

Brussels, 28/10/2009
C(2009) 8414

Dear Lord Roper,

Thank you for sending us your Report "The United Kingdom opt-in: problems with amendment and codification".

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely,



Margot WALLSTRÖM

Vice-President of the European Commission

Lord Roper
Chairman of the European Union Select Committee
House of Lords
Palace of Westminster
UK-London SW1A 0PW



EUROPEAN COMMISSION

Brussels, October 2009

REPLY FROM THE EUROPEAN COMMISSION TO THE REPORT OF THE HOUSE OF LORDS "THE UNITED KINGDOM OPT-IN: PROBLEMS WITH AMENDMENT AND CODIFICATION"

The Commission is grateful to the House of Lords for its report "The United Kingdom opt-in: problems with amendment and codification".

This report underlines certain issues of concern regarding the UK's participation in the two Commission proposals amending respectively the Reception Conditions Directive and the Dublin Regulation. It also refers to the Commission's proposal codifying the three Council Regulations laying down a uniform format for visas.

Background

The effect of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community is that those Member States do not take part in the negotiation and adoption of Title IV measures, and are not bound by them, unless within three months of a proposal for legislation being presented to the Council they notify the Council that they wish "to take part in the adoption and application" of the proposed measure.

In the event that the UK and Ireland decide not to take part in the negotiations on a proposed measure, they nevertheless may, at any time after the proposed measure has been adopted, notify the Council and the Commission that they intend to accept it.

The Protocol does not address situations where Title IV measures to which the UK has opted in are amended by subsequent measures.

By contrast the Treaty of Lisbon recognises the difficulties which might arise from the application of the current 'opt-in' system in cases of amended measures: Article 4a of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice provides that if the UK or Ireland do not opt-in to any amendment of legislation which already applies to them, the Council, should it determine that the non-participation of those Member States makes the application of the measure inoperable for the other Member States, may decide that the original measure, and any subsequent amendments, cease to apply to them. The Council may also require the UK or Ireland to bear any financial consequences which may result from their ceasing to participate in the existing measure.

Specific issues raised by the Report

The Reception Directive and the Dublin Regulation

The Commission presented a proposal to amend (recast) the Reception Conditions Directive (2003/9/EC of 27.1.2003) and a proposal to amend (recast) the Dublin Regulation (343/2003/EC of 18.2.2003).

On 6 March 2009 the UK officially notified the Council that it wished to take part in the adoption of the proposal amending the Dublin Regulation but not to the adoption of the proposal amending the Reception Conditions Directive.

Codification of legislation

On 18 December 2008 the Commission presented a proposal for the codification of three Regulations laying down a uniform format for visas.

The three Regulations are: 1683/95 (adopted before the Treaty of Amsterdam and therefore before any opt out regime, and applicable to the UK in the same way as in every other MS); 334/2002 (which amends the previous Regulation and the UK opted in to it); 865/2008 (which deals with the numbering of visas to make them compatible with the VIS; Ministers decided that the UK should not opt in given the fact that it is not part of the VIS.) In other words, the first regulation applies to the UK automatically, the second applies because UK opted in to it and the third does not apply.

The only purpose of a codification is to reproduce the law in a more accessible way without changing its substance. Accordingly, the codified measure will contain certain provisions that are applicable to the UK and others that are not.

Legal issues at stake

1. The first issue is linked to the possible consequences arising from the UK's decision not to opt in to the Reception Conditions Directive proposal which, according to the recast technique, will replace and repeal the Directive which is currently in force and which is binding on the UK. The question therefore is whether the provisions of the current Directive could still be applicable to the UK once the new Reception Conditions Directive is adopted.

The Report of the House of Lords is of the opinion that "*there is at least some doubt*" as to whether the repeal/replacement of the Directive currently in force will be effective in the UK once the Reception Conditions Directive proposal is adopted, or whether the initial measure will continue to apply to the UK because, according to the Report, the repealed legislation will cease to exist and will disappear from the *acquis*.

The Commission considers that the UK would remain bound by the unamended form of the Reception Conditions Directive. That directive would not be repealed for the UK since the UK has not opted into the proposal amending the Reception Conditions Directive and has not participated in the negotiations that will lead to the adoption of the final text. The other Member States would of course be bound by the amended version of that Directive.

In any case, precisely what this will entail in practice will depend to a large extent on the outcome of the current negotiations and on the content of the text which is finally approved and adopted.

Another point that could arise is whether the non-participation of the UK in the amended version of the existing measure makes the application of that measure inoperable for the other Member States within the meaning of Article 4a of the above-mentioned protocol annexed to the Treaty of Lisbon. Should the Treaty of Lisbon enter into force before the conclusion of the negotiations, this will have to be analysed in due course.

2. The second concern is linked to the cross-references to the Reception Conditions Directive proposal which were inserted into the Dublin Regulation proposal.

The House of Lords expressed doubts as to whether the above-mentioned provisions would be applicable to the UK given that it is not participating in the adoption of the proposal amending the Reception Conditions Directive.

The Commission considers that by opting into a measure, UK accepts the measure as a whole. The opt-in system has never, and should never be seen as giving the Member States that are within that system the possibility of "cherry picking". Therefore, the UK will be bound by all the provisions of the amended version of the Dublin Regulation.

Again, the fact that the technique chosen is one of making cross-references rather than reiterating in the Dublin Regulation the relevant provisions of the Reception Conditions Directive should not lead to divergences in the scope of the amended version of the Dublin Regulation.

3. Finally, the codification of the three Regulations laying down a uniform format for visas, the last issue mentioned by the Report of the House of Lords, would appear to raise a number of legal questions, particularly in relation to the application of the codified instrument to the United Kingdom. Taking this into account, the Commission will give consideration as to whether it is appropriate to withdraw the codification proposal.