

## The JHA opt-in Protocol and Schengen opt-out Protocol

The UK's participation in EU legislation on Justice and Home Affairs (JHA) is principally governed by Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), collectively often referred to as the [Lisbon Treaty](#). An explanation of the Protocols is below.

- a. JHA (Title V) opt-in Protocol 21: The UK, and separately Ireland, may choose, within three months of a proposal being presented to the Council pursuant to Title V of Part Three of the TFEU (the part of the Treaty governing JHA matters), 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 would be bound, the European Court of Justice (ECJ) will have jurisdiction over the measure and the Commission will have the power to enforce in respect of any failure to implement properly the measure. 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, as a result, has reduced negotiating weight with which to shape the proposal. However, the UK may, at any stage after a measure has been adopted, indicate its wish to participate, though the Commission has to approve and the Commission and Council can impose conditions.
- b. Schengen 'opt-out' Protocol 19: Article 4 to Protocol (No 19) to the TEU and TFEU, on the Schengen acquis integrated into the Framework of the European Union, provides that the UK (and Ireland respectively) may request to take part in some or all provisions of the Schengen acquis. The Schengen acquis is the body of law which governs 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. The UK does participate in some parts of Schengen, as recorded in Council Decision 2000/365/EC (OJ L 131, 1.6.2000, p. 43–47), i.e. the police and judicial cooperation elements of Schengen. The UK does not however participate in the border control elements. Article 5 of the Protocol provides that the UK is deemed to be in any measures which build on those parts of the Schengen acquis in which it already participates 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. If 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 such non-participation seriously affects the practical operability of the system, but the Protocol states explicitly that it must seek to retain the UK's widest possible participation.

## **The Government's approach to participation in EU Justice and Home Affairs (JHA) legislation**

This Government recognises that cooperation on Justice and Home Affairs can deliver key benefits, helping us to tackle cross border crime and to make it easier for British citizens to do business across borders. Such cooperation can also help enhance the UK's security. It also increases certainty in legal disputes both for business and families (for example about child custody across borders). It can also provide opportunities for practical cooperation and capacity-building work on immigration, organised crime and judicial cooperation.

The Government has undertaken that all JHA proposals will be assessed on a case-by-case basis. The Government will put the national interest and the benefits to our citizens and businesses at the heart of our decision-making and will consider each decision under the Protocols with a view to maximising our country's security; protecting civil liberties; preserving the integrity of our criminal justice and common law systems; and controlling immigration.

The Government has decided that the UK will not opt into a proposal concerning a European Public Prosecutor and has no intention of joining Schengen measures that could weaken UK border controls.

## **Enhanced scrutiny arrangements in 2011 for Government decisions on participation in EU JHA legislation**

All EU proposals are subject to scrutiny by both Houses of Parliament before the Government can agree them in the Council. In the House of Commons this scrutiny takes place in the European Scrutiny Committee; and in the House of Lords by the European Union Committee. The European Union Committee has several sub-Committees; Justice and Home Affairs business is considered by sub-Committees E or F.

To facilitate the scrutiny, Government must provide a copy of the proposal to the Committees within 48 hours of publication plus an Explanatory Memorandum (EM) setting out the Government's position within a further 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, as then Leader of the House of Lords under the previous Government, made a [statement](#) setting out additional commitments by the Government to Parliament in respect of the scrutiny of JHA opt-in decisions to be taken by the Government. These commitments were designed to ensure that the views of the Parliamentary Scrutiny Committees should inform the Government's decision-making process on UK participation in an EU measure, and 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 Government's position.
- To make a Government Minister available to participate in a debate on the proposal recommended by the Committee.

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 Justice and Home Affairs. The package endorsed the continued application of the commitments made by the previous administration but added:

- A written statement to Parliament reporting all opt-in decisions on new EU measures in the area of Justice and Home Affairs; 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.

As a result, the JHA opt-in and Schengen opt-out are now subject to some of the most rigorous Parliamentary scrutiny of all EU business.

In 2013, following consultation with the Parliamentary Scrutiny Committees, the Government finalised its Code of Practice on the Scrutiny of Opt-in and Schengen Opt-out Decisions in Justice and Home Affairs Matters. A PDF version of this guidance for Government officials can be found [here](#).

### **The annual report to Parliament on the JHA opt-in**

The enhanced scrutiny arrangements for the operation of the JHA opt-in included a pledge that the Government would "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".

The Coalition Government have maintained this commitment, and the first such report was published in January 2011: it covered the 12 months since the coming into effect of the Lisbon Treaty on 1 December 2009. For completeness the report also covered the application of Protocol 19 ('the Schengen opt-out Protocol') to the Treaties, which also gives the UK the right to choose in which measures to participate. The report can be found [here](#).

The second annual report on the opt-in was published in January 2012. It covered decisions made between 1 December 2010 and 30 November 2011. The report can be found [here](#).

The third annual report on the opt-in was published in April 2013. It covered decisions made between 1 December 2011 and 30 November 2012. The report can be found [here](#).