrutiny guidelines and to the scrutiny procedures on the opt-in first outlined on 9 June 2008 by Baroness Ashton and further enhanced by the undertakings set out in the Written Ministerial Statement (WMS) to Parliament made by David Lidington, the Minister for Europe (MfE) on 20 January 2011, and following the first Lidington debates in 2012. Departments must continue to follow standard procedures for consulting Business Managers on all Government decisions which are taken as part of the scrutiny process.

1. Article 3(1) of Protocol 21 to the EU Treaties on the position of the United Kingdom and Ireland allows the Government three months to decide whether to opt in to a proposed measure falling within Title V of Part Three of the Treaty on the Functioning of the European Union – Justice and Home Affairs (JHA) matters. The Government has undertaken to give special treatment to legislation requiring an opt-in decision (see the Statement by Baroness Ashton of Upholland, the Resolution of the House of Lords and the MfE's WMS, appended). The original Statement undertook that details would be in a Code of Practice setting out the Government's commitment to effective scrutiny. This Code also incorporates the enhancements to the consideration of JHA opt-in decisions outlined during 2011. Schengen opt-out decisions are treated in the same way.

### **Timetable for Submission of Explanatory Memoranda (EMs), linked to the opt-in timetable**

2. The period for submitting an EM runs not from the date of deposit of the document, but from the date of its publication as a Council document in English. The undertaking given by Baroness Ashton is that Departments will submit EMs "as soon as possible," and no longer than ten working days from the date of the document's publication (as defined here). Departments should be aware that the Cabinet Office guidance requires the completion of further EMs as a dossier progresses.

### **Content of Explanatory Memoranda**

3. The EM will state the date of publication of the proposal, and the date for the Committees to express their opinions on the Government's opt-in or Schengen opt-out decision. This date is eight weeks from the date of publication of the last language version of the proposal and should, where known, be included in the EM. The date by which the UK must notify its opt-in decision will also be three months from the date on the last language version of the proposal. This date

should be ascertained by the Government Department from the General Secretariat of the Council. If not all language versions are available at the point of the EM submission, the date must be provided to the Committees as soon as possible thereafter.

4. The EM will set out the main features of the proposal and the Government's views on it. Additionally it will provide an indication, to the extent possible, of the Government's views as to whether or not it would opt in and the factors likely to influence the Government's decision, but bearing in mind the undertaking not to reach a final decision for at least eight weeks to enable the Government to take into account the opinions of the Committees.

### **Debates in Government Time**

5. If the Government considers that a proposal is likely to attract particularly strong Parliamentary interest sufficient to warrant the offer of a debate in Government time, this offer will be made in the EM whilst recognising that in the House of Lords decisions on debates will rest with the House as provided for under pre-existing arrangements. This is also without prejudice to the right of the House of Commons to call a debate under the usual scrutiny arrangements. The decision on whether an offer should be made will fall to the lead Government Department in light of the process set out in paragraph 6. The Commission Work Programme, the Presidency forward look, pre- and post-Council Statements and the opt-in website will all be used to inform the offer. Departments should liaise with Business Managers via their Parliamentary Teams at the earliest opportunity to request they schedule a Commons debate.
6. An indicative list of opt-in decisions to be made during the year will be provided every six months to both Committees as part of the process set out in paragraph 17. The Government will make an indicative offer of those to be debated in Government time every six months by WMS to both Houses following consultations with the Committees.
7. All debates concerning the Government's opt-in decision should usually take place in the four weeks that follow the initial eight-week period of consideration after the publication of a proposal. Where Parliamentary time cannot be found for an opt-in debate to be held on a Government motion (for example recess), debates could be held on a take note motion early in the three month window. Where the Government offers a debate in Government time, the Business Managers should be informed at the same time as the offer is made to the Committees. The motion for debate should, wherever possible, be notified in advance to allow the Committee discussion time.
8. Decisions on the signing or conclusion of international agreements which concern JHA matters or which the Government considers are subject to the UK's opt-in Protocol because they include JHA obligations, usually state that the agreement is annexed to the draft Decision. Departments will ensure that they include with the EM the text of the agreement in the form in which it is to be signed or

concluded, in accordance with Cabinet Office guidance on negotiating mandates and external agreements. These arrangements apply to the Council Decisions to sign and conclude international agreements which concern JHA matters or include JHA obligations but not the negotiating mandates which are classified. The Committees will be informed of the existence of a negotiating mandate in writing.

### **The opt-in period**

9. During the 3-month period for opting in, Departments will keep the Committees informed of the progress of any negotiations and of any substantial shift in their position on a dossier, in particular on the question of opting in.
10. If the Government decides to opt in, the Minister will write to inform the Committees that it has done so as soon as the Presidency has been notified. If the Government decides not to opt in, the Minister will write to inform the Committees of its decision as soon as it has been reached. The Government will report opt-in and Schengen opt-out decisions and the reasons why they believe their decisions to be in the national interest to both Houses of Parliament as a Written or, where appropriate, Oral Ministerial Statement (WMS/OMS) with a Ministerial letter sent during recess. No undertakings should be given to make an Oral Statement to the House until agreement has been sought as currently required (outlined in chapter 9 of the Ministerial Code). Officials should contact the Clerk/Clerk Adviser to the Scrutiny Committees in advance of publication so that they can inform the Committee Chairmen.

### **Early opt-in decisions**

11. Where the Presidency wishes to put a proposal on the Council agenda for approval or adoption less than 8 weeks after publication and the Government has decided whether or not it wishes to opt in, the Business Managers and Committees will be informed immediately of the decision and the reasons for it.
12. The Lords' Resolution further provides that, in the case of an early opt-in to a proposal awaiting debate in the House, the Minister must give reasons to the House at the opening of the debate.
13. An early opt-in counts as a "scrutiny override" unless cleared by the Committees, and should be an exceptional occurrence. A Minister who has overridden scrutiny must write to the relevant European Scrutiny Committee(s) setting out the reasons why she or he failed to respect the eight-week scrutiny period.

### **Schengen opt-outs**

14. In the case of measures building on the Schengen acquis ("Schengen-building measures") the Schengen Protocol (No 19) takes precedence over the Opt-In Protocol (No 21). The result is that Schengen-building measures which can apply to the UK (broadly, those dealing with police and judicial cooperation) will

apply automatically unless within 3 months the UK exercises an opt-out. The WMS made by the Europe Minister indicates that the enhanced scrutiny arrangements will also apply to decisions under the Schengen Protocol.

### **Post-Adoption Opt-Ins**

15. Where the Government decides to opt in after a measure has been adopted it will inform the Committees of its intentions. The Committees will normally have a similar eight-week period in which to offer their views; however, the Government will need a degree of flexibility in cases where an earlier opt-in is considered in the national interest. As with a pre-adoption opt-in the Government will consider whether to offer a debate on Government time where the proposal attracts particularly strong Parliamentary interest.

### **Debates on Committee reports**

16. Where the Lords Committee has adopted a report on the issue of opting in and has recommended that the report should be debated, the Government has undertaken that its business managers in the Lords will, through the Usual Channels, use their best endeavours to arrange a debate before the Government formally notifies its opt-in decision to the Council.

17. Where the Commons Committee has recommended a debate on the Government's opt-in decision in European Committee or on the Floor of the House, the Government has undertaken that its business managers in the Commons will, through the Usual Channels, use their best endeavours to arrange a debate before the Government finally notifies its opt-in decision to the Council.

### **Annual Report**

18. The Government has undertaken to report each year on the scrutiny of opt-ins. This report will include a review of the Government's application of the Protocol and its adherence to the enhanced scrutiny commitments, as well as opt-in decisions expected in the following year. A table annexed to the Report will show, for each dossier, the date of publication, date of deposit, date of Explanatory Memorandum and, where the Government decided to opt in, the date on which this was done. An update to the table and list of forthcoming opt-in decisions will be provided to the Business Managers and Committees at the mid-year point.

19. In addition, a public [JHA opt-in webpage](#) has been established. This lists opt-in and Schengen opt-out decisions taken by all Government Departments as well as active and forthcoming decisions. It is updated by the Home Office and Ministry of Justice.

### **Recess**

20. The lead Government Department will write to the Committees well in advance of each recess (where relevant) notifying them of forthcoming opt-in decisions. In the House of Commons, the use of policy (take note) debates referred to at paragraph 7,

will be considered where the only time available is early in the opt-in process, on the understanding that further Committee scrutiny may be necessary over recess. In the House of Lords, debates will continue to be on the basis of an amendable motion.

## **Appendix A**

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

*[numbering added]*

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:

1. 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;
2. 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;
3. 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;
4. 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).

5. 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.
6. 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. 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;
7. 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.

## **Appendix B**

## **HOUSE OF LORDS RESOLUTION OF 30 MARCH 2010**

### **European Union Proposals: Scrutiny of Opt-in Decisions**

Baroness Royall of Blaisdon moved to resolve that, 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.

(3) 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.

The motion was agreed to.



Foreign &  
Commonwealth  
Office

## Written Ministerial Statement

20 January 2011

### Enhancing Parliamentary Scrutiny of European Union Business

**Minister of State for Europe (David Lidington):** The imminent annual report on EU Justice and Home Affairs has provided a useful point of reflection on current arrangements for Parliamentary scrutiny over Justice and Home Affairs decisions. The Government has come to the view that the current arrangements are not adequate and the Parliament has too small a role.

I am therefore pleased to announce that the Government has agreed an important package of measures to strengthen Parliamentary scrutiny of EU business, including in the important area of Justice and Home Affairs, to be elaborated and implemented in close consultation with the Business Managers and the relevant Parliamentary Committees. This Government is committed to upholding the right of Parliament to hold the Government to account on EU issues and this package will provide Parliament with further tools to enable it to do this job effectively.

The Treaty of Lisbon provides for a five-year transitional period after which the infringement powers of the European Commission and the jurisdiction of the European Court of Justice (ECJ) will apply to all unamended police and criminal justice instruments adopted under the pre-Lisbon 'third pillar' arrangements. The transitional period began on 1 December 2009 and will end on 30 November 2014. The UK has until 31 May 2014 to choose whether to accept the application of the Commission's infringement powers and jurisdiction of the ECJ over this body of instruments or to opt out of them entirely, in which case they will cease to apply to the UK on 1 December 2014.

Parliament should have the right to give its view on a decision of such importance. The Government therefore commits to a vote in both Houses of Parliament before it makes a formal decision on whether it wishes to opt out. The Government will conduct further consultations on the arrangements for this vote, in particular with the European Scrutiny Committees, and the Commons and Lords Home Affairs and Justice Select Committees and a further announcement will be made in due course.

The Government is fully committed to rigorous Parliamentary scrutiny of opt-in and Schengen opt-out decisions in relation to new proposals from the Commission. The Government will continue to honour the arrangements that are currently in place following the undertakings of the then Government Minister, Baroness Ashton, for enhanced Parliamentary scrutiny of JHA opt-in decisions. The Government will also undertake to extend scrutiny of opt-in decisions with the following commitments.



Firstly, following the existing process of Parliamentary scrutiny of all JHA measures under Title V of the Treaty on the Functioning of the European Union (TFEU), the Government commits to make a written statement to Parliament on each opt-in decision to ensure that Parliament is fully informed of the Government's decision and of the reasons why it believes its decision is in the national interest. Where appropriate and necessary, this statement may be made orally to Parliament.

Secondly, the Government urges the Committees to take full advantage of their existing right to call a debate on an amendable motion on any opt-in decision and expresses its willingness to participate in these debates to ensure full transparency and accountability of opt-in decisions.

Thirdly, in circumstances where there is particularly strong Parliamentary interest in the Government's decision on whether or not to opt in to such a measure, the Government expresses its willingness to set aside Government time for a debate in both Houses on the basis of a motion on the Government's recommended approach on the opt-in. The precise details of these arrangements to allow such debates and the circumstances in which Government time would be set aside will be the subject of further consultation with the European Scrutiny Committees, Business Managers and the Commons and Lords Home Affairs and Justice Select Committees. These discussions will also need to determine how arrangements would operate during periods of parliamentary recess and dissolution of Parliament. However, the Government believes that as a general rule, it would be appropriate to do so in circumstances where it proposes to opt in to a measure which would have a substantial impact on the United Kingdom's criminal or civil law, our national security, civil liberties or immigration policy. The Government will also put in place analogous arrangements for parliamentary scrutiny of decisions to opt-out of measures under the Schengen Protocol.

As currently, the Government will not override the scrutiny process unless an earlier opt-in decision is essential. Where the Government considers an early opt-in to be necessary, it will explain its reasons to Parliament through the statement set out above. In these circumstances, it would usually be appropriate for the statement to be made orally.

The Government is committed to strengthening its engagement with Parliament on all European Union business as part of our wider work to reduce the democratic deficit over EU matters. It will review the arrangements for engagement on EU issues in consultation with Parliament, and make a further announcement in due course.

These measures will significantly strengthen Parliament's oversight of EU Justice and Home Affairs matters and make the Government more accountable for the decisions it makes in the EU.

I have discussed the terms of this statement with the Home Secretary and the Justice Secretary who agree with its contents.