The primary purpose of the House of Lords European Union Select Committee is to scrutinise EU law in draft before the Government take a position on it in the EU Council of Ministers. This scrutiny is frequently carried out through correspondence with Ministers. Such correspondence, including Ministerial replies and other materials, is published where appropriate.

This edition includes correspondence from 1 December 2011 – 8 May 2012.

**JUSTICE AND INSTITUTIONS (SUB-COMMITTEE E)**

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Letter from the Chairman to the Rt. Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

In my letter of 21 October, I said that the Committee acknowledged that this proposal “has the potential to be of great benefit to UK nationals who travel within the EU” but also argued that “the UK should only opt in if the Government are confident that their concerns could be met”; the letter also notified you of the Committee’s intention to take evidence in order to “better inform [its] view” of the draft Directive and the ramifications of the Government’s decision not to opt in to the negotiations from the outset.

Alongside the Committee’s current inquiry into the EU’s wider criminal justice policy, the Committee has now held two evidence sessions looking at this specific proposal; the first session on 23 November with the Lord Advocate, Frank Mulholland QC, and the second, on 30 November, with two representatives of the Association of Chief Police Officers - Chief Constable Alex Marshall and Assistant Chief Constable Andy Adams – and, on behalf of the Law Society of England and Wales, Mr Ian Kelcey. The Committee has found these sessions very informative and is grateful to the witnesses for assisting us in forming our views.

Whilst we continue to see this proposal as having the potential to be of great benefit to UK nationals who travel across the EU, in particular given the disparities in the level of protection throughout the EU’s Member States and the significant backlog of cases currently facing the European Court of Human Rights, the Committee is clear that the proposed Directive raises very significant issues for the UK’s criminal justice system. We therefore agree and endorse the Government’s decision not to opt in to this proposal as currently drafted.

Aside from the Law Society which believes that because the positive aspects of the proposed Directive outweigh the negatives the Government should have opted in to the negotiation of the proposal in order to address their concerns, the other witnesses we saw raised a number of specific problems with the current draft, problems which largely involved its lack of flexibility and permissible derogations. Examples the witnesses raised included:

— the requirement that evidence obtained in breach of the Directive is automatically inadmissible;

— the lack of flexibility in the draft allowing Member State authorities to deny access to a lawyer in exceptional circumstances such as terrorist offences;

— that the individual’s right of access to a lawyer should not apply to non-custodial situations and should only become necessary at the point in time when the suspect’s liberty is curtailed;

— the complete guarantee given to the confidentiality of client/lawyer consultation without the possibility of interference on rare occasions;

— the requirement that prior to waiving the right to a lawyer the suspect must have received legal advice on the consequences of the decision; and,
the potential ramifications of requiring face-to-face access to a lawyer, in particular for the length of time individuals spend in custody.

In light of the UK’s criminal justice traditions and the role the judge plays in our system we agree with the witnesses who argued that the current draft weighs the balance of the criminal justice system too much in favour of the accused and also fetters the judge’s discretion to decide, on balance, the overall fairness of the proceedings. Having heard the witnesses it appears to the Committee that in the UK measures such as the Police and Criminal Evidence Act in England and Wales strike the right balance between the rights of the accused and the interests of justice, a balance that could be upset were the Directive to be adopted by the UK as currently drafted.

In conclusion, in light of the evidence we have heard, we remain of the view that the basic principle which underpins the draft Directive is to be welcomed. In your letter of 20 September to the Committee you said that it was the Government’s intention to work closely with the other Member States to secure a satisfactory text. We endorse this approach and agree that if the Government are able to overcome the difficulties highlighted by our witnesses during the course of these negotiations, the UK should apply to opt in to the Directive. If, however, these problems are not overcome, it is with regret that the Committee believes the UK should remain outside the Directive.

You originally predicted that the Polish Presidency intended to seek a General Approach to this proposal at the Justice and Home Affairs Council to be held this week. However, whilst we understand that this is now unlikely, during the course of evidence taken as part of this Committee’s inquiry into the EU's criminal justice policy, it has been indicated to us that many of the issues raised with this proposal have been addressed in a new Presidency text for discussion at the December Council meeting. The Committee would welcome an explanation from you on the proposed changes to the text.

In the meantime, we continue to retain this proposal under scrutiny.

8 December 2011

Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

Thank you for your letter of 8 December indicating your support for the Government’s decision not to opt in to the Directive at this stage but to work together with other Member States to secure a satisfactory text. Thank you also for your letter of 21 October in which you asked which provisions, other than Article 3(1)(a), would in our view require the UK to enact standards that go beyond those of the European Convention on Human Rights ("ECHR"). We set out our response in detail below. In doing so, we focus on those provisions where this is (in our view) unquestionably the case and where the UK would be obliged to change domestic law or practice to implement the standards proposed in the Commission’s draft.

As a general starting point, the European Court of Human Rights ("ECtHR") has very clearly held that Article 6 of the Convention does not specify the manner in which a person charged with a criminal offence should be able to exercise his right to access legal assistance: this is left to the contracting states to determine. The court’s only task is to consider whether any particular method chosen is consistent with the requirements of a fair trial. In this respect the ECHR provides contracting states with far more flexibility in ensuring the rights than the proposed Directive would.

Article 3 of the proposal would require a suspect or accused person to be provided with access to a lawyer before the start of “any questioning” by the police or other law enforcement authorities (art 3(1)(a)) and from the outset of “deprivation of liberty” (art 3(1)(c)). However, the leading case of Salduz and those cases that follow it have only been concerned with the right to access legal assistance whilst a suspect is held in police custody – which is obviously more narrow. Indeed, in Ambrose v Harris the UK Supreme Court has confirmed that the right to access legal assistance under Article 6 applies only once the suspect has been taken into police custody, or his freedom of action has been significantly curtailed. Lord Clarke in particular disagreed with the Commission’s interpretation of the scope of the right.

1 Salduz v Turkey Application No.36391/02 decision of 27 November 2008 paragraph 51
2 Ibid.
3 Op cit.
4 For example, Panovits v Cyprus Application No. 4268/04 11 December 2008; Dayanan v Turkey Application No. 7377/03 13 October 2009
5 [2011] UKSC 43
6 Op cit. paragraph 125
Article 3(1)(b) would require access to a lawyer to be provided “upon carrying out any procedural or evidence-gathering act”, although this right is qualified by specifying that it applies only where a person’s presence is required or permitted in accordance with national law and to the extent that it would not prejudice the acquisition of evidence. However, there is no case law of the ECHR which interprets Article 6 ECHR as establishing a general right of access to a lawyer in all such situations. The proposed Directive therefore goes beyond the ECHR in this respect. As my letter to you dated 8 August states, the effect of this provision would be potentially to hamper the effective investigation of crime as it might prevent the police from performing a routine body search of an arrested person or require the presence of a lawyer on taking fingerprints.

Article 4(1) of the proposal states that a suspect or accused person has the right to meet with the lawyer representing him. This would preclude provision of legal advice by telephone. However, neither Article 6 of the ECHR nor any case law interpreting it requires that a person must always, as a general rule, be able to meet his lawyer face to face. As the ECHR has held, whilst attendance of a suspect’s lawyer during interview provides a safeguard against police misconduct, this is not an indispensable pre-condition of fairness required by Article 6(1) of the ECHR, provided that in the circumstances of each case the individual receives a fair trial.8

Nor does Article 6 of the ECHR, or the case law interpreting it, provide a general right for a lawyer to check the conditions of a suspect’s detention as envisaged by Article 4(4) of the proposal. The proposed Directive therefore goes beyond the ECHR in this respect.

Article 7 of the proposal provides that the confidentiality of all communications between a suspect and his lawyer should be guaranteed in all circumstances. This right is not subject to any derogation in the Commission’s text. The case law of the ECHR has, however, recognised exceptions to the general principle that communications between a lawyer and his client should be confidential. For example, case law is clear that prison authorities may justifiably read privileged correspondence in the Commission’s text. The case law of the ECtHR has, however, recognised exceptions to the general rule, the draft seeks to establish an absolute right to confidentiality which the ECHR does not recognise.

Article 8(a) of the Commission’s proposal provides that the right to access a lawyer may be derogated from where there are compelling reasons “pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person”. The ECHR does not, in interpreting the Convention, seek generally to restrict the scope of a derogation from the right to access a lawyer. Instead it considers case by case the reason for a restriction and whether it was justified in the circumstances. In the leading case of Salduz, the ECtHR has held that access to a lawyer may be restricted in the light of “compelling reasons”,9. The ECHR therefore gives Member States much more flexibility than the proposed Directive would.

However, Article 8(a) of the proposal requires that the right to access a lawyer may only be derogated from in the light of compelling reasons which pertain to the “urgent need to avert serious adverse consequences for the life or physical integrity of a person”. Such a reason would unquestionably justify the restriction of the general right to access a lawyer, but there is nothing in the ECHR case law suggesting that this is the sole reason for which the right to access a lawyer might be restricted.

Article 9(1)(a) of the Commission’s proposal relates to waiver of the right to access a lawyer. The ECHR, as interpreted by the case law of the ECtHR requires that a waiver of this right must be established in an unequivocal manner, and be attended by minimum safeguards commensurate to its importance.10 However, Article 9(1)(a), particularly when read in conjunction with recital 18, suggests that an effective waiver of the right to access a lawyer may need to be informed by legal advice. The UK Supreme Court has recently confirmed that the ECHR does not require this11. The Directive, therefore, goes beyond the requirements of the ECHR to the extent it would require prior legal advice before a person could waive his or her right to a lawyer.

7 Brennan v UK Application No. 39846/98 16 October 2001, para 53
8 Campbell v UK Application No. 13590/88 25 March 1992, paragraph 48
9 Sakhnovskiy v Russia, Application no. 21272/03, 2 November 2010, paragraph 102
10 Lanz v Austria, Application no. 24430/94, 31 January 2002, paragraph 52
11 Salduz v Turkey Application No.36391/02 decision of 27 November 2008, paragraph 55
12 Pischkalnikov v Russia, Application no. 7025/04, 24 September 2009, paragraph 77
13 McGowan (Procurator Fiscal, Edinburgh)(Appellant) v B (Respondent) (Scotland) [2011] UKSC 54, paragraph 54
Both Articles 10(2) and 13(3) seek to regulate the admissibility of evidence obtained either in breach of certain of the rights in the Directive, or subject to a derogation. Whilst Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such\textsuperscript{14}. Indeed, the ECtHR has consistently maintained that admissibility of evidence is primarily a matter for regulation by national law\textsuperscript{15}. We consider that this provision has the potential to fetter unacceptably the discretion of judges to make decisions on the admissibility of evidence, and goes beyond the requirements of Article 6 ECHR as interpreted by the ECtHR.

In terms of an update on negotiations, reasonable progress has been made on this dossier under the Polish Presidency who have done their best to address some of the difficult policy issues. The current draft is more aligned to ECHR case law in that the right of access to a lawyer would arise before official police interview rather than upon “any questioning”, which could encompass simple questions posed in the street. The provision on access to a lawyer during procedural or evidence gathering acts has also been significantly narrowed and a much larger margin of discretion is left to Member States. The right for lawyers to check detention conditions has been removed and the right to communicate with a third party has been changed to the right to inform a third party of arrest. The requirement to have a lawyer in the requesting country in European Arrest Warrant proceedings was opposed by a majority of Member States so has been dropped from the current text. The draft Directive allows for some very limited derogations from the principle of confidentiality between a lawyer and a suspected or accused person, and the articles on admissibility of evidence have been significantly modified in order to avoid fettering the ability of the judge to make decisions on admissibility having regard to overall fairness of proceedings.

We are pleased with the direction of travel of the negotiations but still have some concerns about the content of the Directive, including the narrowness of the derogations from access to a lawyer. Whilst access to a lawyer is a key right of the defence, there are a number of circumstances where it may be necessary to derogate from a suspect or accused person’s right to have access to a lawyer. These circumstances include preventing interference with or harm to evidence, where awaiting the arrival of a lawyer would cause unreasonable delay to the process of investigation, or would be necessary to prevent crime. A state of play is on the agenda for the December Council and I enclose the current text [not printed].

13 December 2011

**Letter from the Chairman to the Rt. Hon Lord McNally**

Thank you for your letter dated 13 December 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 11 January 2012.

We have decided to retain the proposal under scrutiny.

As you are aware the Committee held two evidence sessions in November addressing this significant and important proposal and many of the situations you describe in outlining the provisions of the text which go beyond current ECHR standards were covered by the witnesses in these sessions and formed the subject of correspondence between us in my letter dated 8 December. Nevertheless, the Committee is grateful to you for your detailed explanation of the proposal’s text in the light of the ECHR.

In relation to the ongoing negotiation of this proposal, when Professor Steve Peers gave evidence to the Committee during its wider consideration of the EU’s criminal justice policy he suggested that a text was available from which the most contentious provisions from the UK’s perspective had been removed ahead of its discussion at the December JHA Council. Whilst this appears to be the text you included with your letter dated 13 December the Committee would welcome a detailed explanation from you of the latest post-JHA Council text.

We look forward to considering your response within the usual 10 days.

12 January 2012

**Letter from the Rt. Hon Lord McNally to the Chairman**

Thank you for your letter of 12 January in which you ask for an explanation of the latest text on the Right of Access to a Lawyer and the right to communicate upon arrest.

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\textsuperscript{14} Sebalj v Croatia, Application no 4429/09, 28 June 2011, paragraph 259

\textsuperscript{15} Ibid.
As we indicated in our letter to you of 13 December, we are pleased with the direction of travel of the negotiations and the efforts of the Polish Presidency to make progress on this dossier but we still have some concerns about the content of the Directive.

On 13 December, we provided you with the text of the Directive which was presented at the December Council by the outgoing Polish Presidency as a “state of play”. We would wish to emphasise that the text we sent to you does not reflect an agreed Council position, but was intended to assist the incoming Danish Presidency by facilitating further discussion. No further document has been made publicly available since the December Council. A working group meeting was held on 9-10 January based on a document which was closely based on the “state of play” text, subject to some minor change.

Discussion on this dossier has been difficult and many key substantive issues remain to be resolved. In particular there are differences of view within the Council as to the extent to which the Directive requires that the state actively facilitates access to a lawyer in cases where a person wants to exercise his right to a lawyer and does not have his own lawyer or the means to pay for one. Our view is that for the rights to be effective in practice the state should facilitate such access including by paying for such access where necessary and appropriate. Other Member States take a different view and read the Directive as simply requiring the state to permit (or not prevent) a person to have access to his own lawyer without obliging the state to facilitate such access actively. A further issue concerns minor offences, which some Member States are keen to exclude from the scope of the Directive.

Below I set out some of the main changes from the version of the Directive that was published by the Commission in June, and the 6 December 2011 draft.

Article 1 now sets out that the Directive applies to those persons who are subject to proceedings pursuant to the Framework Decision on the European Arrest Warrant and, in accordance with new article 4, now refers to a suspect’s right to have a third party informed of arrest as opposed to the right to communicate with a third party.

Article 2 has been amended to exempt out of court disposals for minor offences from the scope of the Directive. This is similar to provisions in the Directive on Interpretation and Translation in Criminal Proceedings and the draft Directive on the Right to Information in Criminal Proceedings. We support this addition and have requested language in a recital to ensure that access to a lawyer is not required where relatively minor examples of criminal offending are dealt with by a Commanding Officer within the Service Justice System.

Article 3 has been changed fairly significantly from the original text and it should be noted that this article is still subject to in-depth debate within the Working Group. The article, which should be read in conjunction with recitals 8 and 9, now provides that the right to access a lawyer will apply before official questioning by the police or other law enforcement authorities. The recitals make clear that “official questioning” excludes questioning designed to establish whether or not a criminal offence has been committed in the first place. The intention of this is to carve out those situations where, for example, a person whom the police suspect of having committed a drink driving offence is asked questions relevant to the process of breathalysing. We support this approach and will continue to work to ensure that the Directive clearly does not encompass preliminary questioning outside of an official interview.

The 6 December version of the text sets out that the right of access to a lawyer should apply from the moment a person is summoned to appear before a court. Although we would agree that a person should have access to a lawyer before a court hearing, the wording of the article is problematic as it would seem to require access to a lawyer to be provided essentially from the moment that a person receives a letter summoning him to court. This would cause practical difficulties – a point which we have successfully made in the working group.

Articles 3 and 4 have been merged. Article 3 no longer provides that a person should have the right to meet his lawyer - this has been changed to a right to communicate. We have sought to ensure that the Directive is sufficiently flexible to permit Member States to provide legal advice by telephone in some minor cases - this point is now addressed in recital 11a. Recital 11, however, appears to contradict this with an explicit right for a person to meet his lawyer. We are negotiating language which would address this discrepancy.

The draft has also narrowed the scope of the evidence gathering acts at which access to a lawyer should be afforded. Access to a lawyer would now only be required during identity parades and “the experimental reconstruction of the scene of crime.” The domestic position is that a person is entitled to have a lawyer present during identity parades. We understand “experimental reconstruction of the scene of crime” to refer to a process which is alien to the UK systems.
Article 3 now refers to the potential to derogate from the right to access a lawyer. The provision now allows greater flexibility than the original Commission text by allowing a derogation from the right where this is necessary to prevent a substantial jeopardy to ongoing criminal proceedings. The scope for derogations is, however, much narrower than in domestic practice. The Police and Criminal Evidence Act 1984 (PACE) [and its Codes of practice] allows for questioning to commence without the presence of a lawyer in a wider range of circumstances, including for example where necessary to avoid the alerting of other people suspected of committing an offence but not yet arrested, and where the delay could hinder the recovery of property obtained in consequence of the commission of an offence. It is of note that the Grand Chamber of the European Court of Human Rights has held (in Salduz v Turkey) that the right to access a lawyer may be restricted in “compelling circumstances” provided any restriction does not unduly prejudice the rights of the accused under Article 6. However, that court does not seek to restrict what such compelling circumstances may be.

The text no longer entitles a lawyer to check detention conditions. We had particular concerns about any requirement which would allow lawyers routine access to police and prison cells as this could raise security issues.

New Article 4 sets out the principle that confidentiality of communications should be guaranteed. Provisions on confidentiality were included in Article 7 of the Commission text. This article is also subject to intense negotiation and has not been agreed at working group level. This article is now much closer to domestic practice as it allows for derogations from the right to confidential communication in some exceptional circumstances, such as where there is reason to believe that the lawyer is involved in a criminal offence with the suspected or accused person. We believe that the text should include such derogations, which are necessary in order to prevent crime and to investigate effectively misconduct by members of the legal profession.

Article 5 has changed from the Commission text in that it refers only to the right of an arrested person to have a third person informed of his deprivation of liberty and sets out some circumstances where this right might be derogated from. This right is much narrower than in the Commission draft which provided an unfettered right for an arrested person to communicate with a person of his choice. Such a provision might have permitted an arrested person to tip off other individuals involved in criminal offences. The new drafting is much better, but we do have some residual concerns about the current text which has a narrower scope for derogation than domestic law.

Article 6, which entitles a suspect or accused person to communicate with his consular authorities, differs from the Commission text as it provides a higher standard of rights from which there is no possibility to derogate. We support this change which more closely reflects the Vienna Convention on Consular Relations.

Article 8 sets out the general conditions for applying derogations. It no longer requires that a derogation should be authorised by a judicial authority but rather that it should be subject to judicial review. This is a positive change as decisions on delaying access to a lawyer are operational matters taken by the police at an appropriate level of seniority and as such should not be subject to routine judicial supervision.

Article 9 which permits a suspect or accused person to waive the right to access a lawyer, no longer suggests that such a waiver needs to be informed by legal advice to be valid. The article has improved significantly, but we do have some residual concerns about the practicalities of ensuring that the person has full knowledge of both the content of the right to access a lawyer, and the consequences of waiving it. There are also potential practical difficulties where a suspect waives his right to a lawyer, but decides at a very late stage of proceedings (e.g., in the late stages of a trial) that he would in fact like to be represented.

Article 10 no longer contains an absolute prohibition on the admission, as evidence, of a confession obtained before a person has been made aware that he is a suspect. Many Member States shared our concerns about this provision and its potential impact on the ability to prosecute offences effectively.

Article 11 no longer provides for dual representation in EAW cases – a provision which was opposed by a significant number of Member States. This article has been changed in order to bring it in line with other provisions of the Directive.

Article 12 no longer requires that Member States do not apply less favourable provisions on legal aid than those currently in place. This may have fettered the ability of Member States to make changes to existing legal aid provision.

Article 13 on remedies is now much improved. It seeks to ensure that an effective remedy is in place where the right of access to a lawyer has been breached, but no longer fetters the ability of judges to
make decisions on admissibility of evidence in the interest of fairness of proceedings. We find this language acceptable.

Although we are pleased with the progress on this dossier, we understand that the European Parliament is likely to want to make significant amendments to the text and we will continue to closely engage in negotiations. The Danish Presidency has indicated that it would like to reach General Approach at the June Council. I will of course keep you updated on developments.

26 January 2012

**Letter from the Chairman to the Rt. Hon Lord McNally**

Thank you for your letter dated 26 January 2012. It was considered by the Justice and Institutions Sub-Committee at its meeting of 15 February.

We have decided to retain the proposal under scrutiny.

The Committee is very grateful to you for your detailed analysis of the 6 December version of the text and notes your comments that it represents a "state of play" and does not reflect an agreed Council position. In addition, we note that the negotiation of this proposal has been difficult and that many issues remain to be resolved.

Regarding the ongoing negotiation of this proposal, since it was first published this Committee has supported the ultimate aim of providing access to a lawyer and we take this opportunity to express our agreement with your view that if this right is to have any value states ought actively to facilitate access to a lawyer including where appropriate paying for such access rather than simply ensuring states refrain from interfering with an individual's right to consult their own lawyer.

Regarding the concerns with the text that you raise we would like to express our support for your attempts to amend the permissible derogations to cover situations where questioning of a suspect can begin without the presence of a lawyer in order to avoid the alerting of other un-arrested suspects, and where delay could hinder the recovery of property acquired during the committing of offences.

We also agree with your view that derogation from the provisions governing the confidentiality of lawyer/client communication ought to be allowed in order to cover the prevention of crime and the effective investigation of misconduct by the legal profession.

Finally, would you explain to the Committee what are the minor offences some Member States are seeking to exclude from the proposal. We look forward to considering your answer within the usual 10 day deadline.

15 February 2012

**Letter from the Rt. Hon Lord McNally to the Chairman**

Thank you for your letter of 15 February 2012. In my letter to you of 26 January, I explained that one of the outstanding issues with the dossier was that some Member States were keen to exclude minor offences from the scope of the Directive. You have asked me to explain what those minor offences would be.

As I outlined in my letter of 26 January, Article 2 has been amended to exempt minor offences which may be dealt with by way of an out of court disposal from the scope of the Directive. Similar provisions exist in the Directive on Interpretation and Translation in Criminal Proceedings and the draft Directive on the Right to Information in Criminal Proceedings. We support this addition. In many Member States minor examples of criminal behaviour are dealt with, at least in the first instance, outside of a court having jurisdiction in criminal matters, for example by police or prosecutors. The provision would mean that the Directive would not apply to proceedings where an authority, other than a court is able to impose a sanction. In the United Kingdom, the provision would exclude, for example, minor speeding violations, where the police have the authority to issue a fixed penalty notice, which the offender may either accept or challenge at court. In the event that a person challenged a fixed penalty notice, the Directive would then apply to any subsequent proceedings before a court in respect of such an offence.

In some Member States there is no comparable system of out of court disposals. However, in cases of minor offending such as some speeding violations, those Member States might not provide access to a lawyer before such cases are considered by a criminal court. Therefore, those Member States have asked for minor offences for which a fine is the main penalty available and a custodial sentence is unavailable, to be excluded from the scope of the Directive during the pre-trial stage. Other Member
States may deal with such matters administratively, which would render them outside the scope of the Directive.

29 February 2012

**Letter from the Chairman to the Rt. Hon Lord McNally**

Thank you for your letter dated 29 February 2012. It was considered by the Justice and Institutions Sub-Committee at its meeting of 14 March 2012.

We have decided to retain the proposal under scrutiny.

The Committee is grateful to you for your answer to the question concerning which minor offences some Member States wish to remove from the scope of the Directive. However, you do not express a view on the proposed change and we would welcome your view as to whether you support the proposed change and whether it gives rise to any concerns.

We look forward to considering your answer within the usual 10 day deadline.

15 March 2012

**Letter from the Rt. Hon Lord McNally to the Chairman**

Thank you for your letter of 15 March 2012, in which you asked whether I support the current text of the Directive which would remove certain minor offences from its scope.

The Government supports Article 2(3) of the Presidency’s text which provides that minor offences which may be dealt with by way of an out of court disposal are outside the scope of the Directive (unless the case comes before a criminal court). We are also able to accept an additional exemption, provisionally agreed by the Working Group, which would exempt minor offences, such as certain speeding violations, which can only be punished by way of a fine rather than imprisonment (unless the case comes before a criminal court). This is to accommodate those Member States for which the use of out of court disposals to deal with minor offences is foreign to their criminal justice systems. We believe that given the Directive is designed to provide a minimum standard, such an addition to the text is proportionate.

28 March 2012

**Letter from the Chairman to the Rt. Hon Lord McNally**

Thank you for your letter dated 28 March 2012. It was considered by the Justice and Institutions Sub-Committee at its meeting of 25 April 2012. We have decided to retain the proposal under scrutiny.

We are grateful to you for the clarification of the Government’s position on the removal of minor offences from the Directive’s scope. We see potential difficulties with this aspect of the proposal and we will have further questions which we will raise when we see the revised text in due course.

26 April 2012

**Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman**

Thank you for your letter of 26 April. I am writing to update you about the progress of negotiations within the Council on this Directive and to inform you that the Danish Presidency intend to seek a General Approach on it at the Justice and Home Affairs Council on 8 June. I enclose the latest version of the text which was discussed at an official level Working Group meeting on 19 April. The dossier will be referred to Coreper shortly.

As I explained to you in my letter of 26 January there have been differences of view within the Council as to the extent to which the Directive should require the Member State to facilitate a suspect’s right to access a lawyer. This issue is still open to debate within the Council. Our view is that for the rights to be effective in practice, the state should facilitate such access including by providing a lawyer where the suspect does not have the means to pay and it is in the interests of justice. However, some other Member States have taken a different view and read the Commission’s proposal as simply requiring the state to permit, or not prevent, a person from having access to his own lawyer.

Article 3(4) as currently drafted would require Member States to ensure that a suspected or accused person, who is deprived of his liberty, is provided with a lawyer where he does not have one. Recital
16 clarifies that the Directive would not require the State to pay for a lawyer where a person has the means to pay for a lawyer himself. In cases when a suspected or accused person is not deprived of their liberty Member States must not prevent that person from exercising his right of access to his own lawyer.

We would have preferred for Member States to be required to ensure that all suspected or accused persons are in a position to effectively exercise their right of access to a lawyer, including by providing a lawyer if the person did not have the means to pay and the interests of justice so required, whether the person is deprived of liberty or not. However, the UK was not supported on this point. Overall, however, we are of the view that a Directive that ensures that a person who is deprived of liberty is provided with a lawyer, rather than merely being allowed to access his own lawyer is an acceptable minimum standard for this Directive because it would make a material change to practice in a number of Member States. A person who is deprived of his liberty is particularly vulnerable, given the risk of self-incrimination and pressure from law enforcement authorities, and is most likely to find it difficult to arrange access to a lawyer himself. This view is supported by the case law of the European Court of Human Rights and our own Supreme Court in ‘Ambrose v Harris’ which clarified that a person should have access to a lawyer when he has been taken into police custody, or his freedom of action has been significantly curtailed. Because of this, we are able to accept the current text.

Below I set out the other main differences between the draft of the Directive that was published by the Presidency in December 2011, a summary of which I sent you on 26 January, and the draft that I have enclosed.

Article 2(4) sets out that in relation to minor offences where deprivation of liberty cannot be imposed as a penalty, the Directive will only apply once the case reaches a criminal court. As I explained to you in my letter of 29 February, in many Member States, including the UK, minor examples of criminal behaviour, such as speeding, are dealt with by way of an out of court disposal, for example, a fixed-penalty notice. Article 2(3) would exclude these type of disposals from the Directive, unless a person decides, for example, not to accept a fixed penalty and requests a trial. Article 2(4) has been added to exclude minor criminal infractions from the scope of the Directive, for those Member States which do not have a comparable system of out of court disposals. Given this flexibility takes into account different approaches of Member States to similar ways of dealing with minor suspected criminal offending, we can support this amendment. Recitals 9 and 38 clarify that the Directive does not apply where minor offences are dealt with by a Commanding Officer within the Service Justice System or as a matter of discipline by Governors within prisons unless or until those proceedings are appealed or referred to a criminal court. I hope that these explanations help to address your concern.

We are satisfied that the text at Article 3 and recitals 12 and 14 mean that the scope of the Directive would not apply in relation to preliminary questioning outside of an official interview by the police or other law enforcement authorities. The recitals make clear that “official questioning” excludes questioning designed to establish whether a criminal offence has been committed in the first place. The intention of this is to carve out those situations where, for example, a person whom the police suspect of having committed a drink driving offence is asked questions relevant to the process of breathalysing. We support this approach.

Article 3 and its corresponding recitals no longer require Member States to allow a suspect to meet a lawyer in all cases– this has been changed to a right to communicate. We have sought to ensure that recital 18 will permit Member States to provide legal advice by telephone in some minor cases.

The December version of the text set out at Article 3 that the right of access to a lawyer should apply from the moment a person is summoned to appear before a court. It is now clarified that access to a lawyer would not need to be provided from the moment that a person was summoned to appear before a court, but in due time before they appear at court.

The provisions regarding the scope of the evidence gathering acts at which a person is entitled to have a lawyer present have been amended. A person would only have the right to have a lawyer present during identity parades, “confrontations” and “experimental reconstructions of the scene of crime” if these procedures exist in national law. These procedures are defined at recital 19 and the latter two are not recognised within our criminal justice system. The domestic position is that a person is entitled to have a lawyer present during identity parades.

Article 3(5) now permits Member States to temporarily derogate from the right to access a lawyer when this is justified by compelling reasons. We are satisfied that this is consistent with domestic practice as well as complying with the requirements of the ECHR. Article 7(2) provides that such derogations may be authorised by a judicial or other competent authority, which would allow these operational decisions to continue to be authorised by senior police officers.
Overall, I am pleased with the amendments that have been made to the text which I believe achieve a better balance between the rights of defendants and the wider interests of justice. I will send you a verbatim recording is not made of all stages of extradition hearings. The rights provided for at Article 11 on remedies now apply to the right of access to a lawyer in EAW proceedings. For example, the provision in earlier drafts which would have given a requested person the right for his lawyer to be present when he is officially interviewed has been replaced with the right for the lawyer to participate during a hearing of the requested person by the executing judicial authority. This is because requested persons are not officially interviewed by law enforcement authorities in the executing state. We and some other Member States have some residual concerns about the requirement for the lawyer’s participation at such hearings to be recorded, because a verbatim recording is not made of all stages of extradition hearings. The rights provided for at Article 11 on remedies now apply to the right of access to a lawyer in EAW proceedings. We support this amendment, which should be read in conjunction with recital 33 which states that Member States should ensure that application of the rights provided for in this Directive should not jeopardise the overall fairness of the criminal proceedings. These provisions have now been removed from the text.

Overall, I am pleased with the amendments that have been made to the text which I believe achieve a better balance between the rights of defendants and the wider interests of justice. I will send you a
further update once the proposal has been considered by Coreper. I hope that you will then be in a position to clear the proposal from scrutiny ahead of the JHA Council on 8 June.

The LIBE Committee of the European Parliament have not yet voted on their draft amendments, but we understand that they plan to do so at the end of May. I will provide you with an update following that vote.

3 May 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Your Explanatory Memorandum of 30 January 2012 was considered by the Justice and Institutions Sub-Committee at its meeting of 29 February. We decided to hold these proposals under scrutiny pending further information, in due course, about the readiness of accession states (other than Andorra and Singapore) to operate the Convention, and an update on the legal issues you raise.

We agree with you that the UK opt-in applies to these proposals, but were disappointed not to be provided with your explanation of the factors affecting the opt-in. This appears to us a case where, in accordance with the undertaking to Parliament of Baroness Ashton of June 2008, it would have been possible to provide this information. On the basis of the information so far provided, we regard it as sufficiently important for accession states to be able to operate the Convention satisfactorily that the UK should refrain from opting in to proposals concerning those states where investigations had not confirmed this to be the case. This approach, of course, does not preclude the possibility of the UK opting in later to the adopted decisions, or even simply complying with their requirements. Whether the UK opts in or not, we do regard it as important that the recitals to the decisions adequately describe the position.

On the legal issues there are some matters on which we should be grateful for further explanation when you provide the update on the investigation into the readiness of the accession states. First, what is the consequence of successfully arguing that EU competence is not exclusive? Would that render the proposals unnecessary, or is there still a need for simultaneous declarations of acceptance by Member States? If EU competence was only partly exclusive would decisions of this sort still be a valid approach?

Second, we would be grateful for confirmation of the implications of dropping Article 218 on the legislative procedure; specifically whether the European Parliament would gain the right to co-decide these Decisions, rather than merely being consulted upon them.

Finally with regard to legal basis it appears to us that Article 81(2) TFEU should additionally be cited because Article 81(3), as it applies in these proposals, merely varies the voting rule in the Council when applying Article 81(2).

1 March 2012

Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman

Thank you for your letter of 1 March. Your Committee agreed with the Government’s view that the UK’s Title V opt in applies to these proposals and you recommended that the UK should refrain from opting in to any of the proposals where investigations had not confirmed whether a particular accession state would be able to operate the 1980 Convention satisfactorily. You also said you would have preferred a better analysis of the factors affecting the opt in decision in my Explanatory Memorandum of 30 January.

When the Explanatory Memorandum was prepared the Government had not had enough time to consider fully the implications of the Commission’s claim to exclusive EU competence in this area. It was also only at the earliest stages of investigations into the ability of all countries concerned to operate the Convention. These investigations are led by the Foreign and Commonwealth Office and take place over a period of time. The Government was able to state its position with regard to Andorra and Singapore as the relevant assessments had been completed before the Commission’s proposals were issued. The assessments of the other countries are still ongoing and therefore I am
not yet able to give you the Government’s position on those. Nevertheless, for the reasons given below, the Government has decided to opt in to all eight proposals.

These opt in decisions were not straightforward. As you will be aware, the EU institutions have in the past taken the view that the Title V opt in does not apply to external agreements where there is exclusive competence because of an internal EU instrument where the UK has opted in. The Government believes that irrespective of the position on an EU internal instrument the UK should now assert its right to opt in to such proposals. It cannot be assumed that a decision not to opt in to any of these proposals would go unchallenged. Any such challenge could distract from the dispute about external competence.

Given the wider significance of these proposals for external competence the Government believes that it is in the UK’s interests to participate fully in these negotiations, including having the ability to vote (bearing in mind that these proposals require unanimity for them to be adopted). I recognise that once we have completed our assessments of each of the countries there may be some with whom we believe the time is not yet right to apply the Convention. In such circumstances the UK will have the ability to vote against the relevant proposal but we will come to that position only after discussions about external competence have been completed. Either way the UK will not be forced to accept the accession of any country it believes is not ready to operate the Convention.

The Government accepts that if the EU had exclusive competence for the Hague Convention flowing from the adoption of the Brussels IIa Regulation then there would be a need for co-ordination of declarations of acceptance. However, the Government remains of the view that the Brussels IIa Regulation does not generate exclusive competence for the Hague Convention. The Government considers that the subject matter of the Hague Convention is a matter falling within shared competence but where the EU has yet to exercise its competence. As such Member States remain free to act in their own right until such time as the EU has exercised its competence. If this matter was to be referred to the European Court of Justice and the Court found that there was at least partial exclusive competence for the Hague Convention arising from the Brussels IIa Regulation it is likely there would then be a need for coordination of Member States positions on future accessions.

I can confirm that if, ultimately, these proposals are taken forward on the basis of exclusive competence we shall seek appropriate wording in the recitals to clarify the UK’s participation.

You asked two questions in relation to the legal base of the proposals. Firstly, you suggest that Article 81(2) should be cited in addition to Article 81(3). However, it would appear that reference only to Article 81(3) has been made in other similar Decisions (for example those on the signature, and then on the conclusion, by the Union of the 2007 Hague Convention on Maintenance). Article 81(2) provides for use of the ordinary legislative procedure and Article 81(3) is a specific derogation from the procedures of Article 81(2). Therefore the Government is content that Article 81(3) is cited alone.

You also asked about the procedure under Article 218. This is a situation in which the European Parliament must be consulted but its consent is not required. These proposals do not fall within the categories where consent is required under Article 218(6)(a). Article 81(3) is a field in which the special legislative procedure applies and where the European Parliament must be consulted but does not enjoy a co-legislative role. Accordingly, Article 218(6)(b) applies and the Parliament will be consulted only. The preamble to the proposals bears this interpretation out.

13 April 2012

ADJUSTMENTS TO THE REMUNERATION AND PENSIONS OF EU OFFICIALS AND OTHER SERVANTS (17620/11)

Letter from Mark Hoban MP, Financial Secretary, HM Treasury, to the Chairman

Your Explanatory Memorandum of 24 January 2012 was considered by the Justice and Institutions Sub-Committee at its meeting of 1 February. We fully support the Government’s objection to implementation of the annual adjustment of salaries and pensions and hope that this proposal will not be adopted.

We decided to clear this proposal from scrutiny. We do not expect a reply to this letter.

2 February 2012
Letter from Baroness Wilcox, Parliamentary Secretary for Business, Innovation and Skills, Department for Business, Innovation and Skills, to the Chairman

I am writing in response to your letter of 14 October, clearing these proposals from scrutiny. In your letter you requested to be updated on the outcome of our discussions with the European Commission on securing a declaration in respect of the exercise of competence on the criminal enforcement and sanctions provisions in Anti-Counterfeiting Trade Agreement (ACTA). I am pleased to inform you that a declaration has now been added to the draft Council decision (12192/1/11) on the signature of ACTA and reads as follows;

“The Agreement contains a number of provisions on criminal enforcement that fall within the scope of Article 83(2) of the Treaty. The Union is not exercising shared competence in this area when signing and concluding the Agreement. This is without prejudice to the wider distribution and exercise of competences under Article 83(2) of the Treaty.”

We will now seek to sign ACTA as soon as possible.

20 December 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 20 December 2011. This was considered by the Justice and Institutions Sub-Committee at its meeting of 11 January 2012.

We welcome the open acknowledgment that the EU is not exercising its competence under Article 83(2) TFEU, but remain disappointed that the ACTA Agreement itself will not include a declaration of the respective competences of the EU and its Member States.

We do not expect a response to this letter.

12 January 2012

BRINGING LEGAL CLARITY TO PROPERTY RIGHTS FOR INTERNATIONAL COUPLES
(8253/11, 8160/11, 8163/11, 8145/11)

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter of 28 November enclosing a copy of the response to consultation. This was considered by the Justice and Institutions Sub-Committee at its meeting of 14 December. We decided to retain this matter under scrutiny pending the development of negotiations.

The Committee noted that the response to consultation was mostly in line with its views.

We look forward to a further update, in due course, when there have been substantive developments.

15 December 2011

COMBATING SEXUAL ABUSE, SEXUAL EXPLOITATION OF CHILDREN AND CHILD PORNOGRAPHY (8155/10, 14279/10)

Letter from the Rt. Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice, to the Chairman


The Government is currently considering implementation of the obligations within the Directive, which must be transposed into domestic measures by December 2013. We currently consider the text of the Directive to reflect law or practice in England and Wales. I have enclosed the published Directive for your reference.

22 February 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter dated 22 February 2012 which was considered by the Justice and Institutions Sub-Committee at its meeting of 7 March 2012. We are grateful to you for the information that the proposed Directive has been adopted. We have already cleared the proposal from scrutiny and we do not expect an answer to this letter.

15 March 2012

COMMON EUROPEAN SALES LAW (15429/11, 15432/11)

Letter from the Rt. Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice, to the Chairman

Thank you for your letter of 24 November concerning the Explanatory Memorandum (EM) I submitted on the above topic on 31 October 2011. I note that you have retained the Commission’s documentation under scrutiny.

You have asked for my current thinking on the questions raised in your letter. As you will know this proposal has not yet been subject to public consultation or full analysis. The response to your questions can only, therefore, be a preliminary view at this stage. These are contained in the attached Annex to this letter.

The differences between the laws of the UK and the Common European Sales Law will only be one factor in developing the Government’s final position on the proposal. The Common European Sales Law will of course be considered on its own merits and the possibility of improvement upon the existing national position should not be ruled out if analysis and consultation demonstrates such. However, the Government will have in mind that the laws of the UK, and indeed those of other Member States, have developed over hundreds of years in response to particular problems of contract law and therefore have the advantage of being “tried and tested”.

This proposal is, as you rightly state, important and will clearly give rise to a range of comments from interests groups across the UK. The forthcoming consultation exercise will inform and assist the Government in developing its position on the proposal. I would also refer you to the report from the Law Commissions who have provided valuable advice to the Government.

8 December 2011

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter of 8 December which was considered by the Justice and Institutions Sub-Committee on 11 January. We are grateful for your detailed responses to our questions. As you may know, the Law Commission and the Scottish Law Commission have provided us with a copy of their published Advice to the Government on this proposal.

We note that you are preparing to undertake a consultation on the Commission’s proposal and look forward to seeing your consultation paper and any impact assessment which will inform the consultation. Like you, we wish to hear the views of stakeholders before reaching a concluded view on the proposal.

On present evidence, however, we make the following observations.
We see no pressing need for this legislation. Although some businesses organisations and others support the proposal, there had hardly been a groundswell of stakeholder pressure for it. Other factors seem to us more important than the existence of different national laws in impeding trade in the Single Market, for example, language, trader reputation, and the perceived practical difficulties of obtaining a remedy in another Member State.

We think the proposed Sales Law would be likely to pose problems from the perspective of businesses, particularly SMEs, notably:

— Businesses would have to adapt to another code of contract law.
— There would be uncertainty as to interpretation, at least over a long transitional period while case law develops. We agree with the Law Commissions that notes and guidance as aids to interpretation should be produced while the draft Regulation is under consideration.
— Businesses would not be relieved of the need for information on other national laws which will continue to govern related areas of law, such as the passing of title.
— Member States should have greater flexibility in the ways in which they may extend the Sales Law to domestic transactions.
— The level of consumer protection (for example, the long limitation period for claims for faulty goods) may, at least in certain Member States, still be such that traders would be reluctant to use the Sales Law.

The proposal also poses problems for consumers and, to some extent, resolving these risks creating more for businesses:

— It is generally accepted that consumers will not, in practice, have a choice of laws.
— Consumers will have a lower level of protection under the proposal than under existing national laws, at least in some Member States. For example, the value of the right to reject is reduced by the provision for a monetary allowance for usage of the goods.
— Consumers will be confused about their rights, since the Sales Law would introduce two schemes of consumer protection in each Member State.

On the choice of Article 114 TFEU as the Treaty base for the proposal, we think there are sound grounds for your doubts. Are they shared by other Member States?

We should like to be kept informed of developments in the Council’s consideration of the proposal and, as mentioned above, to see a copy of your consultation paper. Subject to those points, no immediate reply to this letter is expected.

12 January 2012

CONSULAR PROTECTION FOR EU CITIZENS ABROAD (18821/11)

Letter from the Chairman to the Rt. Hon David Lidington MP, Minister for Europe, Foreign and Commonwealth Office

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee on 8 February. Our scrutiny so far has been limited to the issue of whether the proposal complies with the principle of subsidiarity. While we note that you consider further EU legislation in this area to be unnecessary, we conclude that the proposal is consistent with subsidiarity.

We retain the matter under scrutiny and will consider the merits and vires of the proposal further. No reply to this letter is expected.

8 February 2012

Letter from the Chairman to the Rt. Hon David Lidington MP

My letter of 8 February noted that our initial scrutiny of this proposal was limited to the issue of whether the proposal complies with the principle of subsidiarity. We concluded that the proposal is
consistent with subsidiarity. Your Explanatory Memorandum was considered further by the Justice and Institutions Sub-Committee on 29 February taking account of comments from the Foreign Affairs and Defence Sub-Committee which has also examined the proposal. We thank you for your letter of 20 February responding to mine of 3 February.

When considering earlier Commission communications on consular assistance, we have supported the Government’s interpretation of Article 23 TFEU—that it requires a Member State provide assistance to nationals of other Member States on the same basis, but no more, as provided to its own citizens. We remain of that view.

We therefore endorse your concerns about defining eligibility of family members (in article 3) or specifying the kinds of assistance which should be offered (in articles 8 to 11) since these provisions appear to go beyond the Treaty’s requirement that consular services are provided in a non-discriminatory way but without specifying particular services. Should the proposal proceed, we would endorse your view that those provisions should be removed. On the other hand, clarifying when assistance from a citizen’s own consulate is to be regarded as available in practice (article 3) and codifying the list of situations where assistance may be required (in article 6) could be helpful. In the latter case, as you note, the list reproduces (with the addition of the need for emergency travel documents) the one in current legislation, Decision 95/553.

On further consideration we are also inclined to agree with you that cooperation between Member States’ consular authorities can be left to the present informal mechanisms. If those provisions were also removed, little of the proposal would remain thus rendering further EU legislation in this field otiose.

We should, however, like to know more about present mechanisms for such cooperation. Where the UK has no consular representation, how is assistance to UK citizens provided and how do they know where to seek such assistance? How do consulates routinely cooperate to provide such assistance? In crisis situations, how is assistance coordinated and duplication of effort avoided? Are there mechanisms for national authorities to keep each other informed of their respective capabilities to respond to disasters and other crises which might require, for example, the urgent evacuation of citizens.

On the financial side, we assume that although the FCO does not seek to recover the costs of assistance provided to other EU citizens other than in relation to emergency travel documents, you do seek recovery of any monies advanced to those needing that form of help. Would provision of the kind envisaged in article 12 of the proposed Directive not assist in mitigating the costs of providing assistance to other EU citizens? In what ways would the provisions of article 12 impose unnecessary bureaucracy?

We retain the matter under scrutiny and look forward to receiving a reply to this letter within the usual 10 days.

5 March 2012

Letter from the Rt. Hon David Lidington MP to the Chairman

Thank you for your letter of 5 March following further consideration of the above document by the Justice and Institutions Sub-Committee.

You asked about the present mechanisms for consular cooperation between Member States. Globally, there are regular local EU consular meetings which our staff attend to exchange information, ideas and best practice. Consular Directorate maintain relationships with counterparts in other Member States. This is done through formal meetings (COCON, which meets quarterly in Brussels), informal conversations and secondments. For example, an Irish Ministry of Foreign Affairs officer was recently seconded to our Crisis Management Department. We also have regular bilateral meetings with Member States to share experience and best practice. Through such mechanisms we keep each other informed of our respective abilities to respond to disasters and other crises.

British nationals who need consular assistance in countries where we have no consular representation are able to turn to an EU Member State if they need help. This is explained in our publication Support for British nationals abroad: A guide. In addition, we encourage British nationals to call the Consular Assistance team in London, who are available 24/7 and who can direct callers to the nearest source of consular assistance. Our travel advice also signposts where consular assistance is available in countries where the UK is not represented. Consular assistance may also be available to UK nationals from other non-EU countries including New Zealand and Australia.
You asked whether Article 12 would impose unnecessary bureaucracy. In our view, it would. The requirement to seek authority from the unrepresented citizen’s Member State before providing assistance in crisis or emergency situations would create unnecessary delay. The current system works well with minimal bureaucracy imposed on our consular staff. We do not believe additional legislation is the most effective way of reinforcing the solidarity of the Union or its capacity to act.

Currently, in non-crisis situations, we may assist non British nationals (usually EU or Commonwealth citizens) in places where they are not represented by their own Government. We always act under instruction from the individual’s Foreign Ministry and only advance money when we have confirmation that the Foreign Ministry will repay us in full. It is then for the Foreign Ministry in question to seek reimbursement from the individual concerned.

27 March 2012

Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter of 27 March which was considered by the Justice and Institutions Sub-Committee at its first meeting following the Easter recess, on 25 April.

In the light of the further information you have provided, we agree with you that the directive is unnecessary. As my letter of 5 March mentioned, we share your concern that a directive should not seek to define eligibility for consular assistance or the kinds of assistance that should be provided, since such provision would go beyond the requirements of the Treaty. We agree also that, consular functions being a matter in the first instance for states, cooperation and coordination should be left to the Member States to organise, at any rate unless there is evidence of serious failures in the existing forms of cooperation that you have described. While we see little harm in provisions on when assistance should be regarded as not available from a citizen’s own authorities or listing the situations when assistance may be required, a directive limited to those provisions would hardly be worth pursuing.

We would prefer that the proposal should not be pursued. But we recognise that it is important that there should be cooperation amongst consular authorities to ensure the availability of consular services for UK citizens in countries where there is no British representation.

In your Explanatory Memorandum, you say you will ensure that your concerns are reflected in the directive, implying that it will not be possible to block the adoption of a directive. In that case, we recommend that priority should be given to seeking the deletion of the provisions on eligibility and types of assistance which appear to us inconsistent with the Treaty.

We note that you do not expect negotiations to begin on this proposal until later this year. We retain the matter under scrutiny and ask you to let us know when those negotiations begin. No reply to this letter is expected.

26 April 2012

CONSUMERS: ALTERNATIVE DISPUTE RESOLUTION (17968/11, 17795/11, 17815/11)

Letter from the Chairman to Edward Davey MP, Minister for Employment Relations, Consumer and Postal Affairs, Department for Business, Innovation and Skills

Thank you for your Explanatory Memorandum dated 15 December 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 18 January 2012.

We have decided to retain these proposals under scrutiny.

Given the pressures imposed on us to consider these proposals in the light of subsidiarity within a tight timetable exacerbated by the Christmas recess we have limited our consideration of these matters solely to that matter. There will be ample opportunity for the Committee to consider the content of these proposals at a later date.

In fulfilling our role of assessing these proposals in the light of the principle of subsidiarity the Committee finds itself in a similarly difficult position as adopted by the Government throughout their Explanatory Memorandum, that is, whilst we can see the merit in offering consumers access to what you describe as “cheap, simple and quick” alternatives to litigation, we are asked to consider them without supporting stakeholder views on the merits of these proposals. Given this context it is
difficult for the Committee to make a complete assessment of them against the principle of subsidiarity.

For example in relation to the Directive, you raise what on the face of it appears to be a cogent point regarding the "less onerous and more effective" dispute resolution services offered by credit card companies and whether these proposals would offer consumers any added value; in terms of subsidiarity, this argument would seek to challenge these proposals against the principle on the grounds that the Union should only act where the objectives cannot be sufficiently achieved at Member State level.

Indeed, you raise similar doubts about the added value in relation to the Regulation which, too, will only be clarified post-consultation. Examples here include the "usefulness" of the Regulation's scheme over and above the notification requirements in the Directive (paragraph 57), the idea that one of the functions of the Regulation is to propose one or more competent ADR scheme whereas under the Directive businesses would have already had to commit to a specific scheme (paragraph 60), and the role of facilitators under the Regulation (paragraph 61). However, without for example hearing the views of consumer protection organisations, in particular the pan-European Consumer groups, it is not possible for the Committee to form its own views on the subsidiarity question nor make a full assessment of the merits of your views. As is often the case when the Committee is asked to offer its initial views on the compatibility of proposed legislation with the principle of subsidiarity the basis on which the Committee is asked to form its view is incomplete.

Another example drawn from your Explanatory Memorandum in relation to the Directive also illustrates this problem. You begin paragraph 43 of your EM with the acceptance of the fact that action at EU level does seem necessary in order to establish "comprehensive quality ADR coverage for cross-border disputes", but you also question whether in requiring Member States to put in place ADR programmes not only limited to cross-border situations but also dealing with what they term "intra-Member State" situations "this oversteps the principle of subsidiarity". It is impossible for the Committee to assess either whether this offends against the principle of subsidiarity or the veracity of your question without hearing stakeholder views as to whether it would be possible or desirable to establish "comprehensive quality ADR coverage" throughout the EU before having put in place something similar 'within' the individual Member States.

In the Committee's view, given the factors outlined in the previous paragraphs, it is clear that these proposals engage the principle of subsidiarity but we refrain from expressing a view either way. Without supporting stakeholder views it is too soon for the Committee to answer definitively the subsidiarity question. Of course if and when the subsidiarity issues crystallise the Committee will express its views both to you and the Commission. We therefore look forward to considering in due course the outcome of the Government's consultation and we expect a detailed explanation from the Minister of the consultation’s outcome.

19 January 2012

Letter from the Chairman to Edward Davey MP

Thank you for your Explanatory Memorandum dated 15 December 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 1 February 2012.

We have decided to retain the proposals under scrutiny.

Our letter dated 19 January 2012 set out the Committee's view of these proposals in the light of the principle of subsidiarity. We have now had an opportunity to consider their specific content.

As you say in your Explanatory Memorandum and the Committee recognised when it considered the subsidiarity aspects of these proposals it is difficult to make a full assessment of their merits without supporting stakeholder views. However, regarding the concerns with the content of these proposals that you raise in your Explanatory Memorandum, it seems to the Committee that they do on the face of it seem valid. We ask that you furnish the Committee with a full account of them in the light of your consultation once it has concluded. In addition, given that the aspiration is to have a system built on ADR procedures that are free of charge or at moderate costs for consumers, who will bear the costs of financing the creation of national ADR systems (where necessary) and the Regulation’s Online Dispute Resolution mechanism?

This leaves one remaining issue of substance that the Committee wishes to raise with you at this time, namely the proposed internal market legal base. We too, note that the Treaty includes under judicial cooperation in civil matters a specific legal base designed for the "development of alternative methods
of dispute resolution” (Article 81(g)). The Committee wishes to express its support for your attempts to clarify why this legal base has not been used.

We look forward to hearing from you in due course as to how these matters have progressed.

3 February 2012

Letter from Norman Lamb MP, Minister for Employment Relations, Consumer and Postal Affairs, Department for Business, Innovation and Skills, to the Chairman

I would like to update you on recent developments on the alternative dispute resolution (ADR) proposals and to respond to the questions included in your letters of 19 January and 3 February. I am also requesting a waiver from scrutiny for both legislative proposals (the Directive on ADR and the Regulation on Online Dispute Regulation) to enable the UK to agree to a General Approach on 30 May, providing key amendments are secured.

The Committee asked to receive the outcome of the Call for Evidence that was launched regarding these EU proposals together with an explanation of how this will help form the Government’s negotiating position. I attach the Government Response to the Call for Evidence which will shortly be published on the Department for Business, Innovation and Skills website after the purdah period. We received 52 responses to the Call, many of which were very detailed.

The Committee asked who will bear the costs of financing the creation of national ADR systems (where necessary) and the Regulation’s Online Dispute Resolution mechanism. As the Government response to the Call for Evidence explains, it is not yet clear if additional ADR will need to be established in the UK in order to implement the ADR Directive. If additional ADR is needed then it will be up to Member States to decide how best to fund it. One option would be to leave the funding of ADR to the market to decide, within the Directive’s constraint of it being provided at no more than moderate cost to consumers. I do not, at this stage, consider that the implementation of this legislation would place a significant financial burden on the public purse. The European Commission has explained that it would fund the creation of the Online Dispute Resolution (ODR) mechanism, although Member States would have to provide some funding to support the proposed ODR facilitators.

In terms of the legal base that has been used for these proposals, my legal advisors have now considered the issue carefully. Their advice is that Article 81(2)(g) is probably designed to cover a proposal which develops a new mechanism/form of alternative dispute resolution, where the outcome can be enforced by a court. The object of the current proposals is not to develop alternative dispute resolution per se, but to develop the internal market and therefore they have been rightly proposed under Article 114.

In relation to subsidiarity concerns, I am grateful for the view of your Committee. I am now minded that it would be unproductive to challenge the proposals on the grounds of subsidiarity.

The Committee also asked to be kept informed of significant developments in the negotiations. The European Parliament will be considering proposed amendments to the proposals in Committee on 8 May and is planning a first reading on 23 October. The Danish Presidency has been pushing forward negotiations in Council at some pace. Indeed they are now asking Member States to be in a position to adopt a General Approach on both proposals at the Competitiveness Council on 30 May but texts have not yet been circulated. However from discussions at Working Group and COREPER it is clear that helpful progress has been made but some issues are still to be resolved. Officials are working hard to secure necessary amendments but we are not likely to achieve all we want – as always in EU negotiations some compromises will be necessary to secure key amendments.

I understand that your Committee may only have limited opportunity to consider the proposals before 30 May due to prorogation. I am therefore requesting a waiver from scrutiny for both legislative proposals (the Directive on ADR and the Regulation on ODR) to enable the UK to agree to a General Approach on 30 May, providing key amendments are secured.

A number of important amendments to the text that the UK has been pressing for look likely to be included in the General Approach text. These amendments will: ensure that the requirements on businesses are more proportionate and less confusing for consumers; exclude disputes initiated by businesses against consumers; provide flexibility in the time limits for resolving disputes; and importantly reduce implementation costs for the UK.

However a number of important issues remain that we are seeking to address in line with the Government’s agreed negotiating position. We will continue to seek to secure some necessary
limitations on scope and strongly resist provisions that would call into question the continued effective operation of existing national ADR systems.

On the proposed Regulation on Online Dispute Resolution (ODR) we are seeking further amendments to ensure that the ODR platform will deliver significant benefits for both consumers and businesses and will help to achieve the Government’s priority objective of realising the Digital Single Market. To achieve these goals I believe that the proposal must ensure that: the information provided to consumers is clear, timely and does not mislead them as to the availability of ADR; allow for the continued existence of national systems that require businesses in certain sectors to use ADR; provide appropriate time limits for the ADR process to make sure that quality is not sacrificed for the sake of a speedy resolution; and to ensure the information requirements placed on businesses are not overly burdensome. I also support a limitation in scope to exclude business complaints against consumers.

I will not agree the General Approach unless the outstanding issues mentioned above are addressed to our satisfaction. I will, of course, keep you informed and will write again when the General Approach text is available.

25 April 2012

COURT OF JUSTICE OF THE EUROPEAN UNION (8787/11, 12719/11)

Letter from the Rt. Hon David Lidington MP, Minister of State for Europe and NATO, Foreign and Commonwealth Office, to the Chairman

Thank you for your letter dated 14 October 2011 headed ‘Draft Amendments to the statute of the Court of Justice of the European Union and to Annex 1 thereto’.

In answer to your question about the composition of the General Court, the Government has remained open-minded about the best way for the Court to manage its caseload. On the one hand, we recognise the merits of your argument for an enlargement of the judiciary (by nine judges); on the other, we and other Member States also recognised the merits of a Specialist Court. In late September, the Commission published its Opinion on the Court’s proposed reforms in which the Commission came out against a Specialist Court, arguing instead for an enlarged General Court containing specialist chambers. The UK, along with other Member States, is satisfied this constitutes a good compromise of the different views expressed on the matter by allowing the Court to nurture the kind of expert capacity which we have always sought while giving the Court the flexibility which it has consistently emphasised.

To be clear, the Government’s support for the Commission’s compromise also means it supports an increase in the number of judges which is necessary to manage the Court’s increased workload. However, I should say that I have yet to be persuaded that the Court needs as many as twelve extra judges (an increase of 46%), particularly if the Court can make efficiency savings in its operation.

This brings me to the issue of funding because an increase in judges necessarily implies costs. We want to see the cost of any reform being met from within the Court’s existing budget or, alternatively, from within the EU’s Heading V budget line. In either scenario, I am still concerned that the cost of any reforms should be kept to a minimum because of the need to exercise fiscal restraint at a time of economic austerity.

1 December 2011

Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter dated 1 December 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting on 14 December. We have decided to retain the proposal under scrutiny. The Committee is grateful for your answers to our recent questions and we welcome your expression of support for the idea of increasing the General Court’s judiciary. We look forward to hearing from you in due course as the negotiation of this matter proceeds.

15 December 2011
Letter from the Rt. Hon David Lidington MP, Minister of State for Europe and NATO, Foreign and Commonwealth Office, to the Chairman

Thank you for your letter dated 14 October 2011 headed ‘Draft rules of procedure of the Court of Justice’.

In response to the issue raised in your letter, we think having a limit on the length of proceedings would assist the Court as we would expect it would be generally adhered to by litigants, thus reducing the demand on translation services. We agree with you that the ability of litigants to apply to the Court to exceed any stated maximum length of pleadings should only be done in exceptional circumstances and, if so, such a procedure should not be onerous on the Court.

1 December 2011

Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter dated 1 December 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 14 December.

The Committee is grateful to you for your answer explaining the Government’s position on the Court’s proposed power to limit the translation of pleadings to those deemed by the court “as essential” and your suggestion that the Court set down a maximum length for pleadings whilst allowing this limit to be exceeded following a reasoned application in exceptional circumstances with the consent of the Court. We retain this proposal under scrutiny and we look forward to considering updates from you in due course as the negotiations progress.

15 December 2011

Criminal Justice: The Right to Information in Criminal Proceedings (Unnumbered)

Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

Thank you for your letter of 24 November in relation to the above-mentioned Directive. As promised, please find attached the final text [not printed] which we are in position to agree.

6 December 2011

Letter from the Chairman to the Rt. Hon Lord McNally

Thank you for your letter of 6 December which was considered by the Justice and Institutions Sub-Committee at its meeting of 19 December.

We are grateful for the copy of the final text upon which we have no further comments.

20 December 2011

Cross-Border Debt Recovery in Civil and Commercial Matters (13260/11)

Letter from the Rt. Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice, to the Chairman

I am writing to provide you with a copy of the response paper [not printed] in relation to the Government’s consultation on this proposal conducted between 3 August 2011 and 14 September 2011.

I wrote to you on 31 October 2011 to confirm that the Government had decided not to opt in to this proposal. I highlighted the concerns that had been expressed in the Government’s consultation that had informed the decision about the opt in. The enclosed response paper gives further details of the issues raised.
You will note that the statistics provided in the response paper differ slightly from those given in my previous letter. That is because another response was received after my letter was sent (taking the total to 51) and it has since been discovered that one of the responses suggesting that the UK should not opt in had been counted twice. The correct figure is 24 rather than 25. I apologise for that slight error.

As I said in my previous letter, given the potential benefits of this procedure the Government intends to participate fully in the negotiations with the hope of being able to opt in after adoption if sufficient changes are made to the text that resolve our concerns. I will keep you updated of any significant developments during the negotiations.

26 January 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter of 26 January. This was considered by the Justice and Institutions Sub-Committee at its meeting of 15 February. We decided to retain this proposal under scrutiny.

The Committee was grateful for the Government’s response to consultation and noted that some of the respondents raised an issue concerning the scope of the proposal, either seeking clarification in respect of securities, other financial instruments and trusts or their exclusion from the scope of the proposed Regulation. This is a matter on which we would be grateful for an update, in due course, on the progress of negotiations in addition to the other outstanding scrutiny matters listed in our letter of 24 November 2011.

15 February 2012

DANISH PRESIDENCY PRIORITIES FOR JUSTICE AND HOME AFFAIRS

Letter from James Brokenshire MP, Parliamentary Under-Secretary for Crime and Security, Home Office

Denmark will take over the rotating EU Presidency on 1 January 2012, the second of this Trio of Presidencies (Poland, Denmark and Cyprus). I am writing to give you an overview of likely activity during the Danish Presidency on JHA and Government Equality Office (GEO) issues during the next six months, in terms of those dossiers covered by the Home Office. The letter also takes into consideration where dossiers will or are likely to attract the opt-in and which might therefore be debated. I hope that this will assist the Committee in planning the scrutiny of dossiers that will be put to the JHA Council in this period and any subsequent opt-in decisions. For information, the current timetable for consideration of dossiers at JHA Councils under the Danish Presidency is:

— 26-27 January 2012 (Copenhagen) JHA informal
— 8-9 March 2012 (Brussels) JHA
— 26-27 April (Luxembourg) JHA
— 7-8 June (Luxemburg) JHA

The Danish Presidency will inherit a number of initiatives from the Polish Presidency, including the ongoing negotiations on the European Investigation Order, the Cyber Crime Directive, the Passenger Name Records Directive and the asylum package. Being excluded from all EU JHA measures, the Danes have not indicated many priorities for their Presidency, except for their overall interest in the security agenda, and in maintaining momentum on negotiations around the EU PNR Directive and the Common European Asylum System.

In the area of asylum, the Danes have stated their intention to make as much progress as possible on the legislative measures making up the second phase of the Common European Asylum System. On the Dublin Regulation, the Danes have worked closely with the Polish Presidency to bring forward an alternative proposal for an evaluation system to give early warning of a possible crisis in a Member State’s asylum system. We support this in principle, provided it is led by Member States through the European Asylum Support Office and not by the Commission. The other priority on asylum for the Danes will be the replacement Reception Conditions Directive. We have not opted in to this, but have a strong interest in the negotiations because the provisions on detention could well end up applying to transfers under the Dublin Regulation.
We expect the Commission to present legislative proposals on the creation of a European Entry/Exit System (EES) and a Registered Traveller Programme (RTP) - brought together under the heading of Smart Borders - which will electronically record the crossing of third-country nationals through the external Schengen borders. This is intended to generate reliable data on overstayers in particular, and travel flows in general, while allowing for abandoning the practice of manually stamping passports. Both measures require a long-term commitment, a common understanding and substantial investment. The UK will be excluded from both proposals as they are Schengen measures. Although there are some shared principles with existing and proposed UK systems (including e-Borders), the Smart Borders measures as currently presented are so significantly divergent that we do not have a direct key interest in developments.

The Commission is expected to bring forth proposals in 2012 for visa facilitation with countries of the Southern Mediterranean. The UK does not participate in the elements of the Schengen Acquis that relate to common visa policy and is not bound by EU visa facilitation agreements. Nonetheless, the UK is affected by EU facilitation, which has in some instances led to increased numbers of undocumented irregular migrants being picked up at the UK border, and we will want to engage with the Danes on this matter within the wider context of tackling illegal migration.

On external relations, Denmark is not expected to pursue specific geographical priorities. There will be three EU JHA Ministerial meetings under its Presidency (Russia, US and Ukraine) and they are keen to improve the process for preparing for such meetings. One suggestion is that more focused agendas would provide greater opportunity for substantive discussions. Denmark will seek to conclude ongoing discussions regarding improving the complementarity of activity between EU actors and Member States in the area of JHA external relations. In line with a commitment within the Stockholm Programme, the European Commission is expected to produce a report on this subject during the Danish Presidency.

In the area of counter-terrorism, the Danes are keen to maintain momentum on the EU PNR Directive. The UK’s primary negotiating objective remains securing cover within the Directive for intra-EU flights. Negotiations will also continue on the EU-Canada PNR Agreements under the Danish Presidency with consideration of the EU-US Agreement moving to the European Parliament.

The Data Retention Directive is currently under review: the European Commission published an evaluation report on 19 April 2011 which recognised the value of communications data retained under the Directive but suggested changes aimed at harmonising its implementation across Europe. It is likely that the Commission’s impact assessment and any proposed changes to the DRD will be published during the Danish Presidency. We will want to ensure that any changes do not have an adverse impact on domestic law enforcement arrangements or our ability to legislate in this area in future.

With regard to the freezing of terrorist assets, the Commission is currently considering introducing a new, wide-ranging sanctions regime against ‘internal’ EU terrorists. We recognise the need for the Commission to re-consider the approach to listing for ‘internal’ terrorists in the light of the Lisbon Treaty, but believe it is important that the right legal base is chosen. We believe that the logical and quickest replacement would be the use of an Article 74 TFEU measure, which provides a mechanism for cooperation between the police and judicial authorities of Member States in order to prevent and combat terrorism. This would allow Member States to begin listing in line with previous arrangements, through a Council process, without the need to create new powers and processes.

The Commission has appointed consultants to undertake a review of the Directive on the identification and designation of European critical infrastructures. The Commission plan to have the review signed off by Member States in March, and to present an impact assessment of the planned changes to the wider European Programme for Critical Infrastructure Protection towards the end of June. A Commission Communication on the Programme, including any potential amendment of the Directive, is expected towards the end of 2012. We wish to see the Programme consider how a range of mechanisms can deliver progress towards the aim of improving the protection of critical infrastructure in the EU.

In the area of organised crime, proposals on the future legal base of Europol are anticipated from the Commission, and this may happen within the Danish Presidency. We would need to be convinced any proposals add value to current arrangements and are proportionate. We also wish to ensure the maintenance of existing accountability measures, which we believe are sufficient. We support the enhancement of Europol’s capabilities and believe it can take measures within its existing legal framework and resources to implement proposed initiatives such as the EU Cyber Crime Centre, where it is felt these bring added value. We also look forward to welcoming developments on key cooperation agreements with key third parties and countries.
The Commission intends to publish a package of measures on the **confiscation of criminal assets** in January 2012 under the Danish Presidency, including two draft Directives – one on setting equivalent minimum domestic legal standards and one on mutual recognition of confiscation orders, updating current arrangements set down across existing EU Framework Decisions. The draft dossiers are likely to contain substantive criminal law measures and will therefore attract the opt-in. Working with the Danes and other EU Member States, we will need to consider carefully the proposals to help shape any potential EU law in this area. The UK is keen to promote non-conviction based confiscation (civil recovery) and would fully support proposals for its wider recognition and use across Europe. We are also keen advocates of extended confiscation and third party confiscation.

The Danes will also be continuing the direction of travel set out in the recent Commission Communication towards an EU **drugs** strategy, which we expect to result in legislative proposals on tackling drug trafficking, new psychoactive substances and drug precursors, the first two of which we expect to trigger the opt-in. Whilst recognising the Commission’s right of initiative in this area, the Government thinks that the focus should be on practical cooperation between Member States and that a legislative proposal is not the only way that we can resolve the threats we face from new psychoactive substances.

With regard to the EU **Policy Cycle for organised and serious international crime**, eight Operational Action Plans have been developed and will be implemented by pan-EU project teams to address these threat areas during 2012 - 2013. The project teams are Member State led and the UK is leading the projects on West Africa and Trafficking in Human Beings. We are participating in all projects, with the exception of the project on Mobile (Itinerant) groups. The Standing Committee on Operational Cooperation in Internal Security (COSI) will monitor developments through these project teams. The UK was a partner on Project Harmony which developed the EU Policy Cycle under which these projects operate and we will therefore want to encourage the Danish Presidency to deliver the Policy Cycle’s objectives in accordance with its agreed roadmap.

In the area of **judicial cooperation**, the Danes will need to lead trilogue discussions with the European Parliament on the **European Investigation Order** (EIO) and our focus will be on seeking amendments to the text through MEPs. We will need to engage with the Presidency closely on this as, despite the text agreed at Council representing good progress for the UK, there are still a number of outstanding issues. Most significantly we would like to see the inclusion of an Article on minor offences and a full dual criminality test for coercive measures. Discussions on the annexes of the EIO, including the form on which requests are made, will also take place under the Danish Presidency.

On **Eurojust**, the Commission has announced plans for a legislative proposal that aims at developing and reinforcing Eurojust’s functioning and determining arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust’s activities. It remains unclear how far this proposal will go in terms of reforming Eurojust but my position is that there is no need to strengthen Eurojust’s remit and powers beyond what is already provided for in existing legislation that only came into force in June this year. Our opt-in will apply to this future instrument. The coalition programme clearly states that we will not participate in a European Public Prosecutor’s Office.

In terms of **equalities**, Denmark is not expected to prioritise the draft **Equal Treatment Directive** that is currently being negotiated. We expect them to look to progress one area of the text and provide a progress report to Council. They are likely to bring forward (non-binding) Council Conclusions on gender – probably related to women and the environment. We do not expect these to be difficult.

During this period the Commission will probably bring forward a proposal to improve the **gender balance in boards of companies** listed on stock exchanges, and the initial discussion on this proposal may take place under the Danish Presidency. We expect the proposal will have the status of a Commission recommendation. It is still not clear what approach the Danish will take on this.

Finally, we understand that the Danes will host seminars on child pornography and crime prevention during their Presidency. The tenth anniversary of Eurojust will also be marked in February with Ministers invited to The Hague. The Presidency has scheduled a brief meeting of the JHA Council to coincide with this event on 27 and 28 February.

20 December 2011

Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

Denmark takes over the rotating European Union Presidency on 1 January 2012. I am writing to provide an overview of the Danish Presidency’s priorities in the areas of justice on which the Ministry
of Justice leads. I hope that this will help in the planning of the scrutiny of dossiers that are likely to be considered by the Justice and Home Affairs (JHA) Council during this period. The Danish Presidency is planning to host the following JHA Councils:

- 26 – 27 January (Informal Council) in Copenhagen, Denmark
- 8 – 9 March in Brussels
- 26 – 27 April in Luxembourg
- 7 – 8 June in Luxembourg

The Danes have not, so far, put forward explicit priorities, but there is a substantial inherited agenda which they will take forward during their Presidency.

In the area of criminal justice, the Danish Presidency will look to make progress on the draft Directive on the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest. This is the third measure of the “roadmap” to strengthen the procedural rights of suspected or accused persons in criminal proceedings, which is part of the Stockholm Programme. The UK has not opted in to this proposal because of concerns about its impact on our ability to investigate and prosecute crime, but we are taking part in the negotiations. In the event that our concerns about the Commission’s proposal are resolved we will give serious thought to whether we should apply to opt-in to the proposal once it has been adopted.

The Danes will also begin negotiations with the European Parliament on the Directive on victims’ rights and also continue negotiations on the Regulation on mutual recognition of protection orders in civil matters. The Government has opted in to both proposals.

The Danish Presidency will also look to adopt the Directive on the Right to Information in criminal proceedings. We will write to you to update you once adoption takes place.

The Commission has said that it intends to bring forward a proposal in 2012 to revise Council Directive 2004/80/EC relating to compensation to crime victims and the Danish Presidency may potentially begin negotiations on proposals on this.

Negotiations may also begin on Measure E on the Criminal Procedural Rights Roadmap, about providing special safeguards to defendants or accused persons who are vulnerable. The Commission’s Work Programme states that the measure will ensure that special attention is shown to suspects who are unable to follow the content of criminal proceedings against them due to their age, mental or physical condition.

In line with the Minister of Europe’s Written Ministerial Statement of 21 January 2011 on enhancing scrutiny of JHA opt-ins, the Government has identified the two proposals on victim compensation and vulnerable defendants as potentially being suitable for a debate in Parliament in Government time on the opt-in. This is subject to examination of the proposals once they have been adopted, including on the question of whether the opt-in applies. (It is, for example, not clear at this stage under what Treaty base the victims measure will be proposed, and whether the opt-in will apply.)

We also expect the Commission to publish on 25 January 2012 two legislative proposals aimed at revising the legal framework for data protection. The first is likely to be a Regulation to replace the current Data Protection Directive 95/46/EC (DPD), which applies in a large number of areas (former first pillar) but does not extend to criminal matters. The second is likely to be a Directive that will cover processing of personal data by the police and other criminal justice actors (former third pillar), designed to replace the current Data Protection Framework Decision. The Commission has yet to set out the legal base for the proposed Directive and it is not clear at this stage whether the JHA opt-in will apply.

Negotiations on the accession of the EU to the European Convention on Human Rights (ECHR) will continue under the Danish Presidency. We shall keep you informed of developments in this area.

The Danes will also take forward negotiations on a Council Decision on a new multi-annual framework (MAF) for the Fundamental Rights Agency. As you will be aware, a previous proposal to amend the current MAF was brought forward by the Commission in 2010 and deposited in Parliament, but was withdrawn due to legal difficulties.

The draft Regulations establishing the next generation of Justice funding programmes were proposed in November. They comprise a Rights and Citizenship programme and a Justice programme. Negotiations on the funding proposals are likely to start during the Danish Presidency, however it is
unlikely that final agreement on individual programmes will be reached until the wider multi-annual financial framework package is adopted, expected towards the end of 2012 or early 2013.

Under the Polish Presidency the Commission published their proposal for a Common European Sales Law in October 2011. It seems clear that the Danes do not intend to prioritise this area of work under their Presidency, although they are likely to come under sustained pressure from the Commission to take the work forward effectively. A number of Member States are in the process of consulting on and analysing the detail of the proposals before more detailed negotiations can commence. The UK will carry out a public consultation of the proposal in the New Year.

The Danish Presidency will also continue negotiations on the draft Regulation on European Account Preservation Order. The UK did not opt in to this proposal because of concerns about the lack of safeguards for defendants but we hope to amend the text during negotiations to enable a post-adoption opt in.

The incoming Presidency will continue negotiations on succession and wills, which are reaching their conclusion. The Danes are likely to try and obtain some level of political agreement. The UK has not opted in to this proposal but continues to play an active role in the negotiation process with a view securing satisfactory amendments to enable participation in the final Regulation. Any decision to opt-in to the proposals will be dependant on a thorough and transparent public consultation process.

The Presidency will also continue negotiations on the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). The Government has opted in to this proposal and will continue to play an active role in the discussion and negotiation of the dossier.

The Danes will also take forward negotiations on the Regulations on Matrimonial Property Regimes and Registered Partnerships. The Government has decided to not opt-in to these Regulations and given the differences in the legal systems, we are unlikely to opt in post adoption.

The Poles published an EU Corruption package in June 2011. The matter was discussed at official level working groups on two occasions; however, the extent to which the Danes will take this forward is not yet clear. The EU anti-corruption package is currently under going Scrutiny in UK Parliament.

4 January 2012

EU STAFF REGULATIONS (18638/11)

Letter from the Chairman to the Rt. Hon David Lidington MP, Minister for Europe, Foreign and Commonwealth Office

Your Explanatory Memorandum of 16 January 2012 was considered by the Justice and Institutions Sub-Committee at its meeting of 1 February. We decided to retain this matter under scrutiny pending further information on the potential savings to be gained from this proposal in the light of the Commission’s Impact Assessment, when it is published.

We continue to support the Government’s objective of achieving radical reform and savings. To this end we note that a fixed annual salary adjustment for civil servants does not exist in most Member States. We should be grateful for your view as to whether there are specific circumstances which justify its retention for EU officials.

We do not expect a reply to this letter within the 10 day deadline.

2 February 2012

Letter from the Rt. Hon David Lidington MP to the Chairman

I am writing in response to your letter of 2 February 2012, in which you noted that a fixed annual salary adjustment for civil servants does not exist in most Member States, and requested my view as to whether there are specific circumstances which justify its retention for EU officials.

We do not think that the method, as currently configured, is either acceptable or justified and there are also very significant flaws with the Commission’s current proposal. For example, there is no opportunity for genuine political influence on or oversight of the process, and adjustments are implemented equally for the lowest and highest-paid officials, taking no account of their different circumstances. The fact that in 2011, the method resulted in a proposed 1.7% pay rise for all EU staff
demonstrates that it is not fit for purpose; this did not reflect Member States’ circumstances or the current economic climate.

As you know, negotiations on the future arrangements for deciding EU salary adjustments are ongoing. The UK’s priority is to ensure that in the future, these arrangements facilitate appropriate decisions that take account of the specific circumstances of the EU and its staff. This priority was clearly stated in two letters to the Commission last year, signed jointly with many allied Member States. Among other things, we believe any new process for setting EU staff’s pay should ideally provide for: genuine political involvement of Member States, as necessary; more rapid adjustments to EU staff’s pay, so that actions in Member States and at EU level are better synchronized than at present; and variation to growth in pay according to EU staff’s salary levels.

You also noted within your letter that you are retaining this proposal under scrutiny pending the Commission’s Impact Assessment. We have not yet received this assessment, and UK officials are still pressing for it to be completed and published. I will provide a further update in due course.

27 March 2012

Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter of 27 March 2012 which was considered by the Justice and Institutions Sub-Committee at its meeting of 25 April. We decided to retain this matter under scrutiny.

We note that you do not put forward any reason why EU officials, unlike national officials, should benefit from a fixed annual salary adjustment. We are therefore of the view that the UK should pursue its abolition.

We do not expect a reply to this letter within the 10 day deadline.

26 April 2012

EURO COUNTERFEITING PROTECTION (PERICLES 2020 PROGRAMME) (18938/11, 18939/11)

Letter from the Chairman to James Brokenshire MP, Minister for Crime Prevention, Home Office

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee on 29 February. Thank you for your explanation of the proposal, placing it in the wider context of the Commission’s proposals for the next Multi-annual Financial Framework.

We note that the proposal is to continue an existing programme which appears to play a useful role in tackling counterfeiting of the euro, and that the amount of funding involved is relatively very small and no more than under the current programme. We recommend that the Government support the proposal.

The Select Committee is undertaking an inquiry into the EU’s next Multi-annual Financial Framework for the period 2014 to 2020. This will be a follow-up to the Report, EU Financial Framework from 2014, published in April 2011, which considered the Commission’s Communication on The EU Budget Review. The present proposals will be considered as part of the inquiry and we therefore keep them under scrutiny.

You note that the Government are considering whether the proposals should have a Treaty base in Title V TFEU on justice and home affairs, thus engaging the UK opt-in. We should be interested to learn the outcome of your consideration of this issue and, if Article 352 TFEU remains the base for the proposal relating to non-euro states, an Act of Parliament would be required to enable the Government to support it.

1 March 2012

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 1 March 2012 asking questions on the Explanatory Memorandum relating to the above proposals on the Pericles Programme. Please accept my apologies for the delay in replying while we considered the difficult issues around these dossiers.
Regarding the legal base for draft regulations 18938/11 and 18939/11 relating to the Pericles Programme, there was some debate as to whether the proper legal base for these measures should be Article 84 of the TFEU.

We raised this issue with the Commission whose view is that the aim and content of the measures is the protection of the euro as a single currency and that, as such, Article 133 and 352 TFEU are the correct legal bases. Having considered the arguments put forward by the Commission we accept that these measures are properly brought forward using these legal bases.

Under the European Union Act 2011, Government agreement to a measure under Article 352 requires an Act of Parliament unless one of the statutory exemptions applies. We are exploring this and believe that it is possible that an exemption might apply but cannot be definitive until the negotiations are complete.

18 April 2012

EUROPE FOR CITIZENS PROGRAMME (2014-2020) (18719/11)

Letter from the Chairman to Ed Vaizey MP, Minister for Culture, Creative Industries and Communications

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee on 15 February. Thank you for your explanation of the proposal, placing it in the wider context of the Commission’s proposals for the next Multi-annual Financial Framework (MFF).

As you may know, the Select Committee is undertaking an inquiry into the EU’s next Multiannual Financial Framework for the period 2014 to 2020. This will be a follow-up to the Report, EU Financial Framework from 2014, published in April 2011, which considered the Commission’s Communication on The EU Budget Review. The present proposals will be considered as part of the inquiry and we therefore keep them under scrutiny.

We note that the proposal is to continue an existing programme which appears to play a useful role and that the amount of funding involved is relatively small. We consider that the proposal should be supported in principle, but we will consider the level of proposed expenditure as part of our consideration of the wider MFF proposals.

We should be interested to know the outcome of your analysis of whether the 2011 Act would require prior approval by Act of Parliament but, subject to that, no reply to this letter is expected.

15 February 2012

Letter from Ed Vaizey MP to the Chairman

I am writing further to your letter of 15 February, when I was pleased to note that you considered the proposal to play a useful role, and that the amount of funding involved is relatively small: although clearly, the level of proposed expenditure will need to be taken into consideration as part of our wider proposals under the Multiannual Financial Framework (MFF).

At the Ministerial Council on 10 – 11 May, the Danish Presidency may be proposing a partial general approach to Europe for Citizens, but have agreed that this will exclude the question of the programme’s budget, which will be dealt with separately within the context of the MFF proposals.

On that understanding, should a partial general approach come for a vote at Council I would propose to vote in support. I therefore request that, further to paragraph 5 of the Scrutiny Reserve Resolution, the European Union Committee, please indicate that should a partial general approach as described be required, the UK’s agreement need not be withheld pending completion of scrutiny or the holding of a debate.

Although you had not specifically requested a reply in your letter, you did express interest in the outcome of our analysis as to whether the 2011 Act would require prior approval by Act of Parliament.

At the time of drafting our Explanatory Memorandum on this proposal, we were considering whether there might have been grounds for exemption if the new proposal could be considered simply to prolong or renew an existing programme previously adopted under Article 352 of the Treaty for the Functioning of the European Union (TFEU).
We have now completed our analysis, and can confirm that there are no grounds for exemption. This issue has been the subject of thorough discussion in the European Council Working Group meetings, and also recently been the subject of legal opinions from both the Council and the European Parliament.

All concur that Article 352 is an appropriate legal basis for the proposal, and that this might be supplemented (but not replaced) by Article 167. They also concur that there are material differences in the new programme proposal, not least in terms of its greater emphasis on civic participation in the EU institutions, and better evaluation of the programmes which receive funding.

There is consequently now no doubt that a Parliamentary debate will be required before we can accept the proposal.

24 April 2012

EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS (9145/10, 9288/10, 18918/11)

Letter from the Chairman to Damian Green MP, Minister of State for Immigration, Home Office

Thank you for your letters of 8 and 21 November, and your supplementary Explanatory Memorandum (EM), which were considered by the Justice and Institutions Sub-Committee on 30 November. We are grateful for your explanation of the second part of the Directive.

We clear the proposal from scrutiny in order to enable you to agree a general approach in the forthcoming JHA Council meeting, but ask you to deposit the agreed text (or the latest draft, if not agreed) with an Explanatory Memorandum explaining any further changes. That text will then be under fresh scrutiny.

Your EM notes that the Government are content with certain articles. We have proceeded on the basis, confirmed by your officials, that you consider that Articles 19 to 34 are now acceptable, except where you have drawn attention to the need for specific amendments.

As we have previously said, we support the objective of creating a single system of mutual assistance for evidence gathering in criminal cases, and we cleared the first part of the proposal from scrutiny in June. We endorse your views on the remaining parts of the draft. Specifically, we agree that you should seek to reintroduce the requirement for consent in Article 20, as in Article 19; and also that you should clarify that Article 27(c) should impose no obligation that goes further than the EU Mutual Legal Assistance Convention.

We recall that the Government had an outstanding concern in relation to the first part of the draft Directive, on the limitations on the dual criminality requirement. What are the prospects of securing the desired change?

2 December 2011

Letter from the Chairman to Damian Green MP

Thank you for your further supplementary Explanatory Memorandum (EM) dated 23 January 2012, which was considered by the Justice and Institutions Sub-Committee on 15 February. We are grateful for your explanation of the changes made in the second part of the Directive.

As you know, we support the objective of creating a single system of mutual assistance for evidence gathering in criminal cases, and we cleared from scrutiny the draft as it stood before the Council meeting last December. The further changes agreed at that meeting improve the text and we are content with them.

Since the issue of superseded measures is outstanding, and the opinion of the European Parliament is likely to raise other issues, we keep the matter under scrutiny on the basis of the present document and ask you to keep us informed of developments.

15 February 2012
Letter from the Chairman to Baroness Wilcox, Minister of State, Department for Business, Innovation and Skills

Thank you for your letter of 24 November. This was considered by the Justice and Institutions Sub-Committee at its meeting of 14 December.

Your letter crossed with my previous letter on this subject which indicated that we had decided to clear this matter.

You indicate that you cannot provide a text because it is marked “limité”. However it appears that a suitably redacted text could have been provided if, as is now usual, the identity of the Member State concerned was deleted. If it was not possible to provide a suitably redacted text then it could still have been provided in confidence to the Committee in accordance with the agreement between the Committee and the Government on the handling of limité documents.

I would add that effective scrutiny in circumstances such as this is greatly assisted by a copy of the latest test (redacted if necessary) showing changes from the previous text seen by the Committee.

On the substantive issues we welcome the improvements in the text in relation to the governance of EOCP and Member States’ obligations to provide data to it.

Please keep us updated on the progress of negotiations with the European Parliament.

15 December 2011

Letter from Baroness Wilcox to the Chairman

Further to my letter of 24 November 2011 I am writing in regards to the final compromise text proposed by the European Presidency for this Regulation (Council Doc No. 18680/11). If approved, the Regulation will formalise the move of the EU Observatory on Counterfeiting and Piracy to the Office of Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM). The final document has been deposited and an Explanatory Memorandum attached, explaining the changes that have been made since the Explanatory Memorandum to the original document was deposited on 22 June 2011 (Council Doc No. 10668/11). The final compromise text provided by the Presidency on 20 December 2011 has now been approved at Council working party level and informally by the European Parliament’s representatives although the UK continues to maintain a parliamentary scrutiny reserve on this matter. The European Parliament are expected to vote on the amended regulation in early February and thereafter it is expected as an ‘A’ point at the Competitiveness Council on 20 February 2012. Therefore, we would appreciate the Committee’s timely consideration of the proposal so that the UK can participate in the final vote in Council.

As I have mentioned previously, my officials have been working in Brussels with the following goals in mind.

— ensuring that OHIM’s role and its relationship to the work being carried out by member states, industry and others is clear;
— establishing a clear governance framework to ensure that OHIM’s activities are planned, well targeted and deliver value for money;
— preventing the imposition of mandatory data provisions on member states.

We feel that there has been sufficient compromise reached in all of these areas to proceed with the regulation.

During negotiations we have remained in dialogue with relevant stakeholders, to hear their views and to reflect these into the UK’s negotiations. The key issues that have been raised during our informal consultations and through the stakeholder roundtable held in September 2011 align in broad terms with the Government’s own goals, in particular with regard to improved clarity over the role of the Observatory and governance.

I hope that you can agree with me that the text has moved far in the negotiations and is much clearer about the work of the Observatory and the role of other actors. While I appreciate that benefits of the Observatory are hard to quantify in monetary terms at this stage I believe that it has a valuable role to play in helping to further the protection of intellectual property rights across all members of
the European Union. I would therefore be grateful if you could consider clearing the text from scrutiny so that we can vote to approve the proposal when the time comes.

12 January 2012

Letter from the Chairman to Baroness Wilcox

Thank you for your Explanatory Memorandum of 13 January and your letter of 12 January. These were considered by the Justice and Institutions Sub-Committee at its meeting of 25 January 2012. We decided to clear the matter. In doing so we regret that you did not follow the suggestion in my letter of 15 December that the text supplied should show the changes from the previous text seen by the Committee.

We do not expect a reply to this letter.

26 January 2012

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 26 January, clearing the document from scrutiny.

I am now able to attach [not printed], for your information, the revised Impact Assessment (IA) for the Explanatory Memorandum (EM) which has now been completed.

I apologise that I did not provide a version of the amended proposal showing the changes that had been made to the text. It was unfortunate that the document published by the Council Secretariat did not highlight changes from the previous text. Going forward I have asked my officials to ensure, wherever possible, that changes to early text are highlighted to support effective scrutiny in line with the working arrangements agreed with the Committees.

1 February 2012

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 1 February. This was considered by the Justice and Institutions Sub-Committee, at its meeting of 15 February 2012, which was grateful for a copy of the revised Impact Assessment.

We do not expect a reply to this letter.

15 February 2012

EUROPEAN YEAR OF CITIZENS (2013) (13478/11)

Letter from the Chairman to Damian Green MP, Minister of State for Immigration, Home Office

Thank you for your letters of 9 and 21 November which were considered by the Justice and Institutions Sub-Committee on 30 November.

On the question of the timing of your Explanatory Memorandum, we readily acknowledge that the Home Office exercised proper diligence in relation to this submission of the EM. Unfortunately, owing to a failure of communication within the Committee Office here, the Sub-Committee was unaware that an extension of time had been granted. We note that your Department only took the conduct of this matter after some time has elapsed.

As to the proposal itself, we note that we and the Government are essentially at one in supporting the proposal, and we now clear it from scrutiny.

No reply to this letter is expected.

2 December 2011

Letter from Damian Green MP to the Chairman

Following the conclusion of negotiations in the Working Party on Fundamental Rights, Citizens’ Rights and Free Movement (FREMP) on 20 January I thought the Committee might welcome an update on

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The objective of UK negotiations has been to support the provision of information to make citizens more aware of the rights and benefits that EU citizenship brings but to balance these rights against responsibilities. A clear message should be sent about the rules and conditions which apply to the exercise of these rights. With support from other Member States the UK secured the following language at Recital 17 in the draft text agreed in the Council working group. I have added bolding to highlight the resulting changes:

“A European Year of Citizens in 2013 will provide a very timely opportunity to raise the awareness of the general public about the rights and responsibilities attached to Union citizenship and thus to contribute to the objective of facilitating the exercise of the right to free movement. EU citizens have a critical role to play in upholding the free movement rights.”

In addition Recital 3 refers to the Charter of Fundamental Rights of the European Union which states in its preamble: “Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations”.

The proposal is now being considered by the European Parliament. While the European Parliament has not yet formulated its views on the substance of the proposal a report by the Rapporteur will be presented to the Committee on Civil Liberties, Justice and Home Affairs on 9 February. I understand that the Rapporteur has proposed amendments to the proposal. Other Member States have expressed concern about widening the proposal’s scope and potential cost implications. The UK will monitor developments and lobby Members of the European Parliament to include language as at Recital 17 of the Council draft and to ensure that the scope of the proposal is not widened unduly.

6 February 2012

Letter from the Chairman to Damian Green MP

Thank you for your letter of 6 February which was considered by the Justice and Institutions Sub-Committee on 15 February. We thank you for your update on the progress of this dossier. No reply to this letter is expected.

15 February 2012

FUNDAMENTAL RIGHTS AGENCY: ESTABLISHING A MULTIANNUAL FRAMEWORK FOR 2013-2017 (18645/11)

Letter from the Chairman to the Rt. Hon Lord McNally, Minister of State, Ministry of Justice

Thank you for your Explanatory Memorandum dated 10 January 2012 which was considered by the Justice and Institutions Sub-Committee on 25 January.

We have decided to retain this matter under scrutiny. We agree that the proposal is consistent with the principle of subsidiarity. We take this opportunity to clear from scrutiny the failed 2010 Decision to amend the Fundamental Rights Agency’s current Multiannual Framework numbered 17564/10.

Regarding the two technical issues raised by this matter—the use of a Treaty legal base and the ramifications of the EU Act 2011—we look forward to considering the outcome of your deliberations in due course.

We note that you are considering the merits of this proposal. As we said to you in our letter dated 27 January 2011 in the context of our scrutiny of the failed attempt in 2010 to amend the Agency’s current Multiannual Framework, the Committee supports the substance of this proposal subject to the technical issues. We remain of the view expressed in our letter that matters dealt with under the old Third Pillar, namely police cooperation and judicial cooperation in criminal matters, are areas of EU activity likely to engage fundamental rights and as such should fall within the Agency’s scope.

26 January 2012
GREEN PAPER: EU CRIMINAL JUSTICE LEGISLATION IN THE FIELD OF DETENTION  
(11658/11)

Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

In previous correspondence we agreed to share our response to the Green Paper with the Committees.

Please now find attached [not printed] the Government’s response which has been sent to the Commission.

The Commission will publish all responses to the Green Paper on their website.

13 December 2011

Letter from the Chairman to the Rt. Hon Lord McNally

Thank you for your letter of 13 December enclosing a copy of your response to the Commission’s Green Paper which we found very helpful. This was considered by the Justice and Institutions Sub-Committee on 11 January.

We are aware that detention issues in some Member States give cause for concern and we could contemplate that EU legislation might become necessary. But at this stage, we agree that the case has yet to be made for EU legislation in this field and that the rules on detention should be determined principally by the Member States, subject to Council of Europe and other international instruments. We agree also that other options, such as exchanges of best practice, should be taken forward instead.

We now clear the Green Paper from scrutiny and await the Commission’s reaction to the views it received in its consultation. No reply to this letter is expected.

12 January 2012

HERCULE III PROGRAMME: PROMOTING THE PROTECTION OF THE EU’S FINANCIAL INTERESTS (18940/11)

Letter from the Chairman to Mark Hoban MP, Financial Secretary, HM Treasury

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee on 1 February. Thank you for your explanation of the proposal, placing it in the wider context of the Commission’s proposals for the next Multi-annual Financial Framework.

We note that the proposal is to continue an existing programme which appears to play a useful role in tackling fraud and other illegal activity affecting EU finances. We note that the amount of funding involved is relatively very small, and no more than under the current programme. We support the proposal but endorse your suggestion that the Court of Auditors should examine the effectiveness of this and related programmes, in particular to consider whether there is scope to avoid duplication. We would be interested to know if this suggestion is taken forward.

As you may know, the Select Committee is undertaking an inquiry into the EU’s next Multi-annual Financial Framework for the period 2014 to 2020. This will be a follow-up to the Report, EU Financial Framework from 2014, published in April 2011, which considered the Commission’s Communication on The EU Budget Review. The present proposals will be considered as part of the inquiry and we therefore keep them under scrutiny.

2 February 2012

INTELLECTUAL PROPERTY: CUSTOMS ENFORCEMENT (10880/11)

Letter from Chloe Smith MP, Economic Secretary, HM Treasury, to the Chairman

I am writing to update you on this proposed regulation to improve customs enforcement against the trade in counterfeit and pirated goods. You wrote to my predecessor, Justine Greening, on 14 July
2011 following the Justice and Institutions Sub-Committee’s examination of the Explanatory Memorandum dated 20 June 2011. Good progress has been made since then in the Council’s Customs Union Group. The European Parliament Internal Market and Consumer Protection (IMCO) Committee has also been examining the proposal. As a result, the latest draft of the regulation tabled by the Danish Presidency addresses many of the UK Government’s concerns.

Our concerns about the extension of the arrangements, notably to parallel trade, have been addressed by the removal of parallel trade from the latest draft. We welcome this. Both HMRC and the Border Force, who together administer the border enforcement arrangements in the UK, were concerned that additional demands would be placed on their limited resources. This could only be at the expense of detecting counterfeiting and pirated goods. Parallel trade goods are genuine products but are being imported contrary to commercial distribution or licensing arrangements. It is difficult to see a rationale for using taxpayer-funded resources at the border to enforce such private contractual rights.

Pressure from some Member States to extend the arrangements to cover goods in transit has been unsuccessful. Action can already be taken against goods in transit if there is suspicion that they will be diverted to the EU market and we support that position. We do not agree, however, that the EU customs authorities should attempt to police the world by taking action to detain goods which are genuinely transiting through an EU airport on their way from one third country to another.

Complex “right to be heard” arrangements have also been removed from the draft regulation. This would have added nothing to a procedure which already gives the importer ample opportunity to contest the right holder’s claims before a final decision is made about whether the goods are infringing.

We had some concerns about how the simplified procedure for disposal of goods in small consignments (e.g. in the post) would work. We welcome such simplified arrangements as necessary given the volumes involved. The revised text now makes the small consignment procedure optional, with provision for customs’ costs of storing and destroying goods to be passed on to the rights holder requesting the action. This is the case in the normal procedure and we see no reason why under a specific procedure for small consignments such costs should fall on the taxpayer.

There are some detailed issues to work through on how small consignments are to be defined and the mechanism for doing so. We are reluctant to leave this to the Commission as a delegated act, preferring to see a definition on the face of the Regulation. We also consider that it would set an unhelpful precedent for the use of the delegated act procedure.

In summary, the compromise text brings greater clarity on key points of the legislation without introducing significant changes to the costs and burdens for right holders, consumers and customs authorities.

Further discussions in the Customs Union Group are planned over the coming weeks. It is possible that the Commission and some other Member States may want to see some of the changes reversed, and the final shape of the proposal may therefore be subject to change. If we have reason to believe that there will be any increase in the scope of the current arrangements, with a resulting impact on any of the key players, I will let you have a more detailed assessment.

12 April 2012

JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS IN CIVIL AND COMMERCIAL MATTERS (BRUSSELS I RECAST) (18101/10)

Letter from the Chairman to the Rt. Hon. Lord McNally, Minister of State, Ministry of Justice

Thank you for your letter of 28 November enclosing the Government’s Report in Response to Consultation. This was considered by the Justice and Institutions Sub-Committee at its meeting of 19 December. We decided to retain the matter under scrutiny.

We welcome the retention of existing protection for defendants in the event of the abolition of exequatur.

With regard to cases with a third country dimension we continue to support the Government’s primary negotiating objective of retaining national rules concerning jurisdiction in cases involving a third country domiciled defendant, whilst at the same time having a general flexibility for a court to
refuse jurisdiction if another court (whether in a third country or in another Member State) is better placed to deal with it.

We note that you are not aware of specific problems of litigation being “torpedoed” other than in cases involving arbitration or choice of law agreements. However in respect of arbitration we also note that the overwhelming majority of the respondents were supportive in principle of the reforms proposed, and only two respondents stated a preference for the approach you now propose to take, namely excluding the entire arbitral process from the scope of the proposal. We should be grateful if you would provide details of the complexity and uncertainty that undermine the Commission’s approach. In our earlier report, we considered this approach promising and it appears to have the support, in principle, of the majority of respondents. We should also like to know whether your new approach, which we did not consider to provide the best solution, would reverse the effect of the West Tankers case.

With regard to provisional measures you indicate that the current proposal is for a protective measure ordered in one Member State to be automatically enforceable in the other which has jurisdiction on the substance of a case; and that provisional measures granted ex parte would not be automatically enforceable. We should be grateful for further explanation as to how this would work in respect of protective measures. For example if a court in Member State A takes a protective measure relating to assets in that Member State, what is the benefit of that order being enforceable in Member State B where the substantive case is being dealt with? Furthermore to refuse enforceability of protective measures because they were granted without a hearing appears to us to undermine the purpose of such measures, which by their nature must be granted ex parte, provided that the defendant is able to challenge the measure later.

The issue of libel tourism has arisen in relation both to cases with a third country dimension and cases confined to the EU. We agree that libel tourism is a matter that should be addressed and advocate a solution that is consistent irrespective of whether the cross-border dimension involves another Member State or a third country.

We should be grateful for a response to the specific questions raised in this letter before 16 January. And we look forward in due course to a further update on the progress of negotiations. In that context we would be interested in progress in relation to the handling of litigation concerning trusts, which is one of the specific matters raised by respondents.

20 December 2011

Letter from the Rt. Hon Lord McNally to the Chairman

Thank you for your letter of 20th December 2011.

Before I deal with the points you have raised, it may be helpful if I update you on recent developments at the political level.

RECOGNITION AND ENFORCEMENT

At the Justice and Home Affairs (JHA) Council in December 2011, policy agreement was reached on the general approach that should be taken in relation to the recognition and enforcement of judgments. I enclose the document which describes this agreement in detail and I can confirm that it reflects the Government’s approach on these issues.

In summary, the agreement proposes that the current formal procedure known as exequatur should be abolished. The Government supports this in the interests of simplifying the procedure for judgment creditors as it offers the prospect of reducing the time, complexity and costs that would otherwise be imposed on them. At the same time it was agreed by the JHA that all the current protections to safeguard the legitimate interests of judgment debtors should be preserved in full and should be resolved in the courts of the Member State where enforcement is being sought. This represents a significant improvement on the Commission’s proposal which would, to some extent, have reduced those protections. This reduction would have been further exacerbated by requiring the protection relating to inadequate service of the originating process on the defendant to be resolved only in the Member State of origin.

A further welcome consequence of these improvements is that there will only be one procedure for recognition and enforcement, thereby avoiding the complexity of the Commission’s proposal that would have provided for two such procedures, depending on the particular type of case.
EXTENSION OF JURISDICTION TO THIRD STATE DEFENDANTS

At the Justice and Home Affairs Informal Council meeting on 26-27 January, the majority of Member States (including the UK) opposed the Commission’s proposal to extend the rules of jurisdiction to defendants from non-EU countries. Although there is no firm guarantee that this will be the final position adopted, this early indication means that a good result may well be achievable. This would represent a good result for the UK.

ARBITRATION

You have questioned the Government’s preference for the complete and reinforced exclusion of arbitration from the scope of the Regulation and in particular to provide details of the complexity and uncertainty in the Commission’s approach.

I should emphasise at the outset that the Commission’s attempt to regulate the difficult relationship between arbitration and court proceedings is well-intentioned and aims to ensure that the former cannot be undermined by the latter through abusive litigation tactics. In general terms the proposed solution would work satisfactorily in the great majority of cases and would do much to overcome many of the problems created by the West Tankers decision. This is the main reason why a number of UK interests have given it their support in principle.

The Commission’s proposal would, nevertheless, need various technical adjustments in order to ensure that it fully overcomes the problems created by the West Tankers decision. By way of example, the proposed rule on concurrent proceedings (Article 29(4)) would need to be amended to ensure that the jurisdiction of a court seised under the Regulation should not itself become vulnerable to abusive tactics on the basis of an alleged arbitration agreement. Further, it is not clear whether the Commission’s solution covers de-localised arbitrations which may have no seat. Other technical adjustments are also likely to be required.

The fundamental reason for the Government’s position on arbitration is that the adoption of the Commission’s solution would give rise to additional external EU competence. To date, arbitration has been traditionally, particularly in the context of international negotiations, been within the exclusive domain of the Member States. Many UK interests in the arbitration community wish to see that situation remain unaltered (it is certainly the preference of maritime arbitrators) and, given the commercial importance of arbitration to the UK economy, the Government has accepted that any new EU competence in this area should be resisted.

Given the competence issue and the technical adjustments required to the Commission’s proposal, the Government concluded that an approach based on a complete and reinforced exclusion of arbitration would satisfactorily resolve the West Tankers problems. It would also serve in simply aligning the position within the EU to that which operates in the rest of the world.

PROVISIONAL MEASURES

You have questioned the Government’s approach to the Commission’s proposal in relation to the international recognition and enforcement of provisional measures ordered by courts which have jurisdiction over the substance of the dispute. In relation to such measures the Commission has proposed that it should be sufficient for recognition and enforcement that the defendant merely has the right to challenge the measure under the law of the Member State where it was originally ordered, albeit that he was not summoned to appear before the court and that the measure was intended to be enforced without prior service on him.

The Government’s view on this proposal reflects the jurisprudence of the Court of Justice under which ex parte judgments do not receive international recognition and enforcement. This restriction remains necessary to protect the legitimate interests of defendants and should not be undermined in the way proposed by the Commission. We are unaware of any significant problems with the current position and are not persuaded that the defendant should have the right to challenge such a measure in the court issuing the order. This would be inconsistent with current practice which is not to inform a defendant as it could well offer him the opportunity to dispense with his assets before they are frozen by the court.

The only way to ensure the necessary element of surprise is to seek separate ex parte provisional measures in all those Member States where he has assets and to freeze them.
LIBEL TOURISM

Most concerns about libel tourism relate to cases where both the parties are resident outside the EU and the claimant sues in England and Wales. On this basis such cases fall outside the current scope of the Regulation and are subject to our national jurisdictional arrangements. As you may be aware, we have included provisions in our draft Defamation Bill to ensure that these cases are only heard in our courts where England and Wales is clearly the most appropriate place to bring the claim. If, as we hope, the Commission’s proposal for full harmonisation of jurisdiction is rejected by the Council, that position will continue and any provisions which are ultimately enacted in the substantive Defamation Bill to mitigate libel tourism will not be inconsistent with the revised version of the Regulation.

To the limited extent that any concerns about libel tourism exist where the defendant is domiciled within the EU, i.e. where the Regulation applies, I do not consider that there is likely to be any will in the other Member States to address it. To do so, it would be necessary to persuade the Commission to include the Regulation’s tort jurisdiction within the scope of the revision exercise. Under the institutional rules which govern the revision of the Regulation, only the Commission can agree to include other substantive issues which fall outside the scope of their review. If the Commission refuses such a request, the restricted scope of the revision exercise would operate to exclude any such proposals. As there is little general interest in this problem among the other Member States, the Commission is unlikely to be persuaded of any amendments to the Regulation. Indeed, it is their view that libel tourism is a problem largely confined to the London defamation courts. I therefore do not consider that such an approach would be viable or proportionate.

TRUSTS

The problem here is that the current, over-technical, trust jurisdiction available under the Regulation is too broad to deal with certain trust disputes which should fall within the scope of the Regulation. My officials are currently working with UK trust experts to agree a proposal which will then be presented to the Commission in an attempt to persuade them to include this matter within the scope of the revision exercise, an institutional precondition if an amendment is to be achieved (as already noted above in relation to libel tourism).

I hope this letter addresses the points you raise.

2 February 2012

Letter from the Chairman to the Rt. Hon. Lord McNally

Thank you for your letter of 2 February. We decided to retain the matter under scrutiny pending further negotiations.

In respect of the matter raised in your letter we have the following comments:

— We welcome the support of other Member States against extending jurisdiction under Brussels I to defendants from non-EU countries.

— In the light of your further explanation of the reasons underlying the Government’s approach to litigation concerning arbitration proceedings we can accept the approach of seeking to reinforce the exclusion of arbitration from the scope of the Regulation.

— We are grateful for your clarification concerning provisional measures and note that this was not a problem raised by consultees. We continue to support the maintenance of the current position.

— Given the difficulties you have indicated, we accept that consistency of approach on libel tourism from third countries and EU states need not be a negotiating priority.

— We look forward to an update, in due course, on your proposals to improve the rules relating to trust litigation. When you provide this can you also provide examples of the mischief you are seeking to address.

15 March 2012
Letter from the Rt. Hon. Lord McNally, Minister of State, Ministry of Justice, to the Chairman

I am writing to update you on the Justice and Home Affairs (JHA) Council which took place in Brussels on 13 and 14 December. The Home Secretary and Minister for Women and Equality, Theresa May MP, the Justice Secretary, Kenneth Clarke MP and the Scottish Solicitor General, Lesley Thomson, attended on behalf of the UK.

The Council began in Mixed Committee with Norway, Iceland, Liechtenstein and Switzerland (non-EU Schengen States). The Commission updated on the implementation of the second generation Schengen Information System (SIS II). Commissioner Malmström noted there had been some delays in conducting the national SIS II tests, but that mitigating actions had preserved the current schedule. The Commission assured the Council that the tools used during the milestone 1 tests were in accordance with the 2009 Council Conclusions. The Presidency emphasised the importance of the system and commended the Commission’s work in implementing the project to date.

The Council reached a general approach on their compromise proposal for a visa liberalisation suspension mechanism. Member States would be able to ask the Commission to consider imposing temporary visa requirements if there were a substantial and sudden increase: in irregular migrants, in pressure on their asylum system or in the number of rejected readmission applications. The Presidency concluded that negotiations on the remaining issues under the proposed Schengen Visa Regulation would be taken forward by the incoming Danish Presidency. The UK does not participate in these arrangements.

The Commission presented its proposals for the Home Affairs financial instruments saying the funds had been streamlined and simplified to allow for a coherent and effective response to future challenges. The new emergency mechanism and external dimension would contribute to this. On top of the fixed national allocations, there would be additional funding to further specific EU objectives. On the budget, the Commission said that 2013 funding levels should be used as the baseline reference. The Presidency concluded negotiations which commence in January under the Danish Presidency.

France introduced the item on mobile itinerant crime groups with proposals on how to tackle the phenomenon and wanting to see a roadmap setting out what Agencies, the Commission and the Member States could do. Europol said that this would be one of the priority areas under the new EU Policy Cycle and the Presidency noted that the Standing Committee on Cooperation on Internal Security (COSI) would be the right forum for this discussion. The incoming Danish Presidency said they would also hold a discussion at expert level.

The Presidency introduced their report on the EU response to increased migration pressures, identifying further cooperation with Turkey as a priority. Conclusion of the EU-Turkey Readmission Agreement was seen as essential to launching a wider dialogue, which should continue to be discussed by the Council. The Commission saw four key aspects to the EU’s future response to illegal immigration, which should be based on a ‘roadmap’ and a realistic timetable: solidarity and responsibility; reinforcing cooperation between the EU Agencies; partnership with neighbouring countries under a renewed Global Approach to Migration and Mobility; and maximising the use of EU funds. The Council discussion focused on particular geographical challenges, with most Member States agreeing on the need for further cooperation with Turkey.

The UK (Home Secretary) welcomed the debate, noting that illegal immigration affected everyone, damaging public confidence at the same time as undermining principles of free movement. A longer term, coordinated and strategic approach was needed, including more efficient management of systems as well as disincentives for illegal migrants. Further work with third countries was essential and Turkey was a priority, where dialogue should include measures from across the Justice and Home Affairs portfolio. Joint action should also be taken by the EU to tackle sham marriages and other abuses of free movement rights by illegal migrants. Finally, the Union needed to remain firm on ensuring returns of those with no right to remain in the EU. The incoming Danish Presidency said that this debate would remain on the Council agenda; they would develop a roadmap and identify priorities. The Commission noted the complexity of EU-Turkey discussions on migration and undertook to return to the Council with proposals on taking that dialogue forward.

Recalling that no progress had been made at the European Council last week, the Presidency asked the Council whether it was ready to adopt the Council Decision on the accession of Romania and Bulgaria to Schengen. One delegation maintained a reservation, awaiting the publication of the next
Cooperation and Verification Mechanism (CVM) report in early 2012. The Presidency concluded that the file would now pass to the Danish Presidency.

Over lunch Ministers discussed strengthening Schengen Governance and the proposed amendments to the Schengen Evaluation Mechanism and Schengen Borders Code. The majority of Ministers made clear that decisions on re-imposition of internal borders were the responsibility of Member States. On the evaluation mechanism a majority favoured a legal base in Article 70 of the Treaty on the Functioning of the European Union subject to further analysis.

The main Council started with the adoption of the EU –US Passenger Name Records (PNR) agreement by a qualified majority. The UK has not opted in pending ongoing parliamentary scrutiny. The Commission said the agreement represented a considerable improvement on its predecessor, especially on depersonalisation of data, retention of data on serious crime, and the definition of serious crime. The Agreement will now move to the European Parliament.

The Presidency presented the state of play on the Common European Asylum System, reporting that significant progress had been made, but noting that the 2012 deadline was closer than ever. Ministers noted that a lot had been done to unblock negotiations on the most difficult issues, and the majority of Ministers were pleased that the issue of suspension of “Dublin” returns had at last disappeared. The UK advised caution over the respective roles of the Institutions in the proposal for an early warning mechanism; Member States ran asylum systems on a day to day basis and must be the ones to lead such a mechanism, in cooperation with the EU Agencies. The UK believed that this would increase mutual trust and practical cooperation amongst Member States. The incoming Danish Presidency said the asylum package, including the draft Dublin Regulation, would be the subject of a discussion at the Justice and Home Affairs informal Council in January, with a view to agreeing something concrete for the June European Council. The Commission admitted that a suspension mechanism was no longer viable given the position of the Council, and hoped that the Danish Presidency would initiate trilogue discussions with the European Parliament as soon as possible. On the rest of the asylum package, it was important to keep up momentum on the outstanding issues.

The Commission presented its Communication on the Global Approach to Migration and Mobility but debate was curtailed due to lack of time. The Presidency highlighted the link between the Communication and the earlier discussion on increased migration pressures and confirmed that discussions on the Global Approach would continue under the Danish Presidency.

The EU Counter Terrorism Co-ordinator, Gilles de Kerchove, gave a brief overview of the themes included in his strategy discussion paper, one of three presented to the Council. He picked out two main themes – the importance of ensuring that funding was available specifically for security or counter terrorism research, and the need to progress with conclusions on improving the coherence between internal and external security policy. The Commission said that the new horizon 20-20 programme might help to overcome some of the security funding issues. Commissioner Malmström also drew attention to current work on air cargo assessments, terrorist financing and finally activating the Solidarity Clause.

The justice day started with a general approach being reached on the European Investigation Order, save for one provision on the repeal of an existing instrument. The UK maintained its parliamentary scrutiny reserve. The incoming Danish Presidency will look to take forward negotiations with the European Parliament.

A general approach was also reached on the Victims’ Directive. The UK gave its support to the work in this area, but noted the importance of maintaining the right to a fair trial and defendant’s rights. The incoming Danish Presidency will begin negotiations with the European Parliament early in the new year.

Next there was a discussion on the proposed Regulation on Succession and Wills with the Presidency obtaining a general approach to the text of the Articles of this Regulation with the exception of those concerning administration and clawback. The UK’s two key issues will be considered under the Danish Presidency. The UK expressed its desire to take part in the final Regulation if satisfactory solutions can be found to our concerns.

The Presidency presented a paper on the proposed Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I ). This paper sought agreement to political guidelines to assist in progressing the negotiations on this dossier. These guidelines generally acknowledged the level of agreement that had been reached by Member States on the abolition of exequatur but at the same time recognised that Member States were of the firm view that
safeguards should be retained to protect the interests of defendants. The UK supported the political guidelines.

An update on the progress of the proposal for a Common European Sales Law was provided by the Presidency. The UK felt that further political debate would be required on this important measure.

The Presidency then presented a state of play report to the Council about the progress of negotiations on the draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. Negotiations will continue under the Danish Presidency.

The Commission presented its proposed instruments for the Justice and Rights and Citizenship funding programmes. Judicial training and data protection were highlighted as areas of important work. Formal negotiations will begin under the Danish Presidency. The UK noted the Commission’s presentation.

Following this the Presidency reported on the EU-US JHA Ministerial meeting that took place in Washington on 21st November. The UK noted the report.

Under any other business Lithuania reiterated its request for Member States to withdraw any outstanding declarations under Article 32 of the European Arrest Warrant. The UK noted this intervention.

20 December 2011

JUSTICE AND HOME AFFAIRS COUNCIL (26-27 APRIL 2012)

Letter from the Rt. Hon. Lord McNally, Minister of State, Ministry of Justice, to the Chairman

I am writing to update you on the Justice and Home Affairs (JHA) Council which took place in Luxembourg on 26 and 27 April. The Parliamentary Under Secretary for Crime and Security, James Brokenshire MP, and the Justice Secretary, Kenneth Clarke MP attended on behalf of the UK.

The Council began in Mixed Committee with Norway, Iceland, Liechtenstein and Switzerland (non-EU Schengen States). The Presidency called on Member States to agree the roadmap aimed at combating illegal immigration. The UK thanked the Presidency, welcoming the inclusion of safeguarding free movement rights from abuse by third country nationals and highlighting that the agencies and Member States were alive to the problems of sham marriage and documentation fraud. The UK noted that the actions in the roadmap would provide a better picture of trends of abuse and would ensure action at EU level to tackle this serious issue. The UK called on the Commission to recognise the importance of tackling abuse of free movement as part of the comprehensive strategy to tackle illegal immigration. Cyprus, the incoming Presidency, suggested further discussion was needed on ensuring the principle of free movement was not undermined. Other delegations underlined support for the roadmap and stressed the need for its implementation and review. There was general consensus that the priorities were correct, with interventions highlighting cooperation with countries of origin; strengthening of Schengen governance; tackling abuse of visa liberalisation and free movement rights; and cooperation with Turkey.

The Commission provided an update on implementation of the second generation of the Schengen Information System (SIS II). The final phase of testing would begin in June and the project was still on track to go live in the first quarter of 2013. Member States were urged to complete testing of their own national systems as soon as possible.

Under any other business (AOB) during the Mixed Committee, the Presidency gave the state of play on the Schengen Governance proposals, noting that the outstanding policy issues, including the circumstances under which Member States may introduce internal border controls, would be left for the June JHA Council. The Greek Minister presented an overview of progress on the Greece National Action Plan.

Next under AOB the problem of civilian air crews unable to leave aircraft landing in Russia without a visa was raised, with a call for EU level action or agreement for Member States to deal with this bilaterally. The Commission agreed to raise the issue with Russia.

The main Council started with a discussion on the Common European Asylum System (CEAS). The Presidency noted trilogue with the European Parliament would begin on 8 May on the draft Dublin Regulation and draft Directive on Asylum Reception Conditions, and the draft Directive on Asylum
Procedures was making swift progress despite some outstanding issues. The Commission said that a new Eurodac proposal would be presented to the JHA Council in June.

The Presidency presented their compromise text for the EU Passenger Name Records (PNR) Directive and noted agreement had been reached at a working level, with the exception of the inclusion of intra-EU flights and initial retention periods. They argued that it was now time to begin negotiations with the European Parliament. The UK underlined the operational experience which showed 2-year retention periods and intra-EU PNR data were necessary and urged others to accept the compromise. Despite some outstanding concerns, Member States supported or accepted the proposal, allowing the Presidency to conclude that a general approach had been reached. The EU-US Passenger Name Records Agreement was also adopted during the Council.

The Council considered its position on the Regulation on the marketing and use of explosives precursors. A version of the Regulation had already been debated by the European Parliament, which had refused to accept a dual regime of licensing and point-of-sale registration. The compromise before the Council envisaged that licensing would be the default regime with two exceptions: that pre-existing registration schemes could continue, and that registration could suffice for hydrogen peroxide, nitric acid and nitromethane, where sold in lower concentrations for legitimate use. The UK recalled the importance of action in this area; concentrated hydrogen peroxide had been used in the attacks on the London transport system in July 2005. A proper system of licensing or registration would make it far more difficult for terrorists to obtain these materials. The UK favoured a licensing regime but was prepared to accept the modified dual system proposed in order to break the deadlock. The Presidency concluded that the text would return to the Working Group for agreement on the basis presented before returning to the European Parliament for negotiation.

Over lunch there was a discussion on terrorism. The Presidency thanked Member States for constructive comments and believed that the Council Conclusions on de-radicalisation and disengagement were a topical, balanced set of recommendations. The Conclusions were agreed.

There was a discussion in restricted session on EU admission agreements with third countries, and in particular the proposed agreement with Turkey.

The Presidency presented the Council Conclusions on the Global Approach to Migration and Mobility and emphasised their role in strengthening the global strategy on migration. The Arab Spring had shown there was a need for an updated framework for cooperation with third countries and for greater coherence with foreign and development policy. The Commission highlighted the ongoing discussions on mobility partnerships with Tunisia and Morocco as a good example. The Presidency confirmed the Council Conclusions would be adopted at the General Affairs Council in May.

Under AOB during the main meeting, the Presidency provided an update on two legal migration instruments aimed at harmonising conditions of entry and rights of two categories of workers: Intra-Corporate Transferees (ICTs) and Seasonal Workers. The ICT Directive was now on track and a mandate would be sought in May to negotiate with the European Parliament. Things were more difficult with the Seasonal Workers Directive, and the Presidency called on Member States to reach a compromise. The UK does not participate in these measures.

The Justice day began with the Commission presenting the draft Directive creating minimum standards on the freezing and confiscation of proceeds of crime, noting that it would help return to the legal economy some of the 3.5% of global GDP currently held in ‘criminal’ assets, including by introducing limited powers to confiscate where there is no criminal conviction in place. The UK noted the valuable contribution such powers had made to tackling organised crime. The Commission also encouraged Member States to implement the existing mutual recognition measures to ensure a strong EU framework in this area. Cyprus committed to making substantial progress on the Directive during their Presidency.

The Council agreed a partial general approach on criminal sanctions for insider dealing and market manipulation. The Commission hope that a general approach can be agreed before the end of this year on the outstanding articles. The UK has not opted in to this Directive.

There was an orientation debate on the proposed Regulation on mutual recognition of protection measures in civil matters. The Presidency proposed some principles to guide experts in drafting the regulation. It was noted that it would be important to have a working relationship between this and other similar instruments.

There was an exchange of views on certain issues on EU accession to the European Convention of Human Rights. The Commission will now seek to restart discussions in the Council of Europe. Ministers also agreed on the need to have discussions on the internal rules in parallel with negotiations on the draft accession agreement.
The Presidency asked Member States to ensure they applied the necessary resources to implementing the European Criminal Records Information System (ECRIS); the deadline for doing so was that same day. The UK has implemented ECRIS.

Under AOB the Presidency provided an update on the proposed regulation on Succession. It hopes that the regulation will be adopted as an ‘A’ Point at the JHA Council in June. The UK did not opt in to the regulation and will not look to make a post adoption opt in either. Hungary also confirmed to the Council that they will be holding this years ceremony commemorating the Remembrance for Victims of Totalitarian Regimes. It was also confirmed that Lithuania and Latvia would host the event in 2013 and 2014 respectively.

Over lunch, there was a discussion on ‘Justice for Growth,’ which is the Commission’s term for a range of civil law instruments that it considers will contribute to the EU’s growth agenda.

3 May 2012

ARTICLE 10(4) OF THE PROTOCOL ON TRANSITIONAL PROVISIONS - PROTOCOL 36 TO THE TREATY OF LISBON

Letter from the Rt. Hon Theresa May MP, Home Secretary, Home Office, to the Chairman

Thank you for your letter dated 4 November 2011 requesting a definitive list of measures subject to notification by the United Kingdom pursuant to Article 10(4) of Protocol 36 of the Treaty of Lisbon.

On behalf of the Secretary of State for Justice and myself, I am pleased to provide at annex A [not printed] the list of measures that the Government considers to be subject to this notification. This list is split between old ‘Third Pillar’ measures and Schengen measures. This is due to the slightly different procedures that that would apply to any application to rejoin measures should the decision be taken to reject European Court of Justice jurisdiction resulting in the UK opting out of all measures within the scope of the decision. In respect of measures forming part of the Schengen acquis, this would be governed by the Schengen Protocol. The UK would need to make an application under Article 4 of that Protocol and the Council would decide on the request “with the unanimity of its members” and the representative of the UK. For non–Schengen measures, Article 4 of the Title V Protocol would apply, which is the process for opting in to a measure post adoption and allows for conditions to be set by the Commission.

Also included as part of the annex is a list of measures which the UK has opted in to which repeal and replace, or amend, measures which would otherwise have been within the scope of the notification.

The lists are subject to change as measures are repealed and replaced or amended and we will keep you updated with any changes that are made. In particular we are aware that the Commission is planning proposals for next year involving revisions to Europol, Cepol (EU police college), Eurojust, the framework for cooperation on confiscation of assets and on criminal measures to tackle counterfeiting the Euro, all of which fall on the current list. Those proposals will of course trigger separate opt-in decisions. We are also engaging with the Council Secretariat to ensure that the list is comprehensive.

We are committed to ensuring that Parliament is able to properly scrutinise the decision that flows from Article 10(4) of Protocol 36 of the Treaty of Lisbon as part of our undertaking to hold a debate and vote in both Houses on this decision. We are grateful for the interest that your colleagues in the House of Lords have already shown and look forward to engaging with Parliament fully in this matter.

21 December 2011

MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME (10610/11)

Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

The Justice Secretary wrote to you on the 28 November with an update on the proposed EU Directive establishing minimum standards on the rights, support and protection of victims of crime
and to seek your Committee’s agreement to lifting the Parliamentary scrutiny reserve based upon progress so far and amendments we expected to secure during the final working group.

The working group took place on 28-30 November and I am now in a position to provide a further update. A copy of the latest version of the text is enclosed [not printed]. Good progress was made in these negotiations and I hope this will further reassure so that the Committee is able to lift its scrutiny reservation on this text.

In the Justice Secretary’s letter he stated that Article 7 on interpretation and translation, and Article 13 on the reimbursement of victims’ expenses are now defined in the text to be afforded “in accordance with the role of victims in the relevant criminal justice system” The definition of the role of the victim in the recitals allows the UK to limit rights to where the victim is obliged or requested to participate actively in proceedings and reflects the role of victims in our system. The right to be heard in article 9 is qualified by a recital that allows this right to be exercised in writing which is in line with the current Victim Personal Statement scheme.

An amendment has been secured to the text of Article 5 that allows exceptions to the need to provide reasons for a decision to end proceedings when, as a matter of national law, reasons for the decision are confidential or a result of a jury trial. This amendment had not been sought previously but following further consideration it was decided these exceptions should be made explicit in the text and I am pleased we have been able to do so.

Some points remain for further discussion prior to JHA Council on 14 December and negotiations are continuing at Counsellor and Ambassador level. I am confident that the requirements in the Directive are broadly consistent with current UK practice and that we will be able to agree the text. Any changes to current practice are likely to be of benefit to victims and should be possible to accommodate within our criminal justice systems. I hope that this will give you sufficient reassurance to allow you to lift your scrutiny reservation on this proposal.

5 December 2011

Letter from the Chairman to the Rt. Hon. Rt. Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letters dated 28 November and 5 December which were considered by the Justice and Institutions Sub-Committee at its meeting of 7 December 2011.

We have decided to waive the scrutiny reserve pertaining to this proposal ahead of the Justice and Home Affairs Council on 13-14 December.

Aside from the comments below regarding the amendments to the provisions governing the assessment of vulnerable victims, the Committee sees the amendments to the text set out in your letter as relatively minor adjustments designed to facilitate Member State implementation, and agrees that this latest text represents an improvement on the original.

However, the Committee is more cautious in assessing the impact of the proposed changes to the provisions governing vulnerable victims. It is our view that the redrafting of this provision is potentially more than a simple cosmetic change designed to facilitate Member State adoption, and we ought to have been afforded an opportunity, whilst retaining the proposal under scrutiny, to ask you to explain the ramifications of this change; in particular, the removal of automatic recognition of vulnerability afforded the victims of sexual violence or human trafficking and the disabled. However, the Committee does recognise that perhaps its concerns may be offset by the clear requirement that aside from children, who are automatically classed as vulnerable victims, all other victims of crime must be assessed as to their vulnerability.

The fact remains that it appears that pressure from the Presidency has required you to ask the Committee to either clear this proposal or grant a waiver before Parliamentary scrutiny can be deemed complete; indeed, the text the Committee is being asked to consider remains the subject of discussion in Council working groups, referred to in your letter dated 5 December. Whilst we have chosen in this specific instance to waive the scrutiny reserve to enable the agreement of a General Approach at the Justice and Home Affairs Council, we ask the Government to make it clear to the Council that Presidencies ought to respect national parliamentary scrutiny timetables in order to enable national Parliaments to consider fully proposed texts ahead of their agreement by the Member States.

We look forward to considering your explanation of the ramifications of the proposed changes to the provisions governing the assessment of vulnerable victims within the usual 10 day deadline.
Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman

Thank you for your letter dated 8 December 2011, in which you agreed to waive the scrutiny reserve on this proposal. I am very grateful for this. You requested an explanation of the ramifications of the proposed changes to the provisions governing the assessment of vulnerable victims in the proposed directive. I am writing to respond to your request and to provide you with a further update on the Directive.

The original text included four categories of victims who were to be presumed vulnerable: children, persons with disabilities, victims of sexual violence and victims of human trafficking. As you know, the categories of victims who should be automatically presumed vulnerable have now been removed, with the exception of children. Emphasis has been placed instead on individual needs assessments to determine whether they are vulnerable.

Under Article 21 of the proposed Directive, all victims (as defined in Article 2) will receive such an assessment. Under that Article, the determination of vulnerability may be by reference to the victim’s personal characteristics, the circumstances or type of the crime, or to the risk of secondary and repeat victimisation or intimidation. Victims of sexual violence and human trafficking, or persons with disabilities, may be vulnerable, but will not necessarily be so; the particular position and wishes of the individual victim should be assessed in each case. Further matters relevant to the assessment of vulnerability are set out in the recitals to the Directive, in particular recitals 18 - 22. Once assessed as vulnerable, Member States will be under an obligation to determine which special measures the victim should benefit from, subject to the rules of judicial discretion.

I am satisfied that the proposed changes result in a duty that is appropriate and takes account of the needs of individual victims.

The text on which a General Approach was agreed at the Justice and Home Affairs Council on 14 December contained a number of changes from the previous version shared with your Committee. The main changes are detailed below.

Article 5 has been clarified by a new recital which permits us to take into account factors such as the severity or nature of the crime in determining whether to offer the notification requirements in the Article. It also states that the notification requirements should not apply in the case of petty crime where the possibility of harm to the victim is slight. This brings the requirement closer to current practice across the UK.

Amendments have also been made to Article 10 and the recitals to limit the right to review where the highest prosecuting authority has taken the decision not to prosecute. Moving this from a recital to the operative text reflects the importance of this issue for many Member States.

There has been a small amendment to Article 11 on the right to safeguards in the context of restorative justice services. The amendment clarifies that there are cases which are not appropriate to be referred to such services. However, where a case is referred, the safeguards for victims in the Article will apply.

Article 13 has been limited through further amendment to the recitals to clarify that expenses need not be provided where the victim makes a statement of a criminal offence. The aim of the recital further clarifies and limits Member States’ obligations in respect of expenses.

Article 25 on the co-operation and co-ordination of services has been amended to clarify the appropriate action which Member States may take to facilitate co-operation between Member States to improve victims’ access to their rights as provided under the Directive and under national law.

In your letter of 8 December you mentioned the speed with which the negotiations on this proposal have proceeded and asked me to make clear that national Parliamentary scrutiny timetables need to be respected. Accordingly, in my intervention at the Council I noted the pace at which negotiations have taken place.

I will ensure the Committee is kept updated as we enter trilogue negotiations.

20 December 2011
Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter dated 20 December which was considered by the Justice and Institutions Sub-Committee at its meeting of 18 January 2012. We have decided to retain the proposal under scrutiny.

The Committee is grateful to you for your clear explanation of the reasons for the amendments to the provisions governing the assessment of vulnerable victims and for your account of the text agreed at the December JHA Council.

We look forward in due course to considering your updates of the trilogue stage of negotiation.

19 January 2012

Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman

I am writing to update you on progress on the above Directive. On 27 March the Civil Liberties, Justice and Home Affairs (LIBE) in enhanced cooperation with the Women’s Rights and Gender Equality (FEMM) Committee held an orientation vote on their amendments. 538 amendments were tabled. The Rapporteurs condensed some of them into 39 compromise amendments which were unanimously voted through along with 205 further amendments. The final set of 244 amendments is the mandate for Rapporteurs in trilogue negotiations; it is attached to this letter for reference.

Trilogue negotiations commenced very swiftly following the orientation vote and two further meetings are scheduled to take place on 24 April and 10 May. The Danish Presidency hope to reach a first reading deal by the end of its tenure in June.

Given the volume and wide range of amendments proposed by the European Parliament (EP) I have focused on outlining the main areas that would make a practical difference to UK policy and our position on these rather than providing analysis on all the proposals.

ARTICLE 2 - DEFINITIONS

The European Parliament proposes the Directive be applied regardless of the ‘legal status’ of the victim. We understand this to refer to the immigration status of the victim rather than their status in criminal proceedings and have sought clarity on this point. We would be content for the rights to apply to all victims of crime regardless of immigration status. However, we do not accept the right to participate in all stages of the proceedings if the reference to ‘legal status’ is intended to effectively give a victim the rights of a party to proceedings.

We do not accept that definitions of ‘gender based violence’ or ‘violence in close relationships’ are necessary as they relate to amendments that would define categories of victim throughout the Directive which we oppose. However, domestic violence is a priority area for the EP and some compromise is likely in this area, potentially around support services for victims of these crimes. We will propose that victims in these categories benefit from support and protection measures during criminal proceedings according to the impact the absence of such measures would have on the quality of their evidence. We disagree that the objective of ‘restorative justice services’ is to reach an out-of-court settlement; it can be used at a number of stages during and beyond criminal proceedings.

ARTICLES 3 AND 4 – RIGHT TO RECEIVE INFORMATION ABOUT THEIR CASE

The Parliament proposes that a victim be provided with information on the conditions under which they are entitled to interpretation and translation. We can accept this proposal. We disagree with the amount of information it is proposed be provided to a victim as a disproportionate administrative burden, for example it is proposed that information will be provided on how evidence may be given at court regardless of whether a complaint has reached that stage. We also reject the proposal to give information regarding entitlement to medical care. The EU has very little competence in relation to medical care for victims of crime.

Amendments that would oblige Member States to provide a copy of the complaint and for acknowledgement of the complaint to be translated are not acceptable. They would be unduly expensive and administratively burdensome, and if a complaint were to include a witness statement, this would potentially compromise the administration of justice. It has also been proposed that a victim be able to access ‘relevant case files’; this is incompatible with both our rules of disclosure designed for the common law system and data protection obligations and will be strongly opposed.

We disagree with the proposal that notification of the release of an offender should be on an ‘opt out’ basis; the offer should be made and the onus then be on the victim to decide whether they want the
information. Where the victim does not wish to receive the information but may be at risk of harm it is proposed it is provided regardless; we disagree that this obligation is proportionate unless (as required under Article 2 of the ECHR) it is to protect the victim from the possibility of imminent death.

**ARTICLE 7 (6 OF THE COMMISSION PROPOSAL) – INTERPRETATION AND TRANSLATION**

The General Approach text limited the right to interpretation to be ‘in accordance with their role in the relevant criminal justice system, for their participation in criminal proceedings’. This limitation is not included in the EP amendment but is essential to ensure this right is not afforded to victims who are not actively participating in proceedings and is, as a result, prohibitively expensive and not necessary for justice to be done. It is proposed that interpretation and translation be provided for ‘any communication with their legal counsel’; this will be resisted.

**ARTICLE 8 (7 OF THE COMMISSION PROPOSAL) – RIGHT TO ACCESS VICTIM SUPPORT SERVICES**

A large number of amendments have been proposed in relation to this article as support is a key area of interest for the EP. We disagree that support can be provided from the moment a crime is committed as the authority may not be aware of the victim, and that it should be open-ended. The General Approach text copies the language in the Directive combating trafficking in human beings to link support provision to the criminal proceedings.

**ARTICLE 11 – RIGHT TO SAFEGUARDS IN THE CONTEXT OF MEDIATION AND OTHER RESTORATIVE JUSTICE SERVICES**

We can be flexible on some of the amendments that seek to clarify the measures that will be in place to safeguard victims but we do not agree that victims of certain crimes should be prohibited from participating in restorative justice.

**ARTICLE 17 – RIGHT TO PROTECTION**

The EP has proposed including detail of measures that might be available to protect victims. We disagree that this level of detail is necessary although we would be content for a recital to be added to cross-reference the Directive 2011/99/EU on the European Protection Order and the Regulation on civil protection measures that is currently being drafted.

**ARTICLE 21 - (18 OF THE COMMISSION PROPOSAL) IDENTIFICATION OF VULNERABLE VICTIMS**

It is proposed that the title of this article is amended to ‘identification of victims with specific needs’; we are flexible on this point but prefer the term ‘vulnerable’ as it is the language used in other Directives. A long list of victims who are considered to be vulnerable has been proposed. As this is an instrument establishing minimum standards we disagree that an extensive list is appropriate in the operative text but could accept a list as an illustration in a recital. Two new parts have been proposed to be added to this article which we disagree are necessary as, again, they refer to provision for specific categories of victims.

**ARTICLE 23A - PREVENTION (NEW PROPOSAL)**

We oppose the inclusion of this article on the grounds that legislation to prevent hate crimes is not within the scope of the legal base under which this Directive has been brought. Article 84 Treaty on the Functioning of the European Union permits the EU to legislate to prevent crime, but does not permit harmonisation of laws.

**ARTICLE 24 – TRAINING OF PRACTITIONERS**

We disagree that training should be mandatory in respect of the judiciary as this interferes with judicial independence but accept it should be available. We do not agree that the proposed list of professionals requiring training is necessary or proportionate.

I will continue to keep you informed as negotiations progress.

24 April 2012
Letter from the Chairman to Baroness Wilcox, Minister of State, Department for Business, Innovation and Skills

Thank you for your letter of 30 November 2011 which was considered by the Justice and Institutions Sub-Committee at its meeting of 11 January 2012. The Committee was grateful for the update. We decided to retain this matter under scrutiny.

MASS DIGITISATION AND COMMERCIAL USE

The Committee notes the limited ambition of the proposal as regards mass digitisation and the commercial use of orphan works. We note that you are seeking to find ways to facilitate mass digitisation and the commercial use of orphan works at EU level whilst also seeking to ensure flexibility for national measures in these areas. We support progress in both these areas although we would wish to see rights holders have enhanced protection in the case of commercial exploitation. Do you consider action at EU level would be more effective than national measures?

It would be useful to have your analysis of the policy implications of including unpublished works and photographs within the scope of the proposal.

We should also be interested to know the views of yourself and stakeholders on the contribution towards satisfactory mass digitisation of orphan works that is likely to result from the recent Memorandum of Understanding on Key Principles on the Digitisation and making Available of Out-of-Commerce Works.

IDENTIFYING MEMBER STATE OF FIRST PUBLICATION

It appears that this problem, originally identified in your Explanatory Memorandum, would become more acute if the proposal were to extend to unpublished works such as diaries. We look forward to an update on your progress in obtaining clarification.

DIGITAL COPYRIGHT EXCHANGE

We understand that a feasibility study into a DCE has been commissioned. We look forward to an update on its findings and the Government’s response. In the meantime we support your efforts at retaining flexibility in the proposal to incorporate the use of a DCE.

THE PUBLIC INTEREST MISSION

You indicate that the Presidency has focused the proposal more on the non-commercial exploitation of orphan works in its suggested amendments to recital 17 and deletion of Article 7. We would support continuing efforts to clarify what constitutes non-commercial exploitation, particularly as regards public service broadcasters and should be grateful for your views on these amendments. It appears to us that progress in facilitating commercial exploitation of orphan works will make it all the more important to distinguish between commercial and non-commercial exploitation.

DILIGENT SEARCH

We are grateful for the outline of the various options you have in mind for how a diligent search might be undertaken in the UK. We look forward to the results of your consultation.

We should be grateful for your response to the points raised in this letter when you provide your next update on the progress of negotiations.

12 January 2012
Letter from Baroness Wilcox, Minister of State, Department for Business, Innovation and Skills, to the Chairman

Although your letter of 14 July 2011 welcomed the General Approach of 27 June 2011 and cleared these documents from scrutiny, I would like to take this opportunity to update you on the progress of these two Regulations implementing unitary patent protection.

The Regulation establishing a unitary patent, under the co-decision procedure, has been the subject of informal discussions between the Council Presidency, the Parliament and the Commission with a view to agreeing a deal at first reading. The Council’s position was based on the general approach, and a compromise text was voted through by the Legal Affairs Committee. Their report will be considered next by the European Parliament voting in plenary session, probably in February, along with the Regulation on the translation regime which is subject to the consultation procedure.

We expect both Regulations to return to the Council after the plenary vote in February, possibly with a view to adoption at first reading.

The Legal Affairs Committee’s amendments are mainly concerned with the coming into force of the Regulation, and in particular they make clear that the unitary effect will apply to European patents granted for states for which the unified patent court has exclusive jurisdiction (for disputes concerning infringement and validity of the unitary patent) at the time when the unitary effect is registered. We understand the consequence of this to be that for other states the European patent will continue to have effect as if for a national patent, providing any national requirements are fulfilled as under the existing system.

Amendments also provide that participating Member States shall ensure that the necessary arrangements for the European Patent Office to administer the system are in place by 1 January 2014, although the unitary effect will only apply for any particular state once the unified patent court has exclusive jurisdiction there (which may be later).

I would be happy to supply more detailed information on less substantial changes if that would be helpful at this stage.

19 January 2012

PUBLIC ACCESS TO DOCUMENTS (9200/08)

Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

I am writing further to my letter of 12 April in which I informed you that I had submitted an Explanatory Memorandum to Parliament on the European Commission’s proposal of 31 March 2011 (document 8261/1/11 Rev.1) to update Regulation 1049/2001 regarding public access to the European Parliament, Council and Commission documents (the Regulation) to take account of Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) without prejudice to the wider recast. I also said that I hoped the timetable for the wider recast would shortly become clearer, and that once this was the case I would submit a further Explanatory Memorandum setting out the Government’s position on the revision of the Regulation as a whole.

In anticipation of further developments, I have today submitted a further Explanatory Memorandum to Parliament. This sets out the Government’s view on both the Commission’s 2008 proposals for the wider recast and the amendments to them proposed by the European Parliament Committees in 2010, which are of greatest relevance to the UK. In summary:

— The Government is committed to safeguarding the rights provided by the current Regulation during the recast process. In particular, we oppose the Commission’s proposal to narrow the definition of a “document” subject to the Regulation to those which are “formally transmitted”.

— However, we recognise that sensitive information must be appropriately protected and oppose proposals which limit the scope of current exceptions from disclosure. In particular, we are concerned that proposals to limit the protection afforded to personal data (Article 4(1)(b)), and to limit or remove
those relating legal advice not connected to legal proceedings (Article 4(2)) and the decision making process (Article 4(3)). Similarly the Government is concerned that current requirements to consult with Member States about the disclosure of documents they provide, or have an interest in, should not be diluted.

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The Government supports the extension of the Regulation to all EU agencies, bodies and offices in line with Article 15(3) TFEU. However we do not believe, as I made clear in my letter of 12 April to the Commons European Scrutiny Committee (copied to you), that Article 15(3) provides for the extension of access rights beyond EU citizens and residents.

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We do not believe the recast of this Regulation to be the right vehicle for providing the European Parliament with enhanced rights of access as proposed by the LIBE Committee. A separate legal base exists for such arrangements in Article 295 TFEU.

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More generally, the Government is keen to ensure that the Regulation operates as effectively and efficiently as possible and supports changes which facilitate this.

I will write to you again when the timetable for the recast becomes clearer, but should you have any questions in the meantime I will be pleased to answer them.

23 February 2012

Letter from the Chairman to the Rt. Hon Lord McNally

Thank you for your Supplementary Explanatory Memorandum and letter of 23 February 2012. They were considered by the Justice and Institutions Sub-Committee at its meeting of 21 March. The Committee noted that following the European Parliament’s first reading of the proposal last December discussions will resume in the Council. We decided to hold the matter under scrutiny pending further developments.

We do not expect an answer to this letter within 10 working days.

21 March 2012

Letter from the Rt. Hon Lord McNally to the Chairman

I am writing further to my letter on 23 February 2012 about the ongoing discussions concerning the recast of Regulation 1049/2001 (Access to Documents). In that letter I was unable to provide details as to the timeframe for discussions but promised to write when that information became available.

I can now confirm that we have a clearer sense of the timeframe involved. The Presidency of the Council, held by Denmark, have been keen to get negotiations moving on the recast and have organised a series of Working Party meetings running until the end of their Presidency. The first of these took place on 9 March and further meetings have been scheduled for 27 March, 13 and 27 April, 11 May and 8 June.

Obviously the precise timeframe for negotiations may change depending on progress made at Working Party level, but I hope that this information may give a clearer sense of the timetable involved in the discussions.

27 March 2012

REGULATION ON SUCCESSION AND WILLS (14722/09)

Letter from the Rt. Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice, to the Chairman

I write to inform you on the outcome of negotiations on the proposed EU Regulation on Succession and Wills.

In December 2009, the UK exercised its right under Title V of the Treaty on the Functioning of the European Union, not to opt in to this particular Regulation. Notwithstanding this decision, the UK has played an active part in the negotiations with a view to considering a UK opt in to the Regulation
post adoption. Despite these efforts it has not ultimately proved possible to align the requirements of the UK with the intentions of the Regulation and the interests of Member States. The UK will therefore maintain its position and remain outside the final Regulation which will shortly be concluded.

Negotiations on the proposed Regulation have recently concluded with the final Regulation most likely to be adopted by the Justice and Home Affairs Council as early as April this year.

Unfortunately the final Regulation does not resolve our major concerns in relation to two key areas, namely administration and lifetime gifts and the application of clawback claims. I believe the failure to agree satisfactory resolution of these issues means that the regulation would present some significant disadvantages to the UK legal system and UK citizens – disadvantages which on balance outweigh the potential advantages. For this reason I have decided that the UK should not be party to this Regulation once adopted.

BACKGROUND

Whilst the UK was supportive in principle to simplifying the current, complex, arrangements surrounding cross-border succession the wide divergence in succession laws made this a difficult dossier to negotiate. The differences between the common law and civil law jurisdictions were at opposite extremes of the spectrum. This meant that the UK started from a very different position and trying to reconcile that has been difficult. We nevertheless played an active role in the lengthy negotiation process in an attempt to secure satisfactory agreement to our concerns and ultimately pursue a UK opt in to the Regulation post adoption if possible.

There were, we believed, some significant benefits for British citizens in the proposed Regulation. Not least that it would make the difficult and sometimes complicated process of dealing with an individual's will more straightforward. For example, a British citizen leaving property in more than one Member State would have to make just one will rather than one for each jurisdiction in which they owned property.

NEXT STEPS

The practical implications of the UK remaining outside the Regulation are not actively damaging. UK citizens habitually resident in Members States will enjoy the benefits of the Regulation by virtue of their residence outside the UK. UK citizens habitually resident within the UK but possessing assets or property in a Member State will continue to apply the current arrangements and will therefore not be actively affected by this decision.

Our non-participation in the final Regulation will prevent the UK from suffering from the drawbacks surrounding its ultimate application.

19 March 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter of 19 March 2012. This was considered by the Justice and Institutions Sub-Committee at its meeting of 25 April. We decided to clear this matter.

We agree that the UK should not opt in to a Regulation which does not address the problem of clawback and protect the position of creditors and tax authorities through the system of administration of estates. We do, however, recall that some elements of the proposal would be beneficial; for example removing scission and increasing testator choice of applicable law. In our report we also noted that these benefits could be realised by amending UK law in line with the EU Regulation. We therefore recommend that the Government consider the extent to which UK domestic law should be amended in the light of the new EU Regulation and would be grateful if you would provide us with an update in due course.

26 April 2012
Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Your Explanatory Memoranda on these two proposals were considered by the Justice and Institutions Sub-Committee on 11 January. We are grateful for your explanation of the proposals.

As you may know, the Select Committee is undertaking an inquiry into the EU’s next Multiannual Financial Framework (MFF) for the period 2014 to 2020. This will be a follow-up to the Report, EU Financial Framework from 2014, published in April 2011, which considered the Commission’s Communication on The EU Budget Review. The present proposals will be considered as part of the inquiry and we therefore keep them under scrutiny.

We note that the proposed programmes would be established by Regulation. The current programmes were established by Decision: for example, Decision 252/2007 on the Fundamental Rights and Citizenship Programme, and Decision 1149/2007 on the Civil Justice Programme. Do you see any significance in the change of the form of instrument now proposed?

We find that the figures for the total expenditure ceilings for the next MFF period given in the two proposals differ from those in the main MFF proposals published by the Commission. The explanatory material accompanying the draft regulation on the Rights and Citizenship Programme refers to a total of 431m euros but the policy fiche refers to 387m euros. The material accompanying the draft Regulation on the Justice Programme refers to a total of 463 million euros, but the policy fiche on this Programme refers to 416m euros. (The fiches are in doc. 12475/11 ADD 1.) How are these figures reconciled?

We should be grateful for a reply to this letter within the usual 10 days.

12 January 2012

Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman


You ask, first, if the Government see any significance in the change of form of instruments proposed.

It has become apparent that a number of programmes previously established by Council Decisions are now being proposed as Regulations, so this trend is not JHA specific. The Commission has indicated its desire to increase the consistency of the use of such instruments. Although the choice of instrument may make little or no practical difference, we will be seeking further explanation from the Commission on this point, so as to be satisfied that it is the correct choice of instrument and better to understand the implications.

Secondly, you ask how the figures given in the proposals are reconciled with those first proposed by the Commission in the main multiannual financial framework, the communication A Budget for Europe 2020. The figures are reconciled due to the financial envelopes proposed in the Commission’s communication of June 2011, A Budget for Europe 2020 and accompanying documents, using constant 2011 prices which did not include inflation. The individual Regulations proposed by the Commission on 21 November 2011 used current prices, which do include inflation over the six year period 2014-2020.

30 January 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter of 30 January which was considered by the Justice and Institutions Sub-Committee on 15 February. We are grateful for your explanation of the apparent discrepancies in the expenditure figures. We note that you consider the form of instrument is unlikely to have any practical impact but we would be interested to see the Commission’s explanation in due course.

In the meantime, we retain the proposals under scrutiny as they form part of the Select Committee’s inquiry into the proposals for the next Multiannual Financial Framework, but do not expect an immediate reply to this letter.
Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman


You asked to see the Commission’s explanation for the choice of legal instruments proposed for these programmes. The Commission’s policy fiche on the choice of legal instruments for the Multiannual Financial Framework is a restricted document and is not publically available. However, I can summarise the Commission’s view as follows.

In the current Multiannual Financial Framework the individual programmes are based on a mixture of both regulations and Council Decisions. Of the 65 proposals related to the Multiannual Financial Framework 2014-2020, 23 are proposed as regulations to replace an existing decision.

Since the entry into force of the Lisbon Treaty, the Multiannual Financial Framework as a whole is governed by Article 312 TFEU, which provides that it must be laid down in a regulation. Given the interaction among the overarching instruments and the sectoral legislation, the Commission reasoned that it is in the interest of clarity to harmonise the choice of legislative instrument and ensure coherence and legal security as regards these measures. The Commission also considered that, as EU financial programmes are of direct and general interest for citizens and businesses, the potential beneficiaries, this interest can best be served by an act of general application – a regulation.

The Committee may wish to note that the Council Legal Service have commented on the Commission’s reasoning and concluded, confirming our own legal advice, that the choice of regulation did not raise legal concerns of substance or of procedure in the circumstances envisaged.

1 March 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter of 1 March which was considered by the Justice and Institutions Sub-Committee on 14 March. We note the Commission’s explanation for its choice of instrument for these programmes.

We retain the proposals under scrutiny pending completion of the Select Committee’s inquiry into the proposals for the next Multiannual Financial Framework but do not expect a reply to this letter.

15 March 2012

Letter from the Rt. Hon Kenneth Clarke QC MP to the Chairman

I am writing to inform you that the Government has decided not to opt in to this proposal. I regret that due to the very tight time frame in which the decision was made I was unable to notify you earlier.

Although there are some aspects of the proposal that are welcome, questions remain on the value of activities the programme intends to fund as a whole.

The Government recognises that this decision will have an impact on organisations that have received funding under the predecessors of this scheme. It intends to participate fully in the negotiations with the view that a post adoption opt in could be considered if it were made clearer that the focus of the activities to be funded demonstrated that the programme truly added value and was worthwhile. We will, naturally, keep the Committee informed as negotiations progress.

22 March 2012

Letter from the Chairman to the Rt. Hon Kenneth Clarke QC MP

Thank you for your letter of 22 March which was considered by the Justice and Institutions Sub-Committee at its first meeting following the Easter recess, on 25 April.

We were surprised by the Government’s decision not to opt in to this proposal. While we understand that the Government’s position on the proposed level of funding for programmes under the next Multiannual Financial Framework (MFF) means that you would not, at this stage, endorse any
particular expenditure ceiling, we did not expect you to raise doubts on added value given the Government’s support for the existing equivalent programmes.

We note from your Explanatory Memorandum that you are consulting interested parties and would be interested to know the views of stakeholders on the decision not to opt in and should like to know who received funds under this programme in the last year, and how much. We note also that you intend to participate in the negotiations on the proposal; is there not a risk that other members of the Council will be unsympathetic to proposals for changes in the draft Regulation from a non-participant? That was the tenor of your evidence on this issue to the Sub-Committee on 18 January, when you said “Other things being equal, I think we are in a stronger position and more influential in the outcome if we opt in when we can and then negotiate to sort out any detail”.

We retain the proposals under scrutiny pending developments in the negotiations and, in any event, until completion of the Select Committee’s inquiry into the proposals for the next Multiannual Financial Framework.

26 April 2012

STATUTE FOR A EUROPEAN FOUNDATION (6580/12)

Letter from the Chairman to Nick Hurd MP, Minister for Civil Society, Cabinet Office

Your Explanatory Memorandum of 6 March was considered by the Justice and Institutions Sub-Committee on 21 March. We thank you for your detailed account of the proposal.

The Commission relies on its study of 2008 as evidence that obstacles exist which adversely affect the functioning of public benefit bodies across borders within the EU and, in particular, reduce the amount of financial support which such bodies might attract. Those obstacles arise from the different national provisions on public benefit bodies, including in the treatment for tax purposes of bodies established outside a Member State compared with those of the state in question.

We should be interested to know the outcome of your informal consultations with charities and other stakeholders, whether they support the Commission’s view, and whether further information on the scale of the effects emerges from those consultations.

We agree with you that, if the need for action is established, then such action would have to be undertaken at EU level. It seems to us that the proposal would be consistent with the principle of subsidiarity.

You mention a number of matters which would need to be resolved in order to implement the proposed Regulation as drafted. Since the general concept of what the proposal calls a public benefit foundation is found throughout the EU, it should presumably not be difficult to reach agreement on a definition which would be acceptable for EU-wide treatment of public benefit bodies. Do you consider the prospective legislative changes that would be needed to implement the proposal will amount to a significant difficulty for the UK?

You say the Government does not support the provision to give the proposed Foundations the same tax treatment as domestic charities. What are your objections? Does not the effect of the judgments of the EU Court of Justice in this area mean that the Member States will be obliged to avoid discriminatory treatment of foundations and donors and, if so, would not transparency in the proposed Regulation be advantageous?

We note that you have concerns about the legal base of the proposal. Do your concerns relate to the use of Article 352 TFEU or are they confined to the absence of a specific tax base?

We keep this matter under scrutiny and look forward to receiving a reply within the usual 10 days.

22 March 2012
Letter from the Rt. Hon. David Lidington MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman

Thank you for your letter dated 24 November. I apologise that the Explanatory Memorandum 14769/11, issued by the Foreign and Commonwealth Office on 28 October, did not fully explain the Government position with regards to the Commission’s opinion. I will try to explain in more detail my views on the Commission’s suggestions.

In its Opinion, the Commission has proposed two similar models for selecting judges based on four criteria:

— That those recruited should be well qualified for the job
— That it should be possible to renew the terms of judges in order to promote stability, particularly given the need for specialisation
— That when two judges are from the same Member State, their terms are staggered
— That sufficient representation of judges from both common law and civil law legal systems is ensured

Model I is a: ‘An egalitarian rotating system’ and is based on strict rotation of judges in alphabetical order by Member State or in an order pre-determined by lottery and on the basis that every Member State has one judge and no more than two at any one time. I can see this has the virtue of predictability and, at least over time, equality of national representation. It will avoid politically costly and potentially damaging disputes as to the nomination and selection process of judges each time a position becomes vacant, a problem that can seriously affect the working of the Court. It is important to remember the significance which many Member States attach to having an equitable representation within the European Courts. However, some of the details of the procedure are unclear, especially whether the model, as so designed, could result in greater instability for the Court if there is a high turnover of otherwise experienced judges.

I also see an advantage in the Commission’s second model: specialist appointments, namely that the extra judges are chosen on the basis of merit rather than by rotation, with the caveat that no two Member States should have more than two judges. As the Commission stated, this model has virtue of guaranteeing each Member State representation; of explicitly recognizing merit as a criterion for selection; and as a middle way between Member States which take differing views on this question.

Both models which the Commission proposes are viable: In our view they promote equality between Member States, and have the virtue of being coherent, predictable and compatible with the Treaties. However we remain open minded about any other possible models. The question of selection of judges is a key aspect of the reform package, to be agreed among the Member States. I believe it is also important to resolve the issue of selection as part of a package of measures. It is difficult to agree one without agreeing all.

With regards to the size of the judiciary, we recognise the pressure which the Court is under and the need for reform of the General Court to address those pressures. I am persuaded in principle that the number of judges should be increased but not necessarily about the need for twelve extra judges. The increase in the number of judges by twelve is a significant increase in size on an existing Court of 27 judges and the reason for this number has never been fully explained by the Court. We support proposals which enhance the efficiency of the Court and which constitute good value for money, especially at a time of fiscal austerity. It is important we ensure that the cost of any extra judges is minimised in so far as possible.

The Council continues to take forward discussions of the reform proposals in the Court of Justice working group. The Working Group met on 21st November and informally on 28th – 30th November. The Committee on Legal Affairs of the European Parliament have also published their draft report. The committees on constitutional affairs have also prepared an opinion, and the budget committee is also expected to finalise their opinion. The Presidency presented a “state of play” report at the General Affairs Council on 5 December. It is now likely that the reform package will be pursued further under the auspices of the Danish Presidency.

I would like to thank you for your ongoing interest in this important dossier and I will of course update the Committee when details of the Court reform proposals are finalised.
Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter dated 9 December 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 11 January 2012.

We have decided to clear the Commission’s opinion from scrutiny.

The Committee thanks you for your apology regarding the Explanatory Memorandum which accompanied this matter and is grateful to you for your clear explanation of the Commission’s two proposed judicial appointment systems. We look forward to monitoring the negotiations, under the auspices of the Danish Presidency, of this important aspect of the reform of the General Court in the context of our ongoing scrutiny of the proposed Statute of the Court of Justice of the EU.

We do not expect an answer to this letter.

12 January 2012

UNIFIED PATENT COURT (11533/11)

Letter from Baroness Wilcox, Minister of State for Intellectual Property, Department for Business, Innovation and Skills, to the Chairman

Following my letter to you of 16 November, I am writing to give an update on negotiations, as well as a summary of stakeholder positions as expressed to my Department.

As the draft Agreement is not an EU legislative proposal, nor is the EU as such able to become party, the Presidency has been conducting discussions in a specially convened group, the Friends of the Presidency. This group is supported by the Council secretariat, and the Commission attends in an observer capacity, assisted by a representative of the European Patent Office. More recently negotiations have moved into COREPER.

The Presidency has been focussing on ensuring that the draft Agreement is legally sound in relation to Opinion 1/09 of the Court of Justice of the EU, and the existing EU acquis. They have been less inclined to take on board amendments of a technical nature, given that the substance of the Agreement was discussed in Council working groups before the Council conclusions of December 2009. The previous version of the Agreement was the subject of EM 7928/09.

The Presidency is now hoping for consensus to be reached on some political aspects before an initialling ceremony in Warsaw on 22 December. We expect that any initialling will be provisional, and on the basis that outstanding issues will be addressed satisfactorily before a Diplomatic Conference in June 2012 at which the Agreement will be adopted and signed. It will then be subject to ratification by national governments according to their usual procedures.

We have been consulting stakeholders primarily through the Intellectual Property Office’s European patent reform consultation group, which last met on 29 November. This includes representatives of industry, the legal and patent attorney professions and the judiciary, as well as Government officials. In relation to the text in document 11355/11 a small group of representatives has suggested over 100 amendments, while recognising that issues would need to be focussed for discussions with the Presidency.

The main points identified by this stakeholder group were set out in a “Concerns of Principles” document and subsequently prioritised as follows:

— Appropriate transitional provisions, with a wide-ranging review before the transitional arrangements end, and including the possibility for patentees not only to opt back into the jurisdiction for existing patents but also to opt out for patent applications made during the transition period

— The possibility to initiate actions for infringement and interlocutory relief before the central division

— Simplified language arrangements

— Clarity and finalisation of the Rules of Procedure to ensure uniform quality of judgments
— Inclusion of provisions on infringement of the unitary patent in the Court Agreement rather than in the unitary patent regulation
— Technical issues including future provision for supplementary protection certificates with unitary effect.

Additionally others have commented on the quality of the Patents County Court under recent reforms, particularly for small businesses, and consider it important that this avenue continues to be available; there is already provision for disputes to be taken to national courts rather than the UPC during the transitional period.

In recent weeks, following a bid by Germany for the seat of the central division of the court, industry has mounted an extensive lobbying campaign for the UK Government to also bid for the seat of the central division of the Court. The French Government has bid for Paris to be the seat.

For the Competitiveness Council on 5 December the Presidency have signalled their intention to have a political debate on specific aspects of the Agreement with a view to reaching a consensus, in particular:
— The location of the seats of various bodies
— The financial contributions from states in relation to bodies they host
— Possible methods for calculating contributions from states to costs of the court in the setting-up phase
— Requests to change the language of proceedings on the grounds of convenience and fairness to the parties
— Additional opportunities to bring actions before the central division
— Number of ratifications for the Agreement to enter into force
— Extending the transitional period from that previously agreed in December 2009
— Ensuring that a broader range of provisions of provisions can be reviewed by the Administrative Committee in order to improve the functioning, efficiency and cost effectiveness of the UPC and the quality of its judgments.

In negotiating with European partners on these issues we will be seeking the most effective solutions for users of the patent system, bearing in mind that litigants will have different requirements depending on whether they are seeking to defend or challenge patents, and according to their business models.

How the Presidency concludes the Council of 5 December will depend on the progress of discussions. There will be no vote as this is not an EU agreement. If a consensus emerges on the main outstanding points we would expect the Presidency to conclude that they will invite the 25 participating states to Warsaw to initial the agreement on 22 December. If the Court Agreement is finalised in due course, it will of course be subject to ratification by Parliament.

If it would be helpful, my officials would be very pleased to discuss the substance of the draft Agreement, and the way forward, with the Committee Clerks.

I would also like to take this opportunity to update you on what we expect to happen with the regulations on the unitary patent and the translation arrangements. These two Regulations will not be discussed substantively at the Council. The Presidency has recently been negotiating with the European Parliament on the co-decided Regulation, on the basis of the Council's general approach of June, with a view to reaching a first reading agreement. The indications are that the EP will not insist on substantial changes to the general approach text. I will submit formally on this again when a compromise text is presented.

2 December 2011

Letter from Baroness Wilcox to the Chairman

I am writing to update you on discussion between Ministers at the Competitiveness Council on Monday, and to ask for the Committee's consideration of this issue at the next available opportunity before 22 December.

Perhaps I could explain that it would not be usual practice for the Government to submit a document like that in 11533/11 because it concerns a draft international agreement between states acting in an
inter-governmental capacity and is not based on any provision of the EU Treaties. However I
appreciated that it was of interest to the Committee in relation to their scrutiny of the patent
regulations and the Council decision on enhanced cooperation, particularly following your letter of 17
June, and it was for that reason that I arranged for the deposit of the document and an Explanatory
Memorandum. The negotiations between states on this Agreement are not open to the public, so I
cannot give full details of the package currently on the table.

As I indicated in my letter of 2 December, the Polish Presidency is seeking consensus on political
aspects of a compromise package relating to the draft Court agreement. There was no question of
signing of the Agreement itself by Ministers at the Competitiveness Council of 5 December. But it
was only at a very late stage that it became clear what the Presidency was expecting on 5 December,
and there were further changes on the day of the meeting itself.

After a series of bilateral meetings on 5 December throughout the day, the Presidency presented a
compromise package which in certain key aspects, including the location of the seat of the central
division, was not satisfactory to the UK and at least one other Member State. We are continuing in
bilateral discussions with the Presidency. They may convene another meeting of Ministers, if
necessary, before the proposed initialling ceremony planned for 22 December. It is not yet clear how
this relates to the diplomatic conference and signing planned by the Danish presidency for June 2012.

Details of the compromise package are not publicly available, but they do reflect some progress made
in relation to the concerns raised by our stakeholders. If remaining aspects can be resolved
satisfactorily either through bilateral discussions or in a Ministerial meeting, then the UK would want
to be in a position to join the initialling ceremony on 22 December without any breach of the
Parliamentary scrutiny reserve resolution.

You will appreciate that I cannot be more specific about the Government’s position on outstanding
issues while we are still engaged in negotiations with other states on the overall compromise package.
However I hope the information that I have provided here and in my letter of 2 December is
sufficient to allow the Committee to complete its scrutiny of the draft agreement.

I would add that the Agreement will only enter into force upon ratification by a minimum number of
states to be decided, possibly 13, and I understand that the procedures set out in section 20 of the
Constitutional Reform and Governance Act 2010 will apply after signature and before ratification.

9 December 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letters dated 16 November and 2 December. They were both considered by the
Justice and Institutions Sub-Committee at its meeting of 14 December 2011. Your letter dated 9
December was not received in time for the Committee to consider it. Whilst the Committee was
aware that you asked that the Agreement be cleared we have decided to retain this matter under
scrutiny.

As you are aware the Committee considers this proposal to be an important and complex dossier
and we would like the benefit of hearing evidence from you in person. To that end the Sub-
Committee Clerk will shortly be making contact with your officials in order to arrange a mutually
convenient date early next year.

15 December 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 15 December reporting the Committee’s consideration of this issue at
your meeting of 14 December, and inviting me to give evidence to the Committee in person. I look
forward to appearing before the Committee on 15 February.

Although your letter did not raise specific issues, I thought that the Committee might find it useful to
have available an unofficial consolidated version of the working documents published so far, so as to
have a more up to date complete version of the text. An analysis of the main changes is attached in
Annex 1 [not printed]. This includes an indication of the areas covered by the Polish compromise
proposal presented on 5 December, on which we expect discussion to continue. The compromise
proposal has not been made publicly available, other than to the extent summarised in the Council
press release after the 5 December Competitiveness Council, and is still under negotiation. I hope
this information is helpful.

19 January 2012
Letter from Baroness Wilcox to the Chairman

Thank you for the opportunity to give evidence to Sub-Committee E on 15 February.

While I hope that I and my officials were able to provide information to assist the Committee with their consideration of the draft court Agreement, I also wondered whether it would be helpful to set out some further explanations and definitions.

In particular I thought it might be useful to expand on the definitions given in Article 2 of the draft Agreement, since these are not always the same as those commonly used in the field.

For example Article 2 point (5) defines a European patent as a patent granted under the provisions of the European Patent Convention, granted for one or more contracting Member States, but without unitary effect. This is what practitioners would normally call a European “bundle” patent, since once it is granted by the European Patent Office in Munich it effectively becomes a bundle of individual national patents for the states chosen by the patent holder.

Disputes about European “bundle” patents are currently subject to the jurisdictions of the individual national courts for the states where each “bundle” patent has effect. So if a particular “bundle” patent has effect in say France, Germany, the United Kingdom and Spain, the national courts in each of those countries will deal with disputes, but only with respect to their own territorial jurisdiction.

Under the draft Agreement, the Unified Patent Court only covers disputes on such “bundle” patents in respect of the territories of the contracting EU Member States covered by the patent. In theory all 27 EU Member States could join the UPC to have this jurisdiction apply to European “bundle” patents for their territories. It had previously been intended that the other 21 states party to the European Patent Convention could also join the Agreement, but this has been ruled out following Opinion 1/09 of the EU Court of Justice.

Instead of the national courts having jurisdiction over disputes in respect of their individual national territories, the UPC would give rulings with a single effect in all the respective Member States (ie those contracting parties to the UPC which are covered by the European bundle patent in question, as chosen by the patent holder).

Then Article 2 point (6) defines the European patent with unitary effect as one granted under the provisions of the European Patent Convention, again by the European Patent Office in Munich, but benefiting from unitary effect by virtue of the EU patent regulation to be adopted. This unitary effect will cover the territories of the EU Member States who are participating in enhanced cooperation, currently 25 states. So instead of a European “bundle” patent which turns into a number of individual national patents, a patent applicant may choose the “European Patent with unitary effect” (or the unitary patent) with single effect across 25 states.

The unitary patent is not the same as the previously envisaged EU patent, in that it will only cover the territories of the 25 Member States participating in the enhanced cooperation rather than the whole territory of the EU. However, the unitary patent will be established by an EU Regulation. While it might appear simpler to wait until all EU Member States agreed to a “pure” EU patent, it has taken 12 years to get this close to agreeing on a language regime which is essentially the same as that proposed by the Commission in 2000, and it is not clear how much longer we might have to wait to achieve agreement between all 27.

Given that when the Unified Patent Court comes into full effect, it will give single judgments covering multiple states for both the European “bundle” patent and the unitary patent, the question might be asked why we have both systems running in parallel.

One reason is that the “bundle” patent offers a patent holder more flexibility about where he or she chooses to maintain patent protection, by deciding not to pay to renew the patent in states where patent protection is no longer required. With the unitary patent, the patentee must renew for all states and pay the corresponding renewal fee. Otherwise the patent will lapse across all 25 states. Users have been clear that they want both the bundle patent and the new unitary patent systems to be available.

The question was also raised why we should bother with the complication of having the Unified Patent Court deal with the European bundle patent – it would be much simpler to set up a system purely for the unitary patent and where clearly a single jurisdiction is needed for the patent to have unitary effect.

There are two reasons for the Unified Patent Court to deal with both systems.
First of all a single jurisdiction for the European bundle patent is also a long-felt need, dating back at least to 1999 when the Paris intergovernmental conference of states party to the European Patent Convention set up a working party to see how this could be achieved.

Secondly the unitary and bundle patents are granted under the same system, the European Patent Convention, and the same legal questions are likely to arise. It therefore makes for better legal consistency and greater business certainty to have disputes on both types of patent dealt with by the same court.

The Court of Justice does not currently have jurisdiction over disputes between private parties, only acts of the institutions. There is no specific provision in the Treaty on the Functioning of the European Union which would allow the EU Court of Justice to have jurisdiction over private party disputes in relation to the European bundle patent, which is created by an intergovernmental agreement, the European Patent Convention. That is why the Unified Patent Court is being set up by intergovernmental agreement, rather than being constituted as a body within the Court of Justice.

Referring again to the definitions set out in Article 2 of the draft Agreement, the choice of the term “Patent” to refer to a European bundle patent and a European patent with unitary effect has caused some confusion among readers, because normally the word “patent” would include national patents granted by national patent offices. These are not covered by the Agreement or the Unified Patent Court and will continue to be subject to national law and courts.

Even some large companies operating in European-wide markets continue to use national offices to obtain patent protection as well as or instead of using the European Patent Office, according to their particular needs. Indeed recent studies have shown that national patent offices in Europe together grant approximately the same number of patents per year as the European Patent Office does. It seems that national patent offices continue to fulfil a need felt by patent applicants.

I hope this further information is helpful and will of course be happy to answer any additional questions arising.

Perhaps it would be useful to indicate that the latest we have heard from the Danish Government is that they are hoping for agreement on the whole patent package by the Competitiveness Council of 31 May. But that does not prevent them from continuing to seek agreement earlier.

28 February 2012

Letter from the Chairman to Baroness Wilcox

Thank you for giving evidence to the Justice and Institutions Sub-Committee at its meeting of 15 February 2012. The Committee is also grateful for your letter dated 28 February 2012 which was considered at the meeting of 14 March 2012. We retain the proposed Agreement under scrutiny.

We also take this opportunity to thank you for the two letters dated 19 January 2012, sent in anticipation of your appearance before us on 15 February, and for the update on the two Regulations numbered 9224/11 and 9226/11 respectively.

EVIDENCE SESSION

When the Committee asked you to give evidence we were seeking clarification of five main issues: (i) why the Court was being created outside the formal structure of the EU, (ii) the complexities of the Court’s structure, (iii) the role of the Court of Justice, (iv) the cost of the Unified Patent Court, and (v) the general progress of the negotiations. In relation to the latter the Committee was concerned by an apparent rush to agree this proposal in light of your request before Christmas that we clear this matter ahead of a formal signing ceremony in Poland.

On all five of these issues the Committee is grateful for your helpful evidence but we also have a number of questions that we wish to raise with you.

In relation to why agreement is being sought outside the formal structure of the EU (issue (i)), the Committee is grateful to you for your explanation that the main advantage lies in the fact that in the participating 25 States the Unified Patent Court will be a single court able to decide cases arising out of both the unitary patent and the traditional bundle patents granted by the European Patent Office. Were agreement to be sought within the EU’s framework, patents granted by the European Patent Office would lie outside the EU court’s jurisdiction.

In relation to the complexities of the Court’s structure (issue (iii)) whilst we are grateful to you for explaining it to us in your evidence, we have two further questions for you. The first is related to the
issue of splitting the jurisdiction to hear validity and infringement actions separately (bifurcation); in
previous correspondence you have told us that UK stakeholders are opposed to bifurcation, however
when you explained the Court’s structure you said that the central division will deal with validity
cases and the local divisions will take infringement cases (see question 10). Is there a danger that this
structure will build bifurcation into the Unified Patent Court’s system? The second question relates to
the rules governing the interaction between the different divisions of the Court of First Instance. Can
you explain these rules to the Committee and the extent to which they will limit the potential for
parties to choose a favourable court in order to simply delay proceedings?

We asked you a number of questions regarding the role of the Court of Justice (issue (iii)). Whilst
you were able to reassure us that the provisions of the Agreement governing preliminary rulings
would allay the CJ’s fears, we have a question regarding your response to the quote from Sir Robin
Jacob (see question 32). In your reply you raised the Government’s attempts to address his fears by
limiting the CJ’s role by removing the infringement provisions from the Regulation governing the
unitary patent. Given that a General Approach to the relevant Regulation was agreed at the
Extraordinary EU Competitiveness Council held on 27 June 2011 and that in your letter to us dated
19 January 2012 you suggested that the Member States were close to adopting the Regulation at first
reading, is it not too late to pursue this solution to Sir Robin Jacob’s concerns?

Moving on to the cost of the Court (issue iv), it is the Committee’s view that the figures quoted seem
justified if at the end of the process a viable pan-European patent protection system is achieved.
However, in relation to the Commission’s prediction that the Court will need 101 full-time and 45
part-time judges, whilst we note your argument that the Court’s caseload will rise gradually and that
“such a great number will not be required from the outset” we remain unconvinced at this time that a
pool of sufficiently qualified and expert judges currently exists to staff the Court.

This brings us onto the final issue of clarification, namely the progress of the negotiations. The
Committee was reassured by your repeated notes of caution regarding the ongoing negotiation of this
matter, in particular given that before Christmas the Polish Presidency appeared to be in such a hurry
to reach agreement on a proposal the negotiation of which you described as having “a way to go yet”
(Question 18). We welcome your reassurances that getting the “right package” is important and that
the UK will only sign up to the Agreement when it is happy with the proposal.

LETTER DATED 28 FEBRUARY

As for your most recent letter, we are grateful to you for your further explanation of the
Agreement’s provisions. However, it appears from your final paragraph that the optimism to agree
the package remains. In light of the evidence you gave us on 15 February on this issue has there been
sufficient movement in the negotiations to justify the Danish Presidency’s optimism?

We look forward to considering your answers to our questions within the usual 10 day deadline.

15 March 2012

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 15 March 2012 in which you asked a number of questions relating to the
evidence I gave to the committee when I appeared before you on 15 February and in my letter of 28
February 2012.

SPLIT JURISDICTION OF THE UNIFIED PATENT COURT (“BIFURCATION”)

Bifurcation is an option built in to the current draft of Unified Patent Court (UPC) Agreement.

As the Committee is aware, at first instance the UPC will comprise two types of division. There is
the Central Division whose main role will be to hear cases about the validity of a patent (also known
as revocation actions). There will also be a number of local or regional divisions which will hear cases
about infringement of patents.

UK stakeholders have been very critical of bifurcation based on their experiences of how the system
works in national jurisdictions that favour splitting infringement and validity actions. It is true that
bifurcation on its own can favour patentees, but if the Court is required to handle linked aspects of
the same overall case to a common timetable, for example, then this distorting advantage would be
removed. We will continue to argue the case against bifurcation. However, in the meantime we are
also working to mitigate the distorting effects.
It is inevitable that in a multi-division system parties will try to choose a favourable division. That is why we are placing so much emphasis on getting the Rules of Procedure right to minimise the differences between divisions, including the effects of bifurcation. However, there are also rules written in to the UPC Agreement which are designed to ensure parallel actions can be heard together by the same division.

I have included a diagram of the basic structure and rules in the current draft of the UPC which I hope the Committee will find helpful in understanding the following explanation.

As a general rule, infringement actions will be initiated at the local division of the Member State where the infringement is alleged to have occurred or where the defendant is resident or has their place of business located. If the Member State concerned does not host a local division but is part of a regional division, then the infringement action will be heard by that regional division. If the Member State concerned does not host a local division or is not part of a regional division then infringement actions will be initiated before the Central Division.

It is often the case that a party will file a counterclaim for revocation of the patent when they are faced with defending an infringement action. In the UPC, such counterclaims also will be initiated at the relevant local or regional division. However, in this case the panel of judges at the local or regional division has discretion on how to proceed. The panel may choose to proceed with both infringement and counterclaim actions. Alternatively, it may refer the counterclaim to the Central Division and either proceed with the infringement case or suspend the infringement case pending the result of the counterclaim action. Finally, with the agreement of the parties, the local or regional division panel may transfer both actions to the Central Division for a decision.

It is also possible to file stand-alone actions for revocation of a patent (sometimes known as free-standing nullity or free-standing validity actions). In the UPC, revocation actions will be initiated at the central division. However, if an infringement action on the same patent involving the same parties has already been started at a local or regional division, then the revocation action must be brought before the same local or regional division. In this situation, the local or regional division will be able to apply the same discretion as they do with counterclaims, i.e. proceed with both actions, refer the revocation to the Central division or refer the entire case to the Central division.

Minimising references the Court of Justice of the European Union on patent law ("articles 6-8")

In your letter of 15 March you asked whether it was not too late to pursue a solution which would minimise references to the ECJ on matters of patent law (i.e. the removal of articles 6-8 from the Unitary Patent Regulation) given that the General Approaches on the Unitary Patent Regulation were adopted at the Competitiveness Council in June 2011 and that adoption of the regulations at first reading appeared imminent.

As I stated when I gave evidence before the Committee on 15 February, the Government would like to minimise the number of references to the ECJ particularly in areas of specialised patent law where the court does not have the relevant expertise. We agreed to the General Approach on 27 June on the condition that we would return to this issue under the then Polish Presidency. We have repeatedly pressed this point as I outlined in my letter of 28 February. But we have been unsuccessful so far in the face of strong opposition from the Commission and Member States. Nonetheless we continue to argue strenuously for the removal of the infringement provisions from the Unitary Patent Regulation.

At the same time, the European Parliament have postponed their plenary vote on the Regulations. We understand that the European Parliament will not vote on the Regulations until the current impasse on the location of the Central Division is resolved. So, I believe there is still time to influence the outcome on this issue.

Availability of suitably trained judges

I note the doubts expressed in your letter about whether there are enough suitably trained judges to staff the various panels of the Court. There are already a large number of expert judges in the major patenting jurisdictions of Europe – for example Germany has around 150 patent judges in the Federal Patent court alone. A proportion of the existing expert patent judges in the major jurisdictions might be expected to become available to work for the Unified Court as the caseload of the Court grows.

The Court will not reach full capacity for some years and training for additional judges is planned to start as soon as the Court is agreed. Indeed many of the smaller Member States have been very
interested in training their judges so they will gain patents expertise. The panels of the various divisions will need judges from different Member States, therefore it will be very important to start training-up judges as soon as possible.

DANISH PLANS FOR AN AGREEMENT IN MAY

The Danish Government is hoping for an agreement on the whole patent package at the Competitiveness Council on 31 May 2012. It is only natural that the Danes will want to push for a successful outcome on the EU patent package during the term of their Presidency. Signalling a timescale for reaching agreement may be seen as a way of maintaining focus on the unitary patent and patent court.

The UK continues to be an active and constructive participant in the discussions and we are working towards reaching an agreement during the Danish term. However, it is important that we get the unitary patent and court system right so that it gives users a genuinely better alternative to the current system.

I hope this further information is helpful and will of course be happy to answer any further questions the Committee may have.

28 March 2012

Letter from the Chairman to Baroness Wilcox

Thank you for your letter dated 28 March 2012. It was considered by the Justice and Institutions Sub-Committee at its meeting of 25 April. We have decided to retain the proposal under scrutiny. The Committee is grateful for your answers to our questions relating to the evidence you gave when you appeared before the Committee in February. Our concerns regarding the availability of suitably qualified judges also related to translators and interpreters. We look forward to monitoring this matter as it develops in due course.

26 April 2012