



HOUSE OF LORDS

European Union Committee

1st Report of Session 2009–10

**Asylum directives:
scrutiny of the
opt-in decisions**

Report

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The European Union Committee

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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The Members of the Sub-Committee which conducted this inquiry are listed in Appendix 1.

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Asylum directives: scrutiny of the opt-in decisions

Introduction

1. The present scrutiny reserve resolution of the House governing the circumstances in which Ministers of the Crown may give agreement to European Union proposals for legislation¹ does not in terms cover the circumstances in which the Government decides whether or not to opt in to a proposal for legislation, even though such a decision is arguably at least as important as agreement on the final text of the proposal.
2. In anticipation of the entry into force of the Treaty of Lisbon, 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 new procedure for improving the scrutiny of legislation subject to the United Kingdom's opt-in. 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 in Appendix 2.²
3. This report, prepared by Sub-Committee F,³ considers two recent Commission proposals for changes in the Common European Asylum System. Both will apply to the United Kingdom only if the Government decides to opt in. It is the first report to be made after the entry into force of the Treaty of Lisbon, and hence under this new procedure.

The Treaty background

4. In earlier reports on the United Kingdom opt-in we have explained at some length the distinction between first pillar legislation under Title IV of the Treaty establishing the European Community (TEC), where the United Kingdom opt-in applied, and third pillar legislation under Title VI of the Treaty on European Union (TEU), which was not subject to a United Kingdom opt-in.⁴ Since the entry into force of the Treaty of Lisbon on 1 December 2009 that distinction no longer applies. The first and third pillars have been merged, and all legislation within the area of freedom, security and justice (AFSJ) will now be made under Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU). This includes legislation on policies on border checks, asylum and immigration (Chapter 2 of Title V); judicial cooperation in civil matters (Chapter 3); judicial cooperation in criminal matters (Chapter 4); and police cooperation (Chapter 5).

¹ See the European Union Committee's *Annual Report 2009* (23rd Report, Session 2008–09, HL Paper 167), Appendix 2.

² A fuller explanation of the negotiations leading up to agreement on this enhanced scrutiny process is contained in our report *Enhanced scrutiny of EU legislation with a United Kingdom opt-in* (2nd Report, Session 2008–09, HL Paper 25).

³ The members of the Sub-Committee are listed in Appendix 1.

⁴ See e.g. *The United Kingdom opt-in: problems with amendment and codification* (7th Report, Session 2008–09, HL Paper 55), paragraphs 1–5.

5. For all substantive AFSJ legislation, Commission proposals will be subject to what is now called the ordinary legislative procedure: codecision between the European Parliament and the Council, which acts by a qualified majority. None of this legislation will apply in the United Kingdom unless it exercises its opt-in.⁵

The Common European Asylum System (CEAS)

6. Following the entry into force on 1 May 1999 of the Treaty of Amsterdam, which granted the Community competence in asylum and immigration matters,⁶ the European Council met in Tampere in October 1999 to prepare the first five-year policy programme for justice and home affairs, and agreed to develop a Common European Asylum System (CEAS). To achieve this, the Council adopted between 2000 and 2005 the following measures, which constituted the first phase of legislation:
- the EURODAC Regulation,⁷ establishing a fingerprint database to assist in the identification of asylum seekers (December 2000);
 - the Temporary Protection Directive,⁸ on minimum standards for providing temporary protection in the event of a mass influx of displaced persons (July 2001);
 - the Reception Conditions Directive,⁹ laying down minimum standards for the reception of asylum seekers (January 2003);
 - the Dublin II Regulation,¹⁰ determining which Member State has jurisdiction to examine and decide an asylum application (February 2003);
 - the Qualification Directive,¹¹ laying down minimum standards for qualification and status as either a refugee or a beneficiary of subsidiary protection (April 2004); and
 - the Asylum Procedures Directive,¹² laying down minimum standards on procedures for the granting and withdrawing of international protection (December 2005).

The Committee considered and reported on all of the proposals which preceded these measures in a series of four reports published in 2001 and 2002.¹³

⁵ i.e. unless within three months of a proposal being presented to the Council the United Kingdom notifies the President of the Council in writing that it wishes to take part in the adoption and application of the proposed measure: Article 3 of the Protocol on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

⁶ TEC Title IV, Article 63 (visas, asylum, immigration and other policies related to the free movement of persons).

⁷ Regulation 407/2002 on the creation and operation of a database of fingerprints of asylum seekers.

⁸ Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced people and measures to promote a balance of effort between Member States.

⁹ Directive 2003/9/EC on minimum standards for the reception and support of asylum seekers.

¹⁰ Regulation 343/2003 determining the State responsible for examining an application for asylum.

¹¹ Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals as refugees or as persons otherwise in need of international protection.

¹² Directive 2005/85/EC on minimum standards for granting and withdrawing refugee status.

¹³ See *Minimum Standards in Asylum Procedures* (11th Report, Session 2000–01, HL Paper 59); *Minimum Standards of Reception Conditions for Asylum Seekers* (8th Report, Session 2001–02, HL Paper 49); *Asylum Applications—Who Decides?* (19th Report, Session 2001–02, HL Paper 100); *Defining Refugee Status and those in need of International Protection* (28th Report, Session 2001–02, HL Paper 156).

7. In November 2004 the Council agreed the Hague Programme,¹⁴ the second five-year programme which set out the future development of justice and home affairs policy for the period 2005 to 2009. It stated that the second phase of the CEAS should be completed by the end of 2010¹⁵ by adopting proposals to amend the first-phase measures, following a review of those measures to be conducted during 2007. An evaluation of the first-phase measures was duly carried out and the Commission published a Policy Plan on Asylum¹⁶ in June 2008 which announced the amendments that were to be made.

The first three second-phase proposals

8. In December 2008 the Commission put forward proposals for replacing the two instruments making up the Dublin system (the Dublin II and EURODAC Regulations)¹⁷ and the Reception Conditions Directive.¹⁸ We considered in our report *The United Kingdom opt-in: problems with amendment and codification*¹⁹ the problems which would arise if the United Kingdom did not opt in to these instruments in their revised form.
9. It was generally accepted that if the second phase measure was an amendment of the first phase measure, and the United Kingdom did not opt in to the amending measure, the first phase measure would continue to apply in the United Kingdom. What was at issue was whether the same would happen if, as is the case, the change is to be made by altogether repealing and replacing the first phase measure. Our view, contrary to that of the Home Office, was that, because the repeal was to be made by a provision of an instrument not applying in the United Kingdom, the first phase measure would continue to apply.
10. The Government did not opt in to the proposal to repeal and replace the Reception Conditions Directive. In our view the result will be that, when the new Directive is adopted and comes into force for 24 Member States,²⁰ the Directive in its current form will continue to apply in the United Kingdom. We have recently received from the Commission a response to our earlier report in which they emphatically agree with our conclusion. We reproduce

¹⁴ [2005] OJ C 53/1. This was the subject of our report *The Hague Programme: a five year agenda for EU justice and home affairs* (10th Report, Session 2004–05, HL Paper 84).

¹⁵ That optimistic timetable has now been revised: it is hoped to complete the second phase by 2012.

¹⁶ COM(2008) 360 final.

¹⁷ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Document 16929/08), and Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EC) No [...] establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Document 16934/08).

¹⁸ Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Document 16913/08).

¹⁹ 7th Report, Session 2008–09, HL Paper 55. The measure to which we refer in this report as the “Reception Conditions Directive” is referred to in that report as the “Reception Directive”.

²⁰ The other three Member States are the United Kingdom, Ireland (which also has an opt-in), and Denmark, to which no measures in the AFSJ apply.

that response in Appendix 3.²¹ We have asked Home Office Ministers for their reaction to the Commission's views, but have yet to receive a reply.

The two latest second-phase proposals

11. On 21 October 2009 the Commission put forward its proposals for the two remaining directives making up the second phase of the CEAS, and the Council circulated them on 23 October. The three month period for opting in therefore expires on 23 January 2010.
12. Because these proposals were made before the entry into force of the Treaty of Lisbon, they are based on Article 63 of the TEC, within Title IV. This will now change to the equivalent legal base in the TFEU, Article 78(2).

The Qualification Directive

13. The first of the two proposals²² is for a revised version of the first-phase Qualification Directive, which sets out the criteria for qualifying either as a refugee or a beneficiary of subsidiary protection, and defines the rights resulting from each status. In its report on the proposal for the first-phase Directive the Committee welcomed the measure.²³
14. We set out in Appendix 4 the Government's explanatory memorandum on the proposal for a new second-phase Qualification Directive. Their overall view is summarised in paragraph 12: "Many of the proposals in the Directive are unobjectionable from our viewpoint as we already comply with the duties that they would impose on us. However there are other proposals, as set out below, that would cause us difficulties." Paragraphs 14 to 33 give the Government's views on particular provisions, and explain their reservations about some of them.
15. The new Directive would create a uniform status for those qualifying as refugees and beneficiaries of international protection by removing Member States' discretion to limit the rights available to the latter category. We welcome this proposal, which would in any event not result in any significant changes to the rules now applying in the United Kingdom as there is already a single procedure in place for both types of claim. Furthermore the United Kingdom does not distinguish between refugees and beneficiaries of subsidiary protection in terms of their entitlements.
16. Provisions of particular concern to the Government include:
 - Article 2 which would extend the definition of "family members" to include married minor children, another adult relative responsible for a minor, and minor unmarried siblings;
 - Article 7 which would place on Member States the burden of demonstrating that non-State agents who may offer protection to an applicant have the will and ability to uphold the rule of law; and

²¹ Our report also dealt with problems which arise in the case of codification, and the Commission's response also deals with these. We do not reproduce in Appendix 3 the parts of the response relating to codification.

²² Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Document 14863/09 + Add 1, Add 2, Add 3 & Add 4).

²³ *Defining Refugee Status and those in need of International Protection* (28th Report, Session 2001–02, HL Paper 156), paragraphs 29–30.

- Articles 11 and 16 which would limit Member States' ability to cease protection if the beneficiary can demonstrate "compelling reasons arising out of previous persecution", and which the Government fear would require them to continue to offer protection to persons no longer needing it.
17. The Government, as is their custom, do not at this stage indicate whether or not they intend to opt in to the proposal. In our view it should be possible to deal with their reservations in the course of negotiations; none of these difficulties seem to us to be so significant that the Government should decline to opt in. **Accordingly we urge the Government to opt in to the proposed second-phase Qualification Directive.**
18. Moreover, if the Government do not opt in, they will face exactly the same difficulties as they now do in the case of the Reception Conditions Directive, as we have explained in paragraphs 8 to 10. They might for example find themselves applying a narrower definition of "family members" than that applicable in the rest of the EU. For that reason alone, we believe that it is not so much desirable as essential that the Government should opt in.

The Asylum Procedures Directive

19. The second of the two proposals²⁴ would revise the current Asylum Procedures Directive, which lays down minimum standards for the procedures for granting and withdrawing international protection. The Government's explanatory memorandum on the proposal for a new Asylum Procedures Directive is set out in Appendix 5. While the Government support the ideals of simplification of procedures and improved efficiency, they believe that the new Directive "does precisely the reverse"; they are "concerned that the proposals in this recast directive would, if adopted, work against Member States' ability to tackle abuses of the asylum system".²⁵
20. The Government have particular concerns about Article 27 of the proposal, which seeks to introduce a six month time limit within which a decision must in the first instance be taken on an application for international protection, and which would also reduce the grounds on which such applications may be accelerated by Member States. They are also concerned about Article 34 which seeks to prohibit Member States from considering an application as "manifestly unfounded" where the applicant's country of origin appears on the common list of third countries which Member States are currently required to consider as being safe countries of origin. The proposal omits the provision of the 2005 Directive which allows the adoption of such a list. The Government believe that these provisions will have a detrimental effect on their ability to make what they refer to as "fast and fair" decisions through the Detained Fast Track (DFT) scheme, and will also undermine their continued use of non-suspensive appeals (NSA). We however are not persuaded that these provisions would have a significant detrimental impact on the Government's current system.
21. Although, as in the case of the Qualification Directive, the Government decline to commit themselves on whether or not they will opt in to the

²⁴ 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 (Document 14959/09 + Add 1, Add 2, Add 3 & Add 4).

²⁵ Explanatory memorandum, paragraph 12.

