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 09 December 2010 to 26 May 2011.

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

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

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee. We agree that the proposal is consistent with the principle of subsidiarity.

We note that you are considering the merits of the proposal. We hope that you will reach the view that the UK should support it. During the negotiations leading to the establishment of the Agency, the Committee considered that the scope of activities of the Agency should include matters within the then Third Pillar on the ground that fundamental rights were likely to be engaged by EU activity in the fields of police cooperation and criminal justice. We strongly remain of that view.

We raise a technical issue on the legal base for the proposal. The Commission's explanatory memorandum states that the proposal could not be adopted under the provisions of Council Regulation 168/2007 and must have a base in the Treaties. Council Decision 2008/203 establishing the Multi-annual Framework itself offends against the legal principle on which the Commission bases its view. That being so, it would seem unsafe simply to amend the Framework; rather, the Framework should be re-established, with the proposed amendments, in a fresh Decision. We should be interested to know your view on this issue.

In the meantime, the proposal should remain under scrutiny and we should be grateful for a reply to this letter within the usual 10 days.
Letter from the Rt. Hon. Kenneth Clarke MP, Lord Chancellor, Secretary of State for Justice to the Chairman

Thank you for your letter of 27 January in which you asked for my view on a technical question regarding the legal base for the above proposal for a Council Decision. I am writing to update you about recent developments in the negotiations on this proposal and to respond to the question you posed in your letter. You ask whether the legal base for the proposal offends against the Commission’s own view that it must have a base in the Treaties and therefore that the Multi-Annual Framework (MAF) should be re-established.

Since the Explanatory Memorandum of 22 December 2010, there has been some discussion of this proposal in the Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) working group relating to the legal base. A number of doubts have been expressed about whether the legal base proposed by the Commission is the correct one. The Government shares those concerns, which reflect the point that you make in your letter.

The FRA was established by Regulation 168/2007, using Article 308 EC (the predecessor to Article 352 TFEU) as its legal basis. The original MAF was adopted by Council Decision 2008/203, whose legal basis was Article 5(1) of Regulation 168/2007. However, as you are aware, in the light of the ECJ’s judgment in Case C-133/06 the Commission now considers that a secondary legal base not provided for in the Treaties is not a legitimate legal basis for adopting the proposed amending Decision. Instead the Commission has proposed that the amending Decision is adopted in reliance on Article 352 TFEU, which was the legal basis for Regulation 168/2007.

As you indicate in your letter, it appears to be implicit in the Commission’s proposal that the existing MAF was adopted in reliance on an unlawful secondary legal base. This would seem to undermine any proposal to extend the thematic areas in which the FRA can work which relies on the current MAF. Furthermore, concerns have been raised that it is not permissible for an implementing act such as Decision 2008/203 to be amended by a legislative act adopted using a legal basis in the Treaties, because the Treaties do not permit hybrid instruments that are partly of an implementing nature and partly of a legislative nature.

A further difficulty that has been pointed out is that Regulation 168/2007 was originally limited to areas covered by Community law, and so excluded the former second and third pillar. Article 352 TFEU can only be used as a legal basis if the EU legislator decides that action is necessary to attain an objective set out in the Treaties and that the Treaties have not otherwise provide the necessary powers. But the EU legislator did not make that decision in relation to third pillar areas when Regulation 168/2007 was adopted, and indeed could not have done so because at the time Article 308 EC could only be used in relation to the first pillar. It follows that former third pillar areas can only be included in the MAF following such a decision by the legislator to amend the Regulation and enlarge the scope of the FRA’s activities in the Regulation. This is not what the Commission has proposed.

The Government intends to oppose the proposal because of these technical concerns, which are likely to be shared by other Member States. Even on its current questionable legal basis unanimity would be required for the Decision to be adopted. It therefore seems likely that the Commission will withdraw the proposal and replace it with one that meets the concerns that been expressed, although that process is likely to take some months. I will of course inform the Committee of any developments.

7 March 2011

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

Thank you for your letter of 7 March which was considered by the Justice and Institutions Sub-Committee on 16 March. We note that you share our concern on the legal point we raised, and that this and other legal concerns have been put forward in the discussions in the Council working group.

You do not mention your view on the merits of the proposal which your Explanatory Memorandum said was under consideration and look forward to hearing the results of that consideration. We reiterate our view that the UK should support the substance of the proposal.

We note that you expect the proposal to be superseded by a revised one and we retain the matter under scrutiny pending further developments. No immediate response to this letter is expected.

17 March 2011
Letter from Baroness Wilcox, Minister of State, Department for Business, Innovation and Skills to the Chairman

I am writing to inform you of negotiations on the multi-lateral ACTA treaty that the EU and UK participated in with other World Trade Organisation partners, including the United States, Japan and Canada.

ACTA will not create new intellectual property rights, laws, or criminal offences in the UK and EU but will provide an international framework that strengthens international enforcement in areas of intellectual property (IP). In November 2010, the Prime Minister identified IP as a driver of innovation and growth and enforcement of IP rights is being considered in the No-10 Review of IP and Growth; IP has been similarly identified as an area of importance by the EU.

As is common practice in trade negotiations, ACTA was negotiated in confidence and negotiations were completed in December 2010. I will, of course, update the Committee once the text and the proposals have become available for national scrutiny and will prepare the usual explanatory memorandum using the normal parliamentary procedures. However, in the meantime I am taking this opportunity to update you on recent progress.

The European Commission is preparing its proposal to the Council, the European Parliament and Member State Parliaments; further details on the content of this proposal are expected in April 2011. But it is expected that the recommendation will be for the EU and its Member States to sign and ratify the treaty. In areas where Member States retain competence, they will decide whether to accede in their own right.

25 January 2011

APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS (8453/11)

Letter from the Chairman to Jonathan Djanogly MP, Parliamentary Under-Secretary of State, Ministry of Justice

Thank you for your Explanatory Memorandum dated 18 April 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 11 May.

In my letter of 26 November 2010 the Committee welcomed the Commission’s Communication on the strategy for the effective implementation of the Charter of Fundamental Rights and the Committee is pleased to review the Commission’s first annual Report adopted under the strategy.

Like you, we agree that the European Union should respect individuals’ rights in the same way as the Member States and we welcome the Commission’s undertaking to review annually the Charter’s application; in particular, as the Committee believes that the process will afford the Commission a frequent opportunity to assess in an open and public manner the Charter’s strengths and weaknesses.

Two examples drawn from this present Report illustrate the value of this exercise. First, the statistic that of the 4000 letters received by the Commission three quarters pertained to situations falling outside the remit of EU law. This statistic, as the Report concludes, illustrates considerable misunderstanding among EU citizens as to the situations when the Charter applies. The conclusion that it is necessary to take action both at the national and EU level to further publicise the Charter’s purpose and application is one this Committee welcomes.

The second example concerns the ongoing plight of the Roma. This Report offers an annual opportunity for the Commission to publicly ensure that all EU citizens’ rights enshrined by the Charter are protected and we welcome the Commission’s plan to adopt a framework for national Roma integration strategies.

Are you able to tell the Committee how the Commission’s work regarding the Charter relates to the work of the European Union Agency for Fundamental Rights and whether in compiling this Report the Commission drew on the work of this Agency? In relation to the section of the Report addressing the most important developments in 2010, the Committee looks forward to scrutinising all the Commission’s suggested legislative proposals.

We retain this matter under scrutiny and we look forward to considering in due course your views on the Council’s Conclusions on the Report to be agreed in June.

13 May 2011
Letter from the Rt. Hon. Kenneth Clarke MP, Lord Chancellor, Secretary of State for Justice to the Chairman

I am writing to inform you that the above Council Conclusions are due to be adopted at the General Affairs Council on 23 May 2011. These Council conclusions follow the publication of the first annual report on the Application of the Charter by the European Commission in April. The Council Conclusions set out the Council’s work in ensuring compliance with the Charter of Fundamental Rights.

The Council Conclusions refer to the existence of a working party within the Council system, the working party on Fundamental Rights (FREMP) which is tasked with considering issues around fundamental rights and specifically its work in developing guidelines to assist other formations of the Council in identifying and resolving fundamental rights issues. The working party and the guidelines are referred to in my letter to you of 3 March, following the adoption of Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter.

The Council Conclusions due to be adopted on 23 May set out the actions the Council has taken or announced to date under each of the six chapters of the Charter. The Conclusions refer, amongst other things, to Council Conclusions on the European Pact for Gender Equality and the Code of Conduct that the Council has adopted following the EU’s ratification of the UN Convention of the Rights of the Child, which set out the internal arrangements between EU institutions relating to the Convention. It also notes the adoption of Conclusions advancing Roma Inclusion.

The Conclusions also note the adoption of earlier Conclusions on Equity and Health in All Policies and updated consular guidelines on the protection of EU citizens in third countries.

Under the heading of Justice the Conclusions refer to the Council’s actions in putting in place aspects of the Stockholm Programme; namely progress on the Roadmap on procedural rights of suspected or accused persons in criminal proceedings. In this context they note the adoption of the Directive on Interpretation and Translation in Criminal Proceedings and express their hope that the Directive on the Right to Information in Criminal Proceedings can be agreed in the near future.

The Conclusions express agreement with the Commission’s concerns that the requests and complaints from the public are often based on misunderstandings of the purpose and scope of the Charter, and that more accessible information about the Charter should made available on the Council’s and Presidency’s homepages.

Given the horizontal nature of the work referred to in these Council conclusions, they are due to be adopted at the General Affairs Council rather than Justice and Home Affairs Council. The Government intends to support the adoption of the Conclusions.

16 May 2011

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

Thank you for your letter of 13 May to Jonathan Djanogly, to which I am responding on behalf of the Ministry of Justice. In it you ask a number of questions on the European Commission’s report on the Application of the Charter of Fundamental Rights.

Firstly, you ask about the relationship between the work of the Commission and that of the Fundamental Rights Agency (FRA). The Charter provides a clear reference point, both for the Commission and the FRA, bringing together as it does the rights that already existed within EU law in a single place, however the work that each body undertakes is different.

The FRA’s role is to provide relevant institutions and authorities of the European Union (EU) and its Member States with assistance and expertise on fundamental rights when implementing Community law, and to support them in taking measures and formulating appropriate courses of action. The FRA has no powers to examine individual complaints and it can’t - unless requested to - look at the fundamental rights implications of draft EU legislation. The Commission’s work as set out in the annual report, seems to fill these two gaps; its reactive consideration of problems which come to its attention through correspondence from the European Parliament and individuals, and the internal processes which aim to ensure that EU legislation is drafted in a way which respects the rights of those within the EU.

Secondly, you ask whether the Commission drew on the work of the FRA when compiling the report. Apart from noting some references to FRA research in order to set out the situation with regards to particular fundamental rights I am not aware of any greater use the Commission has made of the reports of the FRA.
As noted in the Secretary of State’s letter to you of 16 May the Council has drafted Conclusions in response to the Commission’s report. These were agreed at General Affairs Council on 23 May and I enclose a copy.

The Government supported the adoption of the Council Conclusions because they provide a stock take of the work that the Council has undertaken to ensure that the EU does not breach people’s fundamental rights. They do not include additional, as yet unannounced, initiatives but give a retrospective review of the Council’s actions.

I also enclose a copy [not printed] of the non-binding guidelines referred to in the Secretary of State’s letter. These will be used by other formations of the Council, such as working groups in identifying and resolving fundamental rights issues.

25 May 2011

ARTICLE 6 OF THE STAFF REGULATIONS: EQUIVALENCE BETWEEN OLD AND NEW CAREER STRUCTURES (8547/11)

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

Your Explanatory Memorandum of 27 April was considered by the Justice and Institutions Sub-Committee at its meeting of 18 May. We decided to clear the document.

In doing so we agree with your criticism of the principle of equivalence between the pre- and post-reform staff regimes and support your efforts to persuade the Commission to propose amendments to the Staff Regulations which will achieve a more efficient and cost effective EU public administration. We would welcome Council Conclusions to this effect.

We should be grateful if you would update us, in due course, on the terms of any Council Conclusions and on the further work the Commission has been asked to produce.

20 May 2011

AUTHORISING ENHANCED COOPERATION IN THE AREA OF UNITARY PATENT PROTECTION (18115/10)

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

Thank you for your Explanatory Memorandum dated 7 January 2011 which was considered by the Justice and Institutions Sub-Committee at its meeting of 26 January 2011.

We retain this matter under scrutiny.

As you are aware this Committee has long been an advocate of a pan-European Patent protection scheme and, in the event that the Member States proved unable to agree unanimously the translation Regulation, we suggested pursuing cooperation in this field via the provisions of the Treaty dealing with enhanced cooperation. Having failed to agree unanimously the original translation Regulation at the December Council, we welcome this draft Decision particularly as France, Germany and the UK are included, as these states account for the vast majority of patents granted by the EPC system.

We note your intention to impose conditionality on the UK’s participation in the enhanced cooperation process based upon a favourable (from the Government’s perspective) outcome of the Court of Justice’s deliberations on the compatability of the agreement creating the European and European Union Patents Court with the Treaties. Should this not be met by introducing a relevant condition into the proposed Decision?

27 January 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 27 January welcoming the draft decision and asking whether our intention to impose conditionality on the UK’s participation should not be met by introducing a relevant condition into the proposed Decision.
As I mentioned in our EM of 7 January, we wanted to ensure that if the Court of Justice of the EU (ECJ) concluded that it required wider powers under Article 262 TFEU, then the UK could withdraw from the request for enhanced cooperation.

We have now been given assurances by the Commission and the EU Presidency that although there are no specific provisions in the Treaty, a declaration to be adopted at the same time as the authorisation decision will make clear that any state may withdraw providing the implementing regulations have not been agreed. The proposed text would read:

*Any Member State listed in Article 1 may notify to the Council and the Commission that it is withdrawing from the enhanced co-operation in the area of unitary patent protection as authorised in this Decision, provided that at the time of that notification no acts have yet been adopted within the framework of the enhanced co-operation.*

Reopening the text of the decision itself was not a viable option given the risk of further amendment and debate which might hold up progress on this important file. And reaching agreement on the decision at the 10 March Competitiveness Council would allow the Commission to come forward with proposals for the implementing regulations (on the patent and on language arrangements) very shortly afterwards.

Clearly we will have to take a view on UK participation when we receive the ECJ Opinion currently expected on 8 March, and we will update the Committees accordingly. But the option of remaining within the enhanced cooperation, unless we have to withdraw, allows us to continue to influence the design of the system and ensure progress.

16 February 2011

**Letter from the Chairman to Baroness Wilcox**

Thank you for your letter dated 16 February 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting on 9 March.

We have decided to clear the proposal from scrutiny.

We note the conclusion of the Court of Justice's opinion delivered on 8 March that the agreement setting up the pan-European Patent Court is not compatible with the EU Treaties. We therefore look forward to receiving from you your suggestions as to how to take this matter forward in light of the Court’s opinion.

In the meantime we are grateful to you for dealing with our question about imposing conditions on the UK's participation in enhanced cooperation in this field.

We look forward to your answer in due course.

10 March 2011

**BRINGING LEGAL CLARITY TO PROPERTY RIGHTS FOR INTERNATIONAL COUPLES**

*(8253/11, 8160/11, 8163/11)*

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

Your Explanatory Memorandum of 8 April was considered by the Justice and Institutions Sub-Committee at its meetings of 11 and 18 May.

We are grateful for your full explanation of the Commission’s proposals. We decided to retain these documents under scrutiny, whilst clearing document 11817/06 (the Commission’s earlier Green Paper) which has now been superseded.

**GENERAL CONSIDERATIONS**

This is an important legislative initiative. As the Commission points out, a significant number of marriages have an international element, either because the spouses have changed their Member State of residence or because they own property in another Member State. We believe the number of such international marriages will inevitably increase as will the number of international civil partnerships.

We also accept that the different laws of different Member States and the potentially conflicting manner in which they can interact gives rise to complications for international couples. Thus, at
present it is possible that the courts of more than one Member State may accept jurisdiction to deal with the property consequences of the end of a marriage and the law to be applied to the same situation can vary depending on which court is dealing with the matter. This creates uncertainty and expense. We are therefore sympathetic to the Commission’s aim of simplifying the conflict of laws rules of the Member States by seeking to ensure, as far as possible, that one court has jurisdiction, that one law applies to a particular situation, and that a decision made by a court in one Member State is, in principle, recognised and enforceable in other Member States with the minimum possible formality.

However, the potential benefit of such simplification is counterbalanced by the adverse impact of intervention in the particularly complex areas of family relationships and property. These are areas where the laws of Member States vary considerably and any attempt to govern the interaction between them is difficult and liable to give rise to unintended consequences.

Matrimonial property can be considered as a good illustration of the diversity of property law in the EU. You rightly point out in your Explanatory Memorandum that the concept of matrimonial property as a separate form of property ownership¹ does not clearly exist in UK law at all as regards relationships during the currency of the civil partnership, nor in the laws of England and Wales, and Northern Ireland after the relationship ends. It is clear from the background papers produced by the Commission that even amongst those Member States with a clearly distinctive matrimonial property regime there are differences as to what property is treated as matrimonial property and in the specific rules that apply to such property.

The potential adverse effects of interfering with national property law and the speculative nature of the Commission’s assumptions as to the actual costs imposed on individuals arising from the present situation lead us to advocate a cautious, step by step, approach at this stage. This is consonant with the Stockholm Programme in which the Council limited its call for EU legislation to the extension of mutual recognition and emphasised the need to take into consideration Member States’ legal systems, including public policy, and national traditions.

We therefore regard full consultation with interested parties as very important and welcome your intention to do this. We shall also be very interested to see the outcome and the Government’s own Impact Assessment. In the meantime, and subject to specific points emerging from these exercises, we have the following specific comments and questions.

**SCOPE OF THE PROPOSAL**

Given that the UK jurisdictions do not have clear matrimonial property or civil partnership property regimes, in the sense understood by these proposals, we strongly support the need to clarify the scope of the proposals to make it clear how it would apply as far as the UK is concerned; in particular how it will affect jointly owned property², pension entitlements, trusts, and land.

The fact that the division of property in the UK on the breakdown of a marriage or civil partnership is often determined on the basis of the needs and resources of the parties, and could therefore be considered more akin to the determination of maintenance than a matrimonial property regime, makes it particularly important to distinguish clearly between maintenance obligations and matrimonial property. Do you consider that this distinction is sufficiently clear in these proposals?

A special consideration arises from the drafting of the civil partnership proposal. By virtue of Article 2(a) this proposal would only apply to “the set of rules concerning the property relationships of the partners…resulting from the link created by the registration of the partnership”. It appears to us that, in the UK, no property relationships arise simply by virtue of the fact of the civil partnership; and therefore it is arguable that the proposal would not bite on property owned by UK registered partners. Do you agree?

**JURISDICTION**

As indicated above we are sympathetic to the objective of ensuring, as far as possible, that the courts of only one EU Member State should have jurisdiction to deal with a dispute as to matrimonial property or the property of civil partners; and would wish to discourage the “rush to court” where this cannot be fully achieved.

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¹ Broadly, both spouses have an interest in matrimonial property, and it is subject to specific rules as to how it is managed and how it will be divided or inherited at the end of the marriage.

² The normal rule is that joint property automatically passes to the survivor on the death of one of the owners.
It is however important that the choice of which court should have jurisdiction is based on the most suitable connecting factor and that the connecting factor chosen can be determined with reasonable certainty.

In this connection it is relevant that we do not, in principle, support the courts of a Member State applying foreign law in the field of family and property law. It creates additional complication and expense in establishing the nature of the law to be applied to the case, makes it difficult for judges faced with alien concepts of law, and impacts particularly hard on litigants in person. This is something which the Government have avoided in the past, with our support, in parallel legislation relating to divorce, parental responsibility, maintenance obligations, and succession. Hence our conclusion in our Report on the succession proposal\(^4\) that the connecting factor to determine jurisdiction should be the same as that used to determine the applicable law. Our preliminary view is that the same principle should apply here. We should be grateful for your view on this approach; and also on the relative merits of linking jurisdiction in these proposals, alternatively, to jurisdiction to deal with the dissolution of the relationship, maintenance, or succession of a deceased spouse or civil partner.

We note that the Commission proposes that jurisdiction over matrimonial property in respect of marriages ended by death should be given to the court dealing with succession in accordance with the succession proposal to which the UK has not opted in. Does this, in your view, preclude the UK opting in to these legislative proposals, and would it be possible to negotiate a suitably flexible arrangement for the UK to take our non-participation in the succession proposal into account?\(^5\)

In any event, at paragraph 25 of your Explanatory Memorandum you raise a concern as to how the matrimonial property proposal would interact with the succession proposal and could lead to an unwelcome fragmentation of jurisdiction for succession. We share this concern.

One of our objections to the UK opting in to the succession proposal was that the basic connecting factor on which jurisdiction would be based was the “habitual residence” of the deceased; which term was too uncertain and needed further definition. Do you agree that the same consideration applies in relation to the use of this concept as the connecting factor in these proposals?

**THE APPLICABLE LAW**

We note that the matrimonial property proposal would give spouses a limited choice as to the law to apply to their matrimonial property. We support this approach in principle and like you question whether civil partners should not be given some choice too.

In our Report on the succession proposal we drew attention to the fact that property rights are complex when compared, for example, to contractual rights, as they frequently involve third parties; consequently states run systems for the registration of such rights to give them publicity. Furthermore UK property rights tend to be more complex than those of other Member States. To apply the law of one Member State to property found in another, in priority to the normal domestic property law, as would be the consequence of these proposals, can be particularly disruptive, would create uncertainty and potentially lead to unintended consequences. One example, which the Commission has sought to address in its proposals, is that a mortgagee may well find the value of the security diminished as a result of the application of supervening matrimonial property rights found in foreign law. Another example, which you raise, is that the application of a foreign matrimonial property regime could prevent jointly owned property (which is a common form of ownership by spouses and civil partners) passing automatically to the surviving joint owner.

We appreciate that the impact of these proposals on property rights can be limited by expansive exclusions (for example in respect of joint property, trust property, pension entitlements and third party rights) and by providing a broad public policy exception to applying a foreign law.

We should be grateful for your view as to which are the key areas of UK property ownership that will have the greatest adverse impact under these proposals and the extent to which you consider that those adverse impacts can be alleviated by limiting the scope of the proposals or providing specific protections without fundamentally undermining the objectives of the proposals.

With regard to the protection afforded to third parties, we note that you think the UK would need to create a registration system if it were to participate in these proposals so that third parties could be aware that their transaction may be affected by a foreign applicable law. We have concerns about

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\(^2\) Regulations 2210/2003 and 4/2009 do not oblige UK courts to apply foreign law, the UK does not participate in Regulation 1259/2010 and has not opted in to the proposal on succession.

\(^4\) The EU’s Regulation on Succession, 6th Report of Session 2009-10.

\(^5\) In analogous circumstances Regulation 2/2009 was drafted in such a way that its provisions on the applicable law do not apply to the UK.
the cost and efficacy of this and look forward to seeing further analysis in the Government's Impact Assessment.

As a subsidiary matter we would be grateful for further information as to how the proposal would affect the UK systems of land registration.

At paragraph 25 of your Explanatory Memorandum you also raise the prospect of different laws applying to different parts of a succession because the applicable law rules in the succession proposal differ markedly from those in the matrimonial property proposal. Again we share this concern. Do you envisage a solution being found in amendment of this proposal or the proposal on succession?

Overall, it seems to us that the provisions on the applicable law are the most difficult aspect of these proposals. Do you consider there is scope in limiting these proposals to jurisdiction, recognition and enforcement at this stage?

RECOGNITION AND ENFORCEMENT

We support in principle the provisions of these proposals in relation to the recognition and enforcement of court decisions which, as you say, are in line with existing legislation.

We note however that the definition of "court" in the proposals is broad and includes a "non-judicial authority...carrying out...the functions falling within the jurisdiction of the courts ...". Can you confirm that this would mean that decisions of notaries public would be recognised and enforced as if they were decisions of a court? We would be opposed to this. The evidence given to us in our inquiry into succession was that notaries record and give publicity to transactions which are generally concluded in the context of agreement between the relevant parties and in the absence of litigation. However decisions by notaries do not necessarily have built into them the same procedural safeguards as decisions of courts. For example a notary may not have been made aware of a relevant dispute affecting his or her decision. Therefore, at present we do not consider that there is sufficient mutual trust in order to require the decisions of notaries to be recognised and enforced as if they were court decisions.

For the same reason we do not support making authentic instruments produced by notaries recognisable and enforceable as if they were court judgments.

SUBSIDIARITY AND THE OPT-IN

We have taken a preliminary view on subsidiarity and the UK opt-in in order to meet the relevant deadlines.

At this stage we do not consider that the proposals give rise to subsidiarity concerns. As we have indicated above, we believe that the present differences and conflicts in the laws of the Member States in this area can give rise to uncertainty and delay for EU citizen. Whilst the Commission accepts that it has adopted some challengeable assumptions in order to quantify the scale of those problems we nevertheless believe that problems in this area are likely to become more frequent as the number of international marriages and civil partnerships increases. The objective of simplifying the conflict of law rules between Member States requires action at EU level in the absence of effective wider international action.

We also consider, at this stage, that the Government should not exercise the opt-in. We are influenced by the fact that the matrimonial property proposal engages with the proposal on succession on the death of a spouse, and that the Government, with the support of this Committee, has not exercised the opt-in. We also believe that the concerns with both proposals raised in this letter give rise to a risk of ending up with unacceptable legislation which would outweigh the negotiating benefits of opting in. We do however consider that the UK should contribute to discussions on the proposal with a view to achieving a Regulation to which the UK could opt in.

We look forward, in due course, to an update on the results of your consultations with interested parties, sight of your Impact Assessment, a response to our specific requests for information and questions, and an update on negotiations.

20 May 2011
Letter from the Rt. Hon. Kenneth Clarke MP, Lord Chancellor, Secretary of State for Justice to the Chairman

I am writing to inform your Committee that the Hungarian Presidency of the EU Council has published draft Council Conclusions on the Council’s role in ensuring the effective implementation of the Charter of Fundamental Rights (the Charter). The Presidency is hoping to adopt the Council Conclusions at the Justice and Home Affairs Council on 25 February. The Presidency is keen to ensure that the Council, in line with recent communications from the Commission and the European Parliament (EP), has sufficiently robust processes to ensure that the Charter is effectively implemented in the legislative process.

The main points in the draft Council Conclusions are as follows:

— That the Council acknowledges that it must respect the Charter in relation to both amendments to Commission proposals and when Member States are drafting own-initiative proposals;
— That the Council reaffirms its commitment to guarantee that Fundamental Rights are respected in its internal decision making processes in a visible and transparent way for the benefit of EU citizens;
— Any processes should not be burdensome, long or inefficient and the Council should rely on existing structures within the EU;
— Member States are reminded that they are the first level of checking for compliance with Fundamental Rights and Charter obligations;
— Guidelines should be drafted by the Fundamental Rights, Citizens Rights and Free Movement of People Working Party (FREMP) and the Council Legal Service for the Council on how to identify and solve problems over Fundamental Rights in its own proposals;
— The Council and its working groups should be able to refer instances on a case by case basis where necessary to FREMP to seek its expertise and assistance;
— The Council will make full use of the existing mechanism of making references to the Fundamental Rights Agency within the Agency’s mandate to ensure that the Agency’s expertise is properly utilised;
— FREMP will maintain and reinforce co-operation with the Fundamental Rights Agency; and
— There will be an annual exchange of views on the Commission’s annual report on the application of the Charter.

The Government is committed to ensuring that the Charter constrains EU legislation and that the principles and rights enshrined in the Charter are accurately reflected in EU legislation, in line with the UK’s Protocol to the Charter. I am content that the Council Conclusions will ensure that the Council and Member States take a rigorous approach, using existing structures and without increasing the burden upon the FREMP working group.

7 February 2011

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

Thank you for your letter of 7 February which was considered by the Justice and Institutions Sub-Committee on 16 February. We are grateful to you for alerting us to the proposed Conclusions. We agree that these should assist in ensuring that the Council implements the Charter in its legislative work and welcome the Presidency’s initiative which, we note, complements the Commission’s Communication on the same subject.

16 February 2011

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

Thank you for your letter of 16 February in response to mine of 7 February concerning the Council conclusions on the role of the Council of the European Union in implementing the Charter of Fundamental Rights. I am writing to the Committee to confirm that the JHA Council adopted these
Council Conclusions on Friday 25 February 2011, a copy is enclosed for your information. These Conclusions were passed by A point. They were considered to be uncontroversial; aimed at reviewing the Council's own internal systems in light of similar considerations by the European Commission and European Parliament.

As set out in my letter to you of 7 February, the Council Conclusions acknowledge that the Council, being a co-legislator, must respect the Charter both when making amendments to legislative proposals and in any acts the Council adopts on the initiative of a quarter of the Member States. It reaffirms its commitment to guarantee that fundamental rights are respected in its internal decision making processes in a visible and transparent way for the benefit of EU citizens.

The Council conclusions refer to the existing structures of workable and reliable tools to ensure compliance with fundamental rights, including the expertise, knowledge and experience of Member States and the Council Legal Service.

The Council conclusions recognise the responsibility of the Council preparatory instances (policy-specific working groups) for scrutinising the compliance with the Charter, but that they should be assisted in this task by the Council Legal Services where appropriate, and through the use of guidelines which help them identify and resolve fundamental rights issues arising in their dossiers. These guidelines will be drawn up by the Working Group on Fundamental Rights, Citizens Rights and Free Movement of People (FREMP). They should also make use of the expertise of the Fundamental Rights Agency, asking for its advice on issues which fall within its remit.

The Council conclusions also state the intention that FREMP should consider and take account of relevant reports published by the Fundamental Rights Agency. Finally they commit to an annual exchange of views on the Commission's annual report on the application of the Charter and to consider relevant publications by the Fundamental Rights Agency.

3 March 2011

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

Thank you for your letter of 3 March which was considered by the Justice and Institutions Sub-Committee on 16 March. We are grateful for sight of the Council Conclusions, the proposal for which we welcomed.

17 March 2011

COMMERCIAL LAW: LATE PAYMENTS IN COMMERCIAL TRANSACTIONS (8969/09)

Letter from Mark Prisk MP, Minister of State for Business and Enterprise, Department for Business, Innovation and Skills, to the Chairman

I am writing to alert your Committee that the Directive has now been approved by the European Parliament.

In practice this means that the protections enjoyed by UK businesses operating in the UK will now be extended across Member States.

NEW PAYMENT PERIODS

The standard deadline for paying bills will be 30 days, mirroring UK arrangements.

The Directive uses rather convoluted language regards business-to-business payments but the effect is the same as legislation in the UK: parties can negotiate their own terms and suppliers are free to challenge what they perceive to be unfair practice.

The language used is that the general deadline will be 30 days unless otherwise stated in the contract. If both parties agree, it is possible to negotiate up to 60 days and the payment period may be further extended beyond 60 days if "expressly agreed" by the creditor and the debtor in the contract and provided that it is not "grossly unfair" to the creditor.

For public-to-business payments the general deadline is 30 days. If the two parties wish to extend the payment period, this has to be "expressly agreed" and "objectively justified in the light of the particular nature or features of the contract" but under no circumstances may the deadline for public authorities to pay a bill exceed 60 days.
Member states may choose a payment deadline of up to 60 days for public entities providing healthcare. This is because of the special nature of bodies such as public hospitals, which are largely funded through reimbursements under social security systems.

INTEREST RATE, COMPENSATION AND VERIFICATION PERIOD

Arrangements here match UK legislation with the exception that the compensation payment has been simplified into a single amount regardless of contract value.

The statutory interest rate on overdue payments will be the reference rate plus at least 8%. The creditor is also entitled to obtain from the debtor, as a minimum, a fixed sum of €40, as compensation for recovery costs.

The verification period for ascertaining that the goods or services comply with the contract terms is set at 30 days. This period may be extended in the case of particularly complex contracts, but only if expressly agreed and provided it is not grossly unfair to the creditor.

NEXT STEPS

The new directive enters into force 20 days after its publication in the EU Official Journal. Member States will then have two years to implement the new measures (December 2012).

14 December 2010

Letter from the Chairman to Mark Prisk MP

Thank you for your letter 14 December. This matter was considered by the Justice and Institutions Sub-Committee at its meeting of 22 December. We are grateful for the update on the conclusion of negotiations and the adoption of the proposal.

We note your description of the language of the Directive as “convoluted” as regards business to business transactions. We are disappointed that you have accepted this language and hope that it does not lead to difficulties of interpretation. As you know we were concerned at the lack of clarity of the original proposal when we first considered it in July 2009. We regard it as important that EU legislation is drafted in the clearest possible terms and trust that the Government will generally continue to press for this in order to avoid similar future difficulties.

22 December 2010

COMMON UNDERSTANDING ON THE DELEGATION OF POWER TO THE COMMISSION TO ADOPT NON LEGISLATIVE ACTS UNDER ARTICLE 290 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

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

I write to update you about progress on the Common Understanding between the Council, Commission and European Parliament, which seeks to set out “the practical arrangements, agreed clarifications and preferences applicable to delegations of legislative power” under Article 290 TFEU. The Common Understanding is not legally binding. It does not formally require parliamentary scrutiny. However, I am sending it to the committee because, as a gentleman’s agreement between the three institutions, it is likely to shape the way in which delegated acts will be taken in the future. The text of the Common Understanding was agreed by the European Parliament on 3 March 2011, thus concluding the adoption process. It was officially sent to the Council, and therefore shared with Member States, on 4 April 2011.

Article 290 does not require further legislation to implement it. However, to ensure a coherent approach to the adoption of delegated acts, the Commission published a Communication on 9 December 2009 that set out the practical arrangements for delegated measures. This was welcomed by the Council and was submitted for scrutiny to UK Parliament committees under EM 5107/10 of 19 January 2010. Since then the Council, Commission and European Parliament have been developing a Common Understanding to build on the Commission Communication. The process leading up to it has been particularly slow because both the Council and the European Parliament sought to reach an agreement on the Comitology Regulation (which came into force on 1 March 2011) before finalising practical arrangements in relation to delegated acts.
The following features were secured in the negotiations on the Common Understanding:

I) **Consultation of the Council and the European Parliament (Point 4)**

Under Article 290, there is no obligation on the Commission to consult Member States, the Council or the European Parliament before adopting delegated acts.

However, the Commission commits in the Common Understanding to consult both the European Parliament and the Council “in advance and in a transparent way”. The Commission has informally indicated that Member State representatives will be invited to expert groups to discuss draft delegated acts in advance of their adoption. This gives Member States the opportunity to influence the content of delegated acts and ensures that the Council will be better placed to decide whether to exercise its powers of revocation and objection.

II) **Consultation of National Experts (Point 4)**

Along with other Member States, we have secured a strong commitment by the Commission to consult national experts, although it was under no legal obligation to do so. This ensures that Member States are well informed about forthcoming delegated acts and that their views and experience are taken into account.

III) **Duration of Delegation (Points 8 and 9)**

A basic act may specify if the delegation of powers to the Commission is for a fixed or indefinite duration. The UK’s preference is for the power to adopt delegated acts to be granted for a fixed period of time, unless there is good justification to the contrary.

When the delegation is granted for a fixed period of time, we have avoided a blanket rule that renewal should be automatic. The Common Understanding also clarifies that whatever the duration of the delegation, this does not affect the Council’s right to revoke it at any time.

IV) **Period for Objection (Points 10 and 11)**

Without prejudice to the urgency procedure, we have secured in principle a period of no less than two months, extendable by a further two months within which the Council may decide whether to object to the delegated act. This should provide enough time for the Council to take an informed decision. If the Council does object, the delegated act does not enter into force.

V) **Urgency Procedure (Points 12-14)**

The Common Understanding provides that the urgency procedure should be reserved for exceptional cases, and that its use should be duly justified by the legislator in the basic act. A delegated act adopted under the urgency procedure enters into force without delay, however, the Commission is required to repeal it immediately should the European Parliament or the Council object.

V) **Standard Clauses**

The Common Understanding contains standard clauses which the institutions agree should be used whenever possible although they can be modified as circumstances demand.

Despite initial resistance by the Commission, these include a recital on Commission consultation with the European Parliament and the Council.

*19 April 2011*

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

Thank you for your letter of 19 April. This was considered by the Justice and Institutions Sub-Committee at its meeting of 11 May.

The Committee notes that you do not consider that the Common Understanding required formal parliamentary scrutiny. However it would require deposit if, according to the terms of reference of the European Union Committee, it had been “submitted by an institution of the European Union to another institution and put by either into the public domain”. Is this the case with this document? We also consider that effective scrutiny would have been enhanced if the Committee had been informed of this matter before negotiations on it had effectively concluded. Would this have been possible?
On the substance we welcome inter-institutional agreement on the practical arrangements for handling delegated legislation and support the outcome of the negotiation, which slightly improves the position of the Council compared to that set out in the Commission’s original Communication on this subject and also leaves more scope for fixed term delegations.

We should be grateful for a reply to this letter, and also the points raised in my letter of 10 February clearing the Commission’s Communication, within the usual 10 day period.

13 May 2011

CONSULAR PROTECTION FOR EU CITIZENS IN THIRD COUNTRIES: STATE OF PLAY AND WAY FORWARD

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

Your Explanatory Memorandum (EM) on this matter was considered by the Justice and Institutions Sub-Committee on 18 May. We are grateful for your detailed account of the Commission’s Communication.

We note that this is the third time in the last five years that the Commission has sought to focus attention on the implementation of the Treaty provision on consular assistance. We considered the Green Paper in 2007 and the Commission’s Action Plan in 2008. Many of the considerations that informed Commission thinking in those documents now appear in the Communication.

Our position on the Commission’s proposals is essentially unchanged. We agree with your interpretation of the provision now found in Article 23 TFEU, namely, that EU citizens have a right to receive from another Member State’s consular authorities assistance in the circumstances and in forms that they would afford to their own citizens. Article 23 does not provide a basis for determining what kinds of assistance should be provided. We will consider the legislative proposals anticipated in the Communication against this background.

Like you, we support steps to increase awareness of the right under Article 23 both among the public and among consular officials, and we welcome the ideas put forward by the Commission, including establishing a website and the promotion of training for officials. We consider that EU action, within the bounds set by Article 23, to maximise the effectiveness of Member States’ provision of assistance through coordination and arrangements for cooperation should, in principle, be useful, particularly in preparing to manage assistance in crisis situations. We therefore consider that steps to regularise, with third countries, the provision of assistance under Article 23, and the proposal for a feasibility study into the use of consular teams, are worth pursuing. We bear in mind the cautionary points in paragraph 16 of your EM, with which we agree, but also the financial constraints facing all Member States.

We now clear the Communication from scrutiny, with the expectation of returning to this subject when the Commission publishes its legislative proposals. No reply to this letter is expected.

19 May 2011

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

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

Thank you for your Explanatory Memorandum which was considered by the Justice and Institutions Sub-Committee at its meeting of 25 May 2011.

We have decided to retain the matter under scrutiny.

We have read these proposals with great interest in the light of our recent inquiry and Report looking at the Workload of the Court of Justice.

REFORM OF THE COURT OF JUSTICE

Taking reform of the Court of Justice first, none of the President’s suggested reforms (i.e. proposals i – iv) came up during the course of our inquiry. We tentatively welcome these proposed reforms and look forward to considering the discussion of them as they develop.
As far as proposal iii is concerned, the abolition of the obligation to read the Juge-Rapporteur’s report at the oral hearing, it is not clear to us why, as both the President and the Government say “there has been no such reading for 30 years”, it is necessary to abolish this legal obligation. On the other hand, if it is a legal obligation, why has there not been such a reading for 30 years? Can you provide this Committee with a more detailed explanation of the purpose of the reading of the Report and how it has operated and what will be gained by its abolition?

REFORM OF THE GENERAL COURT

The Committee is very pleased to see the inclusion in the President’s requested reforms that the number of judges serving the General Court be increased, particularly as the President’s arguments and conclusions mirror those included in our recent Report.

We hope that the Member States acquiesce to the President’s request quickly. However, we fear that Member States remain blind to the case for urgency in reforming the General Court. The CJEU’s submission to the Council repeatedly mentions the urgency of the situation, indeed the President concludes his paper with the words: ”the Court wishes to stress the urgency of the measures to be adopted”;

and in support of his request for an increase in the number of judges serving the General Court, he says “in view of the urgency of the situation, the speed with which the proposed solution can be implemented is a critical factor for the Court of Justice” (emphasis in original).

These two clear statements from the President support the Committee’s conclusion in its recent Report that the situation pertaining to the General Court requires urgent structural reform (see paragraph 53 of the Committee’s Report). The President’s repeated emphasis on the urgency of the situation represents a clear request from the Court for the Member States to deal with these proposed amendments quickly. However, in the section of your Explanatory Memorandum headed Timetable, you repeat the statement used by you in relation to the proposed reform of the Civil Service Tribunal that “there will be many more discussions on this ... before a conclusion is reached”. As our Report made clear we consider that the Member States should deal with reform of the General Court as a matter of urgency.

In paragraph 11 of your Explanatory Memorandum you say:

“... we want to be sure that alternatives have been full examined. As the House of Lords report of 6 April looking into the workload of the CJEU identifies, there are other procedural measures that the General Court should consider, such as embracing more robust case management.”

Without wishing to turn the scrutiny of this matter into a formal discussion of our Report, the Committee would like to reiterate that whilst we did indeed conclude that the General Court should adopt more robust case management procedures we qualified that statement by observing that: “addressing the GC’s case management record is not going to solve the GC’s wider workload problems” (see paragraph 124). The Committee considered alternative reforms for the General Court other than increasing its judiciary but in the end we said that:

“We recommend an increase in the GC’s judiciary. Whilst we recognise the cost implications, if the Member States are serious about addressing the GC’s workload problems this reform represents the best and most flexible long-term solution” (paragraph 136).

We look forward to receiving your formal response to our recent Report, and considering your answers to our questions within the usual 10 day deadline.

25 May 2011

CRIMINAL JUSTICE: COMBATTING SEXUAL ABUSE, SEXUAL EXPLOITATION AND CHILD PORNOGRAPHY (8155/10, 14279/10)

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

Thank you for your letter dated 19 November 2010 which was considered by the Justice and Institutions Sub-Committee.

We have decided to clear this matter from scrutiny. In doing so we are grateful for your undertaking to send the Committee the agreed text supported by a new Explanatory Memorandum after the JHA Council of 2-3 December.
In relation to Article 10, you say that the sections addressing the mutual recognition of disqualification orders have been deleted and that “there is no duty to recognise other Member State’s disqualification decisions”. Can you reassure the Committee that there are measures in place that enable the UK authorities to deny individuals convicted of these offences in other Member States access to professional activities involving regular contact with children?

We also take this opportunity to make two further points of clarification. First, the heading of your latest letter refers to the draft numbered 14279/10 but omits reference to 8155/10. It is the Committee’s view that 14279/10 constitutes an incomplete draft that was cleared from scrutiny in our letter to you dated 4 November and that in this instance we are solely concerned with the draft numbered 8155/10. Second, although your latest letter begins by referring to a letter from you dated 10 November, no such letter was received by the House of Lords Committee office.

We look forward to considering the agreed text of this proposal and your Explanatory Memorandum in due course.

1 December 2010

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

Thank you for your letter dated 1 December concerning the proposed Directive on combating the sexual abuse, sexual exploitation of children and child pornography. May I also thank the Committee for clearing document 8155/10 from scrutiny.

I am grateful for the points of clarification provided by the Committee in respect of the document references and regret the letter of 10 November referred to my last letter. This was an inadvertent error referring to a letter sent to the European Union Scrutiny Committee, copied to you, and I apologise for this.

I note you ask for reassurance that there are measures in place to enable UK authorities to deny individuals convicted of child sex offences in other Member States access to professional activities involving regular contact with children in light of the amendments to Article 10 of the proposal.

The UK participates in an EU agreement, Council Framework Decision 2009/315/JHA, on the organisation and content of the exchange of information extracted from the criminal record between Member States. This enables the UK to be notified of any offence committed by a UK national within the EU and for the UK to request conviction details on foreign nationals who enter the criminal justice system. Any record of child sex offences obtained through this exchange mechanism is added to the Police National Computer (PNC) and therefore is made available to UK disclosure agencies. Information on previous convictions or ‘certificates of good character,’ as they are known in some systems, are usually a pre-requisite of the terms of employment for professions involving children.

Employers in the UK are entitled to such information in accordance with the Rehabilitation of Offenders Act 1974, which designates regulated activity with children as a prescribed purpose for which a Criminal Record Bureau (CRB) Enhanced check is available. This will identify all offences on the PNC including those committed abroad.

The Independent Safeguarding Authority established in (January) 2008 is responsible for placing individuals who pose a risk to vulnerable people on barred lists. The Independent Safeguarding Authority can place an individual from another Member State on a domestic barred list based on conviction information originating from their country of origin. Consequently that individual would be disqualified from working or volunteering with children.

Employers in activities which involve regular contact with children are required to request overseas ‘certificates of good conduct’ from any applicant who has spent more than 6 months abroad, generally within the last 3 years. Where they obtain information showing previous offences they are required to pass this to the ISA so that a barring decision can be considered as above. Should disqualification be confirmed (by the ISA placing the individual on their barred list) then this will also be shown on CRB disclosures in the future so that the individual will not be able to take up employment with children elsewhere in the UK.

I hope from the response you are reassured the current mechanism as detailed above is used to prevent convicted sexual offenders from other Member States from participating in professional activities involving regular contact with children.

With regard to the Directive as a whole, the Government deposited the latest text of the Directive on 10 December and I am pleased to deposit an Explanatory Memorandum (EM) which covers all the Articles in the Directive. Negotiations on the Directive will continue with the European Parliament and we will ensure that the Committees are informed of developments as they occur. I also attach a copy of the Impact Assessment for your information.
Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter and Supplementary Explanatory Memorandum dated 15 December 2010. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 26 January 2011.

We retain the latest unnumbered draft under scrutiny. The drafts numbered 8155/10 and 14279/10 cleared scrutiny late last year.

In light of the removal from the text of Article 10 of the provisions requiring the mutual recognition of disqualification orders, the Committee sought your reassurance that existing measures sufficed to prevent sexual offenders convicted in other Member States obtaining employment bringing them into regular contact with children in the UK. Whilst the Committee is grateful for your detailed explanation of the UK’s existing mechanisms, we are not, as yet, reassured. For example, at paragraph 37 of the Supplementary Explanatory Memorandum setting out the detail of the Member States’ discussions of this aspect of the draft proposal, you say that “in light of the difficulties raised on this issue, the Government can agree to these changes, but notes that there is a continued need for further work at EU level on this issue” (emphasis added). Given that your letter seeks to reassure the Committee that existing UK measures work, why does the Supplementary Explanatory Memorandum acknowledge that there remains a need for further work at the EU level?

In addition, in the fourth paragraph of your letter you say that the Council Framework Decision 2009/315/JHA “enables the UK to be notified of any offence committed by a UK national within the EU and for the UK to request conviction details on foreign nationals who enter the criminal justice system” (emphasis added). How are those individuals convicted of these offences abroad which do not enter the UK criminal justice system to be denied access to employment opportunities in positions working with children?

Your letter also explains the role fulfilled by the Independent Safeguarding Authority (ISA) who can “place an individual from another Member State on a domestic barred list based on conviction information originating from their country of origin”. How is this information passed between Member State authorities? Can ISA or any other relevant Member State authority request this information as of right or is there, like the Framework Decision, a trigger mechanism i.e. the individual must first enter the criminal justice system?

Finally, in relation to the proposal’s content, are the Government in a position to explain to the Committee how the preventative intervention programmes dealt with in Articles 19aa and 20 will operate in practice to deal with and rehabilitate those offenders convicted of these offences?

The Committee looks forward to receiving your answers to these questions within the usual 10 days.

27 January 2011

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

Thank you for your letter dated 27 January concerning the proposed Directive on combating the sexual abuse, sexual exploitation of children and child pornography. I note that you have retained the recent unnumbered draft of the proposed Directive under scrutiny.

You ask why the Supplementary Explanatory Memorandum dated 15 December acknowledges that there remains a need for further work on the issue of disqualification of convicted child sex offenders from activities involving regular contact with children at EU level. By way of clarification, this is a reference to further operational cooperation between Member States rather than a need for further legislation. It would be beneficial for Member States, particularly those who will be obliged by the proposed Directive to introduce a system of disqualification of convicted child sex offenders, to share knowledge and best practice. The current UK system of disqualification, our vetting and barring scheme, was introduced in 2009. The experiences of Member States with developed vetting and barring schemes could be used to support the development of such systems across the EU. This was not made explicit in the Supplementary Explanatory Memorandum however I hope the explanation above provides clarification.

You also ask how those individuals convicted of child sex offences abroad are denied access to employment opportunities working with children where they do not enter the UK criminal justice system. As indicated in my letter dated 10 December, employers in activities which involve regular contact with children are encouraged to request overseas ‘certificates of good conduct’ from any applicant who has spent more than 6 months abroad, generally within the last 3 years. The applicant
would request this certificate from the relevant body in that other state. We therefore recommend that employers take up references before making an employment decision.

Where employers obtain information showing serious previous offences they are required to pass this to the Independent Safeguarding Authority (ISA) so that a barring decision can be considered. Should a decision to include a person on a barred list be made by the ISA then this will show up on Criminal Record Bureau disclosures in the future, which are requested in order for the individual to work with children. This will mean that a barred individual will not be able to take up employment with children elsewhere in the UK.

There is no formal EU mechanism by which the ISA can seek conviction or disqualification information from other Member States. The existing instruments relate only to individuals who enter the criminal justice system, be they notifications of Britons convicted abroad or previous convictions received in response to a request about an EU national being prosecuted here. As mentioned previously, in order to ensure that convictions abroad are captured we recommend that references be taken up and that the person provides a certificate of good conduct from their home country or a country in which they have lived for more than 6 months in the last 3 years.

Your final query asks the Government to explain how the preventative intervention programmes dealt with in Articles 19aa and 20 will operate in practice to deal with and rehabilitate those offenders convicted of these offences. You may also be interested in Recitals 10c and 10d which describe how the Council hopes these will work. Recital 10d also clarifies that offenders do not have an individual right to participate in a programme. Members States retain the discretion to decide what constitutes an intervention measure or programme and whether they are appropriate in any individual case.

Article 19aa requires Member States to make intervention programmes or measures available for people who fear they may offend where we consider it appropriate. In practice, the National Offender Management Service (NOMS) provides funding to a national helpline which is run by the Lucy Faithful Foundation. The helpline was set up to equip adults to protect children from abuse and takes calls from both adult abusers and those who fear they may abuse. The counsellors on the helpline encourage them to recognise their behaviour as abusive or potentially abusive and proactively to seek help to change. It is my view that this would constitute a suitable intervention programme or measure for people who fear they may commit child sexual offences.

In respect of convicted child sex offenders, as referenced at Article 20 of the proposal, they would be subject to an assessment using empirically-based assessment tools on conviction. Accredited Sex Offender Treatment Programmes (SOTP) are then allocated on the basis of risk and need – higher need/risk offenders complete more time in treatment. Offenders who are not allocated to a treatment programme, such as those who refuse to cooperate or those who are unsuitable for group work, are managed and treated in other ways, informed by a Supervision Plan. The Supervision Plan is developed by NOMS.

10 February 2011

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

Thank you for your letter dated 10 February 2011 which was considered by the Justice and Institutions Sub-Committee at its meeting on 16 March 2011.

We have decided to retain under scrutiny the latest unnumbered draft of the text agreed at the December JHA Council. We have already cleared from scrutiny the drafts numbered 8155/10 and 14279/10.

 Whilst the Committee is grateful to the Minister for his detailed response to our questions, given the removal from the agreed text of the measures requiring the mutual recognition of disqualification orders, we remain concerned that existing EU measures provide limited coverage to deal with those individuals seeking relevant employment in the UK who have been convicted of these offences abroad; in particular in light of the fact that: (i) “existing instruments relate only to individuals who enter the criminal justice system”; and (ii) that there is no formal EU mechanism by which the relevant national authorities can request conviction or disqualification information as of right. This second concern is exacerbated by the fact that the Independent Safeguarding Authority’s role, the body responsible for collating this information in the UK, is built around placing individuals from another Member State on domestic barred lists based on conviction information originating from the individual’s country of origin. It is the Committee’s view that these facts are at odds with your conclusion that in the EU context there is currently no need for further regulation dealing with this eventuality.

We do not expect an answer to this letter but we look forward to periodic updates from you charting the proposal’s progress through the European Parliament.

17 March 2011
I am writing to update you on progress on the above Directive. On 14 February the LIBE (Civil Liberties Justice and Home Affairs) Committee held an extraordinary general meeting to give an orientation vote on their amendments. There are a large number of amendments and this letter focuses on those that the Presidency has highlighted where the rapporteurs believe that amendment of the text is required and those where the Presidency will seek clarification of some of the European Parliament’s (EP) amendments. Formal Trilogue discussions between the EP, Presidency and the Commission began on 16 March and this will initially focus on clarifying the EPs objectives with certain amendments.

I outline the main areas the EP has suggested amendments to below:

**ARTICLE 2 DEFINITIONS**

The EP has proposed that a definition of sex tourism should be added to this Article. However their proposed definition is unclear and in terms of the Directive as a whole it is unclear what function the definition would have as the term is not used in other Articles. However it is possible that a description of the various actions which make up sex tourism may be considered as part of the introductory recitals. This will be subject to further discussion.

**ARTICLES 4-6 (OFFENCES)**

With regard to the penalties for the offences in Articles 4 to 6 the EP wishes to provide for fines in conjunction with minimum maximum terms of imprisonment and the levels of penalties proposed by the EP are higher than those endorsed by the Council in December. It would be unusual for a Directive to refer to fines in the criminal law Articles although in the UK, when it comes to sentencing, the Judiciary has the flexibility to impose fines instead of, or as well as, terms of imprisonment.

The EP also propose amending the Solicitation (Grooming) offence in Article 6 to emphasise that the manipulation of the child is the aim of the offender, and this would limit the scope of this article and make any offence more difficult to prosecute. Article 6 currently replicates the Solicitation offence in Article 23 of the Council of Europe Convention on Combating the Sexual Exploitation of Children (2007). The EP amendment is unclear in its intent and the Presidency will be seeking clarification on this amendment from the EP at the beginning of trilogue.

**ARTICLE 7 (INSTIGATION, AIDING AND ABETTING)**

In the original Commission text Article 7 (3) sought to make it an offence to organise travel arrangements for the purpose of committing child sex offences. The EP amendments suggest that “other arrangements should also be a modus operandi of a crime” for such offences. The Presidency will again be seeking clarification of this amendment at the beginning of trilogue as the intent is unclear.

**ARTICLE 8 (CONSENSUAL SEXUAL ACTIVITIES)**

The EP amendments suggest the need for (possibly non-criminal) alternative measures in case of acts committed by children. This is a matter already addressed in a recital introduced by the Council text agreed in December and it should not therefore be necessary to include it in the text of the document.

**ARTICLE 9 (AGGRAVATING CIRCUMSTANCES)**

The EP propose a number of new aggravating circumstances which include, for instance, references to slower physical and psychological development or “recognised” types of dependence of the victim, and the purpose of economic revenue or travelling abroad for committing the offence. The Presidency will be seeking clarification of the purpose of such amendments which appear to be examples of aggravating factors which already exist.

**ARTICLE 10 (DISQUALIFICATIONS)**

The EP wishes to broaden the requirements around the exchange of information concerning disqualifications from working with children for some voluntary activities and also suggests that Member States introduce registers of sex offenders. In the UK our Vetting and Barring Scheme already covers some voluntary activities and the notification requirements for sex offenders set out in Part 2 of the Sexual Offences Act 2003 meet the suggestion of a ‘register’.

**ARTICLE 10A (NEW – SEIZURE AND CONFISCATION)**
The EP wishes to add rules on the seizure and confiscation of proceeds from child sex offences including rules on how such proceeds are spent. The issue of how confiscated assets are used by Member States is one which we believe is for Member States to decide on.

**ARTICLE 14 (INVESTIGATION AND PROSECUTION)**

The EP has put forward a number of amendments to provide for a minimum of 15 years in terms of a statute of limitations for prosecutions; the establishment of an early warning system against cybercrime and the elimination of obstacles by internal investigations by other institutions. The UK does not have a ‘statute of limitations’ for the offences in this Directive and the additional amendments will be subject to discussion as to whether they are appropriate for adding to the Directive.

**ARTICLE 15 (REPORTING SUSPICION OF SEXUAL EXPLOITATION AND ABUSE)**

The EP has proposed a number of amendments to provide for rules on training, child-friendly measures, hotlines and other tools for preventing criminal offences against children. Many of these measures already exist in Member States, although in some cases they are provided by the Private Sector or NGOs. There are also a number of amendments where the intention of the proposal is unclear.

**ARTICLES 17-19 (VICTIM AND WITNESS PROTECTION)**

The EP proposes a number of victims’ protection measures, including assistance in case of family violence, obligation to inform the victim of the release of the offender, protection of data and privacy, witness protection, red alert systems, individual rehabilitation programmes, public awareness raising, etc. Some of the proposed amendments are in substance very similar to those proposed to Article 15. The Presidency will seek to rationalise the various amendments to Articles 15 and 17 for further consideration.

**ARTICLE 16**

The EP proposes broad rules of jurisdiction, including making all grounds of extra-territorial jurisdiction compulsory without the possibility of “opt out”. These amendments would undermine the flexible approaches in the application of jurisdiction set out in the previous Framework Decision, the CoE Convention and the Council text. We do not agree with the EP amendment.

**ARTICLE 21**

The EP has proposed changes to the rules on blocking and deleting websites showing images of child abuse and cooperation with third countries. They consider blocking a supplementary tool that may be available but it should also be subject to legislative and judicial control, transparent procedures and safeguards. We note that the EP amendments do not apparently allow for the self-regulatory regimes used in the UK and other Member States by the Internet industry to prevent abuse of their systems and disrupt the distribution of this illegal material. The EP’s proposal is unacceptable to us and we have made our position clear to the Presidency. We will await further developments on this issue during trilogue negotiations.

As I have highlighted the Presidency believe that further clarification is needed on a significant number of amendments from the EP at the beginning of trilogue. The position on these amendments will then be discussed with MS as trilogue continues. I will keep you informed of further developments in relation to this Directive.

28 March 2011

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

Thank you for your letter dated 28 March 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting on 6 April.

We retain this matter under scrutiny.

As you know, the Committee were content with the text that we cleared from scrutiny in November last year and we hope that any amendments to it are clear and improve the Directive’s operation. We are grateful to you for the periodic updates charting the proposal’s progress through the European Parliament and we look forward to hearing about developments in the trilogue.

We do not expect a reply to this letter.

06 April 2011
Letter from the Chairman to Mike Penning MP, Parliamentary Under Secretary of State, Department for Transport

Thank you for your letter of 23 November 2010 which was considered by the Justice and Institutions Committee. We are grateful for your detailed account of recent developments in this dossier.

As the Committee did not meet this week and had to deal with the matter by written procedure, it confined its consideration to the issue of the legal base. My letter of 8 October noted that we considered the Presidency’s proposal to change the legal base to one in Title V TFEU was right. Accordingly, we are content for you to indicate, at the meeting of the Transport Council on 2 December, your agreement to that change. We retain this proposal under scrutiny and, as you note in your letter, the parliamentary reserve should remain pending completion of scrutiny.

We look forward to hearing of the outcome of the Council meeting and will take that further information into account when responding to the other matters in your letter.

1 December 2010

Letter from the Chairman to Mike Penning MP

Thank you for the further Explanatory Memorandum on this dossier, which was considered by the Justice and Institutions Sub-Committee on 19 January. We are grateful for your account of developments at the December Council.

We welcome the consensus among the members of the Council for amending the Treaty base of the draft Directive. We note, however, that no formal decision was taken. While such an amendment would trigger the UK’s opt-in arrangements under Protocol 21, is the agreement in the Council to regard the period for opting in as now running legally secure, in the absence of formal amendment?

When the Committee considered the original proposal in 2008, we questioned whether it was the best way of improving road safety in the EU. Having considered the matter further, taking account of the Commission’s impact assessment and your own, and noting the uncertainties affecting the assessments, we are now of the view that the proposed Directive should, on balance, be beneficial. Accordingly, we think the UK should opt in to the proposal. We remain of the view, however, that the proposal is only likely to produce a marginal improvement in road safety and that consideration should be given to other, more effective ways of addressing the undoubted issues of road safety affecting the EU.

We retain the proposal under scrutiny and would be grateful for further information as matters develop.

20 January 2011

Letter from the Chairman to Mike Penning MP

Thank you for your letter of 10 March which was considered by the Justice and Institutions Sub-Committee on 16 March. We note the decision not to opt in to this proposal and are grateful for your detailed account of the reasons for that decision and your response to our question on the opt-in procedure.

As you know, while we recommended opting in, not least in order to address the issue of offences committed by UK drivers abroad, we thought the proposed Directive would make only a marginal difference to road safety in the UK. We do acknowledge the need to enforce penalties for serious road traffic offences and we note that the UK has not yet implemented the Prüm decisions which would assist. Can you tell us when you expect this to be?

We note that you will consider whether to opt in to the eventual Directive following its adoption and we welcome your intention to continue to participate actively in the negotiations on the proposal with that in mind. We are content to clear this dossier from scrutiny but ask that you let us know the outcome of the negotiations and, if you then give active consideration to opting in, that you provide a further Explanatory Memorandum with the text of the Directive.

17 March 2011
Letter from the Chairman to Damian Green MP, Minister of State for Immigration, Home Office

Thank you for your letter dated 30 November 2010. It was considered by the Justice and Institutions Sub-Committee at its meeting of 22 December 2010.

We retain this matter under scrutiny and note the changes that have been made to the text which will form the basis of a first reading agreement with the European Parliament.

In your letter to this Committee dated 29 June 2010 you offered four reasons to support the Government’s decision not to opt in to this proposal:

i. The proposal “will not make a significant practical difference to the way we combat trafficking and support victims”;

ii. Your fear that the Directive would “make mandatory measures which are currently discretionary” and therefore diminish professional flexibility, and you cited as an example the mandatory appointment of special representatives to support child victims;

iii. The risk that the European Parliament will succeed in expanding the proposal, against the UK interests, in particular in relation to the expansion of extraterritorial jurisdiction (a fear that this Sub-Committee did not share); and,

iv. The requirement that some aspects of the Directive creating duties or rights would require primary legislation.

Whilst the Committee has not formally seen the latest text of this proposal, your latest letter seems to suggest that, at the very least, reasons (ii) and (iii) above are no longer of concern. The latest provisions of Article 14 addressing support and assistance to trafficking victims are qualified by references to the role of victims in the national legal system, and in relation to reason (iii) your letter makes no mention of your feared expansion by the European Parliament of extra-territorial jurisdiction against the UK’s interests. Indeed, as your letter of 11 November 2010 made clear, any adoption of the provisions requiring “further extensions of extra-territorial jurisdiction to cover habitual residents who are offenders as well as British Citizens and habitual residents who are victims” would in any case be optional.

The Committee has previously expressed its support for this proposal and advocated that the UK should opt in. In light of the developments highlighted by your letter and subject to the vote in the European Parliament, would it not appear odd if the Government now chose not to opt in?

22 December 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter dated 22 December, regarding the proposed EU Directive on Human Trafficking. The Committee made a number of points to which I am glad to respond, and I would like to offer my apologies for the delay in replying.

As we outlined in June, we chose not to opt in to the Directive at the outset but to review our position once the text had been agreed. In line with this, we will consider whether to apply to opt in retrospectively, and will consider the revised text of the Directive when doing this.

During the six-month negotiation period, the Directive went through a number of changes. The Government will take into account all aspects of the revised Directive when taking its final decision on whether to opt in, including the points you raise in your letter about supporting child victims, extra-territorial jurisdiction and the creation of additional legislation.

We will write to you shortly with the agreed text of the Directive, seeking your views and those of the Commons Scrutiny Committee. I would be glad to address any comments you have on the agreed text.

2 February 2011

Letter from Damian Green MP to the Chairman

I am writing to you with the revised text of the EU Directive on Human Trafficking, to highlight to you the principal changes that have been made to the text since you last saw it in June and to seek your views on the revised text.
The text of the Directive, which is enclosed with this letter, is due to be adopted by other Member States at JHA Council on 21 March. The Government intends to make a decision on the Directive in February. We would, therefore, seek your views on the revised Directive text by 21 February. I appreciate that this is a rapid timescale, however your views are important to the Government’s decision.

This does, of course, mean that we are seeking your views on a text that has yet to be adopted. Whilst there will be some linguistic changes made to the text as a result of the forthcoming translation of the text, there will be no changes of substance made to the text between now and the date of adoption. We will of course be monitoring changes to the text that may arise during translation, and will notify you of any points of concern.

I have outlined below the principal changes to the Directive text since it has been through negotiations:

— Article 6a is a new Article that requires Member States to ensure competent authorities are entitled to seize and confiscate items used to commit trafficking offences and the proceeds from trafficking offences.

— Article 10 is about providing assistance and support to victims of trafficking. Part (3) has been changed. It requires that Member States ensure that assistance and support for victims is not made conditional on the victim’s willingness to act as a witness during the investigation, prosecution and trial.

— Article 13 seeks to ensure that the necessary support and assistance measures are provided for child victims of trafficking. Part (1a) is new and, like Article 14, requires Member States to appoint a guardian or representative for the child victim of trafficking where the child’s parents or holders of parental responsibility cannot represent the child due to a conflict of interest.

— Article 14 requires, in accordance with the role of children in the relevant justice system, that competent authorities in Member States appoint a special representative for child victims of trafficking in criminal investigations and proceedings when those with parental responsibility are precluded from representing the child. Part (1a) is new and provides for child victims’ free legal counselling and free legal representation (unless they have sufficient financial resources).

— Article 14a is new and is about the assistance, support and protection for unaccompanied child victims of trafficking. It requires Member States to take account of the personal and special circumstances of each unaccompanied child victim, to find a durable solution for the child and to appoint a representative for the child when the child is unaccompanied.

— Article 14b is new and is about compensation to victims. It asks Member States to ensure that trafficking victims have access to existing compensation schemes for victims of violent intentional crimes.

— Article 16a is new and requires Member States to supply a European Anti-Trafficking Coordinator (ATC) with information to facilitate a report published by the Commission every two years on progress made in the fight against trafficking.

— Article 17 is a measure providing for the replacement of the 2002 Framework Decision by the Directive for those Member States who participate in the Directive.

Articles not listed above remain broadly unchanged from the June version of the Directive text, as per the Explanatory Memorandum 8157/10 published on 25 May.

If there are any specific points which require an answer to assist you in giving me your views, I would be very glad to address these.

7 February 2011

Letter from the Chairman to Damian Green MP

Thank you for your letters dated 2 and 7 February 2011. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 16 February 2011.
We retain this matter under scrutiny and note the changes that have been made to the text. We continue to support this proposal and, once again, we repeat our recommendation that the Government should opt in. Could you explain your reasons why the Government would not want to opt in given that three of the four earlier objections no longer apply.

Should the Government change their mind regarding opting in to this proposal once the text is agreed, the Committee would expect a new Explanatory Memorandum to be deposited setting out the agreed text and explaining the change of heart.

We look forward to receiving an answer to our question above within the usual 10 day deadline.

16 February 2011

**Letter from Damian Green MP to the Chairman**

Thank you for your letter of 16 February about the EU Directive on Human Trafficking, in which you asked me to set out the final Directive text and explain the rationale behind the Government’s decision. The Commons Committee wrote to me on the same day asking, additionally, for the legal, financial and policy implications for the UK of the Directive. You asked for an Explanatory Memorandum; however this letter will address the queries that you raised.

The Government intends to apply to opt in to the Directive. In coming to this decision, the Government considered the finalised text against a number of factors, including whether the Directive adds value to the UK’s anti-trafficking efforts, and whether or not it is affordable. On 7 February I wrote to you highlighting the changes to the text as a result of negotiations. In this letter I will outline the rationale behind the Government’s decision, and outline the obligations that would be placed on the UK as a result of each Article in the Directive (at Annex A). This breakdown is based on the final text of the Directive which has been through translation (Annex B).

I would be grateful for your views on our proposed approach by Tuesday 17 May.

You will recall that the reasons for not opting in at the outset were:

— the risk of potential widening of the text as a result of negotiations with the European Parliament;

— that the Directive did not add value to the UK’s efforts to combat trafficking as the UK already carries out most of the measures in the Directive; and

— that the Directive would require us to enshrine in legislation current UK good practice which could remove operational discretion and flexibility.

The main risk has now been overcome: this is a finalised text and so we have avoided the risk of being bound by measures that are against the UK’s interests. While the text has expanded somewhat in scope, the new text still does not contain any measures that would significantly change the way the UK fights trafficking. The new text would still require us to enshrine our good practice into legislation.

What follows is our current assessment of the changes we would be required to make. If our application to opt in is successful, we will work closely with the Commission on implementation. There is some flexibility in how we achieve the aims of the Directive and we will look at the best ways of doing this for the UK.

In summary, UK participation would mean we would be required to: widen one existing offence; amend existing trafficking offences to confer extra-territorial jurisdiction; make mandatory those measures which are currently good practice (e.g. appointing special representatives to support child witnesses during police investigations and criminal trials); and set out the rights of victims to assistance and support. There are no new burdens on the private sector.

Administrative solutions for transposing some of the obligations may be acceptable, and we would discuss these with the Commission. However, if the Commission or ultimately the European Court of Justice does not agree, we would need to legislate to give effect to these.

Primary legislation would be required to implement some of the Directive’s provisions. As such, we would need to find legislative time in a Programme Bill in the second session. All implementing legislation will need to be in force within two years of adoption.

The total costs arising from the Directive have been estimated at approximately £810,000 per year, with £80,000 per year falling to operational policing as a result of potential activity on extra-territorial jurisdiction.
A detailed breakdown of the legal, operational and financial changes resulting from each Article within the Directive is at Annex B. The text of the Directive that has been cleared by the jurist linguists in the Council (including updated Article numbers) and will be adopted by the General Affairs Council on 21 March is attached at Annex E. Overall, we judge the impact of these new measures to be manageable and to pose no significant risk to the UK.

The Government’s decision to apply to opt in is not a change in policy. The Government has been clear since last June that we wanted to consider the final text of the Directive in detail before making a decision. However, the UK has always been a world leader with regard to its anti-trafficking work and has a strong international reputation in this field. Applying to opt in to the Directive would continue to send a signal to traffickers that the UK is not a soft touch, and that we are supportive of international efforts to tackle trafficking.

22 March 2011

Letter from the Chairman to Damian Green MP

Thank you for your letter dated 22 March and Explanatory Memorandum dated 1 April 2011 respectively. They were considered by the Justice and Institutions Sub-Committee at its meeting on 27 April 2011.

We have decided to clear this proposal from scrutiny.

The Committee welcomes the Government's decision to opt in to this proposal. We have advocated opting in to this measure from the first time the Committee corresponded with you on this matter in July 2010.

As this is the first example of a post-Lisbon, post-adoption opt-in decision the Committee is very grateful that you acquiesced to the Committee's request for an Explanatory Memorandum setting out the reasons for the Government's change of heart.

In paragraph 27 of the Explanatory Memorandum you say that the “main risk has now been overcome”. However, it is not clear to the Committee which of the four justifications you offered in the course of the correspondence as arguments for not opting in to the proposal constituted “the main risk” and why it has now been overcome.

Throughout our consideration of this matter the Committee has been at a loss to fathom a clear policy underpinning the Government’s approach to the decision whether or not to opt in to this Directive from the outset; in particular in light of the fact that the UK has opted in to a similar proposal addressing the sexual exploitation and abuse of children. Unfortunately, this Explanatory Memorandum does little to shed light on the matter and we fear that a lack of coherence in the Government’s approach to the opt-in could undermine the UK’s standing amongst the other Member States. As we said in our letter of 13 July in relation to your fear that the European Parliament would succeed in expanding the proposal beyond the UK’s interests:

“the UK Government may be in a better position, standing alongside the other Member States having opted in to the proposal rather than from the sidelines, to deal with any expansive stance likely to impact negatively on the UK's interests.”

Finally in paragraph 15 of the Explanatory Memorandum you say that UK participation would require the widening of one existing offence but you do not specify which one. When read in conjunction with the section of the Explanatory Memorandum dealing with the offences (Article 2) it appears that this relates to the offence of “exploitation of criminal activities”, but you also say that “we do not propose widening existing legislation” to accommodate this offence, this is rather unclear. The Committee would be grateful if you could clarify this issue.

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

28 April 2011

Letter from Damian Green MP to the Chairman

Thank you for your letter dated 28 April, regarding the Government’s intention to apply to opt in to the EU Directive on Trafficking, subject to Parliamentary scrutiny. The Committee posed four questions which I am glad to answer.

You query the "main risk" with the text of the Directive that I cited in the Explanatory Memorandum of 1 April 2011. To clarify, the main risk associated with the text was the possibility that the text could be widened during negotiations. This raised a risk that the UK might be compelled to
implement any extension of the scope of the Directive, or of the obligations contained therein, to a degree unacceptable for the Government.

You make the point that had we opted into the Directive from the outset, the UK would have had more influence in negotiating the content of the Directive. I would like to reassure you that the UK took a full part in the negotiations over the text of the Directive, working closely with other Member States, the Presidency and the European Commission to do so. When we took the decision not to opt in at the outset, we judged it more prudent to wait until we had a final and stable text, from which we could make a considered decision as to whether opting in would benefit the UK.

You raise a query regarding Government policy on not opting in to this Directive at the outset, given that we opted in to the Sexual Exploitation Directive at the outset. There are important differences in the operational and practical benefits of the sexual exploitation and human trafficking Directives. We are committed to assessing each opt-in decision on a case-by-case basis, and we will put the national interest at the heart of our decision making. With any new measures, we consider: security, civil liberties, integrity of the UK legal system, and control of immigration. We have been clear that there is a balance between constructive engagement and national interest. There are areas where the Government has decided that it benefits the UK to participate in some measures and others where we have decided it would not be in our interests.

You query which existing offence would need to be widened as a result of the UK opting in to the Directive. We will need to amend our existing offence of trafficking for the purpose of labour exploitation, so that this offence can be committed where the trafficking takes place wholly within the UK. This offence only currently applies where a person is trafficked within the UK having previously been trafficked into the UK.

I am pleased to note that the Lords' Select Committee on the European Union cleared the proposal from scrutiny on 28 April 2011. As you will be aware, the Commons European Scrutiny Committee cleared the proposal at a debate on the Floor of the House on 9 May 2011. As a result I would like to advise you that we will shortly be applying to the Commission to opt in to the Directive.

16 May 2011

CRIMINAL JUSTICE: EUROPEAN PROTECTION ORDER (17513/09)

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

Thank you for your letter dated 15 November 2010 which was considered by the Justice and Institutions Sub-Committee at its meeting on 8 December 2010.

We retain this matter under scrutiny.

The Committee is grateful for the information you have provided on the proposal’s progress through the European Parliamentary Committee stage. This Committee endorses the stance you have taken on the two Committees’ proposed amendments, in particular as regards the scope of the proposal and in relation to education and publicity campaigns. We would also like to express our support for your interpretation and approach to the operation of the UK’s opt-in Protocol.

9 December 2010

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

Thank you for your letter of 9 December. I am writing to update the Committee on the European Protection Order (EPO) following the European Parliament’s vote on the 14 December.

I am pleased the Committee support the Government’s approach on the operation of the opt-in protocol. When I wrote to you in November the UK was still the “swing” vote in a blocking minority opposing the current text. There was the possibility that, following the European Parliament’s vote in December, it could be claimed that adoption of the text was in prospect and moves could be made to adopt the Directive without the participation of the UK.

Since then, another Member State has joined the blocking minority. This has led to the UK no longer having the “swing” vote which means that Article 3(2) of the opt-in protocol cannot be brought into play. The Council was therefore unable to reach a first reading deal with the European Parliament.

At their plenary session on 14 December 2010, the European Parliament adopted its draft legislative resolution on the EPO. I enclose the text of that resolution which shows good progress on the issues of concern highlighted in my last letter, excepting the fundamental issue of scope.
1) SCOPE (RECITAL 9 AND ARTICLE 1)

The scope of the instrument remains too wide given the criminal legal base it has been brought under and is the reason the blocking minority remains. The draft Directive still applies to protection measures, “independently from the nature, civil criminal or administrative” of the authority that adopts them (Recital 9).

2) INFORMATION PROVIDED FOR VICTIMS RELATED TO THE EPO PROCEDURE (RECITALS 30 AND 35 ARTICLE 6(5))

There has been a move away from earlier prescription by the Parliament about Member States responsibility for training, education and publicity campaigns about the EPO. The new draft of Recitals 30 and 35 allows flexibility in the way Member States decide to address these issues and we are happy with the new text.

Article 6(5) allows the protected person to be informed about the possibility of requesting an EPO “in any appropriate way in accordance with procedures under its national law”. This provides sufficient flexibility for Member States when executing this obligation.

3) ENSURING SPEEDY PROCESSING OF EPOS AND SIMPLIFYING PROCEDURES (RECITAL 12 AND ARTICLE 15)

When I last wrote I was concerned that the European Parliament’s draft amendments suggested the issuing of an EPO should follow a fast track procedure, potentially taking precedence over a domestic protection measure. I am pleased that our concerns have been listened to and the new text at Recital 12 and Article 15 takes a more balanced approach. It recognises the need for expediency, as we are dealing with the protection of the vulnerable, but takes into consideration specific circumstances, so a protection measure would not take priority merely because it was initiated by an EPO.

4) GUARANTEEING ADEQUATE PROTECTION TO MINORS (RECITAL 11)

Previous draft amendments from the European Parliament suggested an EPO could cover family members; a suggestion we said we could accept if it were made clear that the EPO could only cover those protected by the original protection measure, and could not be randomly extended to others. Again these concerns have been listened to and Recital 11 clarifies the position.

5) COLLECTING BASIC STATISTICAL DATA WHICH WILL BE NECESSARY TO EVALUATE THE EFFICIENCY OF THE EPO PROCESS (RECITAL 31 AND ARTICLE 22).

Previous drafts proposed data collection measures that were ambitious and went beyond the scope of the instrument. The ambition has been modified in this draft and the proposals are concerned with the communication of relevant data related to the EPO such as the number requested, issued and/or recognised. This accords with the suggestion in my last letter to the Committee that data collection should be restricted to data relevant to the draft Directive.

In terms of next steps, as there is no agreement in Council on the text we await further discussion. The Hungarian Presidency currently has no meetings scheduled on the measure. At the debate on 14 December, Commission Vice President Reding applauded the work of the co-rapporteurs on this proposal and said that she will build on some of their proposals as part of the future victim’s package that she intends to adopt in May 2011. This package will include a proposal on civil protection measures and, if necessary one on criminal protection measures. She cautioned against adopting measures which were not legally sound. We await these proposals.

I will keep the Committee updated on developments.

11 January 2011

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

Thank you for your letter dated 11 January 2011 which was considered by the Justice and Institutions Sub-Committee.

We retain this matter under scrutiny.

The Committee is grateful for the information you have provided on the proposal’s progress through the Council and the explanation of the draft legislative resolution adopted by the European Parliament. In our letter of 9 December 2010 we endorsed the stance you took on the Parliamentary Committees’ proposed amendments and, save for the ongoing difficulties surrounding the proposal’s scope, we welcome this successful outcome.
In light of your comments regarding the lack of meetings currently scheduled by the Presidency to discuss this matter, we too await the Commission’s proposals in this field and, in due course, your Explanatory Memorandum.

9 February 2011

CRIMINAL JUSTICE: EUROPEAN PROTECTION ORDER (17513/09)

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

Thank you for your letter of 18 November which was considered by the Justice and Institutions Sub-Committee by written procedure. We are grateful for the further information provided by you, and subsequently by your officials, and have decided to clear this matter from scrutiny.

1 December 2010

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

Thank you for your letter of 25 November which was considered by the Justice and Institutions Sub-Committee at its meeting of 8 December.

We are grateful for the further information provided by you. We welcome your confirmation that Article 7, as it has emerged from negotiations, builds on the ECHR.

We do not require any response to this letter.

9 December 2010

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

Thank you for your letter of 9 February on the above proposal. I am writing to update you about recent movement on the European Protection Order (EPO).

As I informed you in my letter of 11 January, agreement in Council could not be reached, preventing a first reading deal with the European Parliament. No further work was undertaken on the EPO. In the last week, however, there has been some movement of which you will want to be aware.

Given the time that has passed since my last letter it might be useful if I set out the background. You may remember the EPO was a Member State initiative brought forward by the Spanish when they held the Presidency in 2010. It aimed to help those granted protection orders (such as restraining orders or non-molestation orders) in one Member State who then move to another Member State, by ensuring continuity of protection. The UK opted in to this Directive in March 2010.

The original draft Directive was brought under a purely criminal legal base, but the scope of the Directive eventually went further and encompassed civil protection measures. As you are aware, only the Commission has the right of initiative to bring forward civil measures. As the legal base was not respected, the UK was part of a blocking minority who called for the scope to be limited to criminal matters. The blocking minority’s position meant a text couldn’t be agreed amongst Member States and so, despite the European Parliament voting in favour of the text, a deal was not reached and negotiations ceased last year.

The Commission undertook to address the problem of legal base. As we informed you via the Explanatory Memorandum on the Victims Roadmap deposited on 5 May, we expect a civil EPO to be brought forward by the Commission on 18 May as part of the victims’ package. As soon as this is published we will deposit the text with the Committee and provide an Explanatory Memorandum in line with the usual process. A decision will need to be made as to whether the UK opts in to the new proposal.

In relation to the original Member State proposal, the Presidency has requested that Member States agree to a narrowing of scope to purely criminal matters. It is this narrowing of scope we were, with the consent of the Scrutiny Committees, pushing for last year. We are pleased that by holding firm on this issue it appears the criminal legal base will be respected.

At the Ambassador’s meeting (Coreper) on the 11 May it was agreed in principle that there was support to reduce the scope of the original Member State EPO to ‘criminal matters’. It was also agreed that the file will go back for working-party discussion and that the European Parliament will be informed.
It appears there will now be two instruments, (a Member State EPO limited to criminal matters and a Commission proposal for a civil EPO). As such, it is important to ensure they are capable of working coherently together. Because the text of the Member State instrument remains open, there will be an opportunity to assess it alongside the Commission’s civil instrument.

I will write to you as soon as the Civil EPO is issued and will keep you updated on both instruments.

16 May 2011

CRIMINAL JUSTICE: THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

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

Thank you for your Explanatory Memorandum of 14 December which was considered by the Justice and Institutions Sub-Committee at its meeting of 22 December. We decided to clear this matter.

The Committee found the summary of the changes contained in the Explanatory Memorandum helpful. However, if it was available, it would also have been useful to have had sight of the text which the Presidency had put forward for agreement of a general approach on 3 December. For example this might have clarified the somewhat obscure reference to “materials of the case” referred to in paragraph 51 of your Explanatory Memorandum.

We should be grateful to be kept informed of progress on this matter. Of course, any significant changes to the proposal emerging from the forthcoming deliberations of the European Parliament should be subject to a further Explanatory Memorandum.

We do not require any response to this letter.

22 December 2010

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

I am writing to update you on progress on the above Directive. On 17 March the LIBE (Civil Liberties Justice and Home Affairs) Committee held an orientation vote on their amendments. Trilogue discussions between the European Parliament (EP), the Presidency and the Commission began on 5 April.

The EP proposed a number of amendments. I have outlined the main areas on which they have focused below, together with the UK position. Given the wide range of EP amendments, I have concentrated on those areas that would make a practical difference in UK policy terms rather than covering all suggestions for alternative drafting.

ARTICLE 1

The EP has made a suggestion to include a non-discrimination clause, setting out that the Directive applies to suspected and accused persons on Union territory regardless of their legal status, citizenship or nationality. Whilst we do not think this is strictly necessary as it was in any event our understanding, we are flexible as to its inclusion.

ARTICLE 2

The EP would like to see more language in the Directive to protect child defendants, and they would like to include a definition of a child in article 2. A reference to the need to pay particular attention to those who cannot understand the content of the letter of rights owing to their young age is already in a Recital to the text agreed by the Council in December last year and we do not see any need to include a definition of a child in the Directive.

ARTICLE 3

The key change that the EP is seeking on article 3 is the inclusion of a reference to the right to be informed about the accusation. Although any person who is charged will be informed of the offence he is being charged with, it is not current practice in the UK to inform the person that they have a right to know what they will be charged with. However, we would be prepared to be flexible in including such a reference in the Letter of Rights. The EP is also seeking to include drafting on the
manner in which information should be given to vulnerable suspects, including children, disabled people and illiterate people. This is already provided for in a Recital but we would be content to examine ways in which the language could be reinforced.

**Article 4**

The EP is keen to add to the list of rights to be provided in the letter of rights. They wish to include a reference to the right to access evidence, the right to contact relatives, employers and consular authorities, the right to bail, right to medical care, information on how to challenge arrest or detention and the maximum period of pre-trial detention applicable to the case. We can be flexible about the possibility of additional rights being included in the letter of rights – for example in the Notice of Rights and Entitlements used in England and Wales we already tell the arrested person that they have the right to have consular authorities contacted. However, other additions would plainly be impractical – for example the maximum length of pre-trial detention will vary depending on the offence the person is charged with. Given the complexity of rules on disclosure, we would only be prepared to accept a very general provision providing for information on the right to access evidence.

The EP is also keen not to have any exception to the principle that the person should have the letter of rights with them throughout the custody period. Whilst the principle that the person in custody should have continuous access to the letter of rights is something which we would subscribe to, we are keen to ensure that the police continue to be able to remove the letter of rights in exceptional circumstances (such as where it is being used to obscure a video camera in the cell and there is a danger that the detained person may harm himself).

**Article 5**

Article 5 provides for a letter of rights to be given to those arrested pursuant to a European Arrest Warrant. The EP would wish to have a general reference to the Framework Decision on the European Arrest Warrant rather than to specify in the text which particular rights in the Framework Decision should be included in the letter of rights. Whilst we find the list of rights helpful in the text agreed by the Council, we can show some flexibility on this point.

**Article 6**

The EP has proposed some changes to the structure of the Article. These are based on the structure of the original Commission text and as such do not differentiate the information to be given on the reasons for arrest and the provision of more detailed information on the charge. We will resist these amendments. The EP has also emphasised the need to ensure that the person is informed of any change in the charge. This is a helpful amendment we would be prepared to accept.

**Article 7**

The EP has endorsed the Council approach of avoiding reference to a “case–file” – a concept which is not uniformly understood by all Member States. However, the EP seeks to widen the scope of the article to provide for access to all evidentiary material for or against the accused which is relevant for the determination of the lawfulness of the arrest or detention. The Council text provides for access to all information which is essential to challenge according to national law the lawfulness of arrest or detention.

The EP is also keen to limit the scope of the exceptions from disclosure to the risk to life or fundamental rights of an individual, something which goes far beyond the requirements of the ECHR and would not sit easily with the UK’s system of public interest immunity applications.

We will oppose these amendments.

I will continue to keep you informed on the progress of this Directive.

30 April 2011

Letter from the Chairman to the Rt Hon Lord McNally

Thank you for your letter of 30 April. This was considered by the Justice and Institutions Sub-Committee at its meeting of 18 May.

Subject to the specific comments below we agree your approach to the amendments to the proposal put forward by the European Parliament.
We are concerned that those arrested under a European Arrest Warrant should have full and specific information as to their rights rather than being given by a general reference to the Framework Directive. Therefore we would not support the European Parliament's desire to generalise the EAW letter of rights and do not support flexibility on this point.

You do not express a view on the European Parliament's desire to extend the information to be given to enable a person to challenge the lawfulness of his or her detention. It appears to us to be undesirable as potentially leading to untoward satellite litigation on the circumstances of the arrest and detention as opposed to the substance of the case. Do you agree?

Additionally we note that the draft report of Birgit Sippel MEP, rapporteur to the European Committee on Civil Liberties, Justice and Home Affairs, also includes a suggestion for a new Article 8.3 which would require evidence gathered in breach of the proposed Directive to be inadmissible. Has this suggestion been taken further, and if so what is your view on it?

20 May 2011

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (5140/11)

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

Thank you for your letter of 3 February. I am grateful to the Justice and Institutions Sub-Committee for clearing the document. However, I also note that you requested more information on an assessment of the harm to businesses caused by infringement of intellectual property rights (IPRs) and the views of practitioners and other stakeholders.

There is no commonly agreed figure for the scope and scale of infringement of IPRs and the UK does not have any more authoritative figures than the EU. The US Government Accountability Office published a report on counterfeiting and piracy in April 2010. In the report, the US also concluded that it is hard to quantify the exact impact. They noted weaknesses in existing studies but did say that there were a number of clear negative effects from IPR infringement for consumers, rights holders, governments and economy as a whole and that all the research suggests the problem is not insignificant. As there is a strong variance in the scale of the estimates of the problem, I list below some commonly used figures; it should be noted that these include many differing types and severity of IP crime:

- OECD November 2009 - estimated global trade (cross border) in physical fakes was worth around $250 billion per year. This excluded digital piracy and domestic piracy;
- The UK's 2007 Rogers Review estimated that criminal gain from IP crime in the UK was £1.3 billion in 2006 with £900 million of that figure considered to be flowing into organised crime. Many parts of industry estimate that the figure is now higher than this;
- Alliance against IP theft estimates the cost to clothing and footwear industries is around £3.5 billion per year (and that over £750 million of these types of products were being sold at markets each year);
- Business Software Alliance estimate loss of £1 billion in 2008/09 - with over 27% of software installed in UK being illegal;
- A report by TERA consultants for the International Chamber of Commerce/BASCAP in March 2010 suggested UK creative industries suffered retail losses of €1.4bn from piracy, representing 0.8% of the reported value added of the UK creative industries (€175bn).

It is against these differing assessment bases, and the assumption by some that every counterfeit sold or pirate recording made is a like-for-like lost sale, that the comments in paragraph 24 of the Explanatory Memorandum were made. The challenges posed by the differing data sets on IPR infringement are acknowledged by Industry, Government and Enforcement Agencies and there is an ongoing dialogue which aims to provide greater clarity. The work of the EU Observatory on Counterfeiting and Piracy will also help contribute to this debate.

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4 For example: Fixed and Mobile Market sites with Stalls, Car Boot sales etc.
Regarding your interest in the views of practitioners and other stakeholders my officials will shortly be convening a meeting of stakeholders to discuss the EU report. I will be glad to write to you with an update on views once that meeting has occurred.

11 February 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your Explanatory Memorandum of 20 January. This was considered by the Justice and Institutions Sub-Committee at its meeting on 2 February. We decided to clear the document.

We should be grateful for your assessment of the harm that is caused to businesses by infringement of intellectual property rights, in the light of the warning you give, at paragraph 24 of the Explanatory Memorandum, in respect of the studies relied on by the Commission. We would also be interested in the view of practitioners and other stakeholders.

You indicate that the Commission’s report may be preparing the ground for further legislation. However, it is clear that the Commission would need to do a good deal more work to support and formulate any concrete legislative proposals. Should further steps in this direction be taken we will, of course, be scrutinising very carefully the evidence supporting further legislation.

We look forward to your reply within the usual ten day period.

3 February 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 11 February which was considered by the Justice and Institutions Sub-Committee on 2 March. We found the list of the commonly used estimates of infringements very helpful. They all appear to indicate that there is a significant problem.

We are grateful for your offer of a further update following your forthcoming meeting with stakeholders and would be most interested to be informed of their views.

3 March 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 3 March. I note your interest in the views of stakeholders at an open meeting that my officials at the Intellectual Property Office (IPO) convened last month.

Around twenty representatives from stakeholder organisations attended the meeting to discuss their views on the Commission’s Report into the application of the Enforcement Directive. There was some agreement with the Commission’s own findings that the economic impact of the Directive is difficult to gauge given the late transposition of the Directive in many Member States. Nevertheless, the discussion did identify a number of stakeholder considerations on the operation of the Directive. In summary a number of those present felt that:

— The Commission is correct in its conclusion that the Directive was not designed with the challenges of digital technologies in mind;

— Their need to be better definition of the types of intellectual property that fall within the remit of the Directive. Attempts by the Commission to bring clarity to the issue have been limited;

— Damages awarded are not dissuasive and do not fully cover legal costs or the costs incurred by plaintiffs in investigating allegations of counterfeiting;

— The role of intermediaries (parties other than the consumer and producer such as Internet Service Providers, shipping agents, freight companies) should be further developed and defined;

— Obligations on disclosure of evidence in some Member States can prove problematic, particularly with regard to the confidentiality of documents (there are current ECJ cases concerning the lack of clarity in this subject);

— In some Member States privacy laws impinge on rightsholders’ efforts to identify infringers.

The outcome of the discussion will help us form a response to the Commission’s request for feedback on the report. This will be submitted by the IPO on behalf of the Government and I shall be pleased to forward to the Committee a copy of the response in due course.
16 March 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 16 March which was considered by the Justice and Institutions Sub-Committee at its meeting on 30 March. We are grateful for the further update following consultation with stakeholders.

1 April 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 1 April. I am glad that you found the further update on the consultation with stakeholders useful.

You may wish to know that the Government response to the Commission Report was sent to the Commission on 29 March: as promised in my letter of 16 March I enclose a copy of the response which I hope you will find of interest.

4 May 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 4 May enclosing the Government’s response to the Commission Report. We note that it broadly reflects the views previously expressed by this Committee and stakeholders. We particularly endorse the call for any future proposal for amendment of the Directive to be supported by a sound evidential base.

20 May 2011

EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (10817/10)

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

Your Explanatory Memorandum on this document was considered by the Justice and Institutions Sub-Committee on 8 December. We are glad to have this redacted version of the Council Decision, though it does not materially add to the information you provided in the summer. We clear this document from scrutiny and, as we have previously said, we would be grateful to be kept informed as matters concerning EU accession develop.

9 December 2010

EU CITIZENS: RIGHTS, RESIDENCE AND CITIZENSHIP (15936/10, 16219/10, 16392/10)

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

Thank you for your letter of 30 November and your explanatory memorandum of 17 December. They were considered on 2 February by the Sub-Committee on Justice and Institutions, who decided to clear the documents from scrutiny, without prejudice to our detailed scrutiny of the proposals as they come forward.

We note that the documents repackage measures also included in a number of other programmes.

We note, however, that the EM was submitted nearly a month late, which is normally not acceptable, but in the circumstances we thank you for your explanation.

3 February 2011
Letter from the Chairman to Justine Greening MP, Economic Secretary, HM Treasury

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee on 25 May. We are grateful for your account of this latest initiative to reform the rules on the governance and functions of the anti-fraud office, OLAF, on which (as you note) the Committee has previously made recommendations.

We support the objective of making evolutionary improvements to improve OLAF’s important operations to combat fraud and welcome the Commission’s proposals. No subsidiarity issues arise.

The changes relating to the governance all appear helpful: the roles of the various actors would be clarified, and the need for efficient investigation would be expressly balanced by safeguards for individuals subject to investigation. The proposal for regular exchanges of views between OLAF and the EU Institutions would maintain appropriate balance between accountability and the necessary operational independence of OLAF. While we acknowledge the risk that the Supervisory Committee might overstep its role, it is difficult to see how further legislative measures could prevent that.

We should be grateful if you would explain your objection to the proposal for a single seven-year term for the Director General. That period does not seem to us unduly long. That said, our preference would be to retain the current provision including the possibility of one renewal.

The changes intended to improve investigations provide useful clarification of the powers and duties of OLAF and the EU Institutions and bodies, and pick up some of the points we made previously, notably on closer working with Europol and Eurojust. We endorse your view that the Director General is best placed to assess whether an investigation might be prejudiced by inappropriate disclosure and should, therefore, be given discretion on the issue of disclosure.

We are keeping the proposal under scrutiny and ask to be kept informed as the negotiations develop.

Finally, we should like an explanation for the late submission of your Explanatory Memorandum. The Commission’s proposal was deposited in Parliament on 22 March, but the EM was submitted over a month later. The time taken to submit it is well outside the agreed period and the delay is particularly significant in this case since the proposal is subject to the subsidiarity Reasoned Opinion procedure. The period for submitting a Reasoned Opinion in this case expired on 17 May. Had any subsidiarity issues arisen from this proposal, the late deposit of the EM would have created difficulties for the Committee.

25 May 2011

EUROPEAN ARREST WARRANT (8977/11)

Letter from the Chairman to James Brokenshire MP, Parliamentary Under Secretary of State, Home Office

Thank you for your Explanatory Memorandum of 11 May. This was considered by the Justice and Institutions Sub-Committee at its meeting of 25 May. We decided to clear the document.

Like you, we welcome the Commission report as a useful update on the operation of the European Arrest Warrant. We agree with the Commission that the EAW system is far from perfect; in particular, we consider that an EAW should only be issued by Member States when it is proportionate to do so and that mutual confidence that all Member States respect fundamental rights in this area needs strengthening. We appreciate that the EAW is presently being reviewed by the Joint Committee on Human Rights in its inquiry on the human rights implications of UK extradition policy and by Sir Scott Baker’s independent review of UK extradition arrangements. However we consider it desirable and inevitable that there should be changes to the EAW and urge the Government to take whatever steps are necessary with the institutions and other Member States to prepare the ground for this.

We should be grateful for your assessment, in the light of the outcome of these inquiries, of the defects of the EAW and the potential remedies for these defects.

We also note that you have in mind that the EAW may be disapplied by the UK if it were to opt out of all pre-Lisbon measures relating to police and judicial co-operation in criminal matters in 2014 under Protocol 36. We would be against disapplication of the EAW regime, and would be interested...
to know what extradition procedures would be in place between the UK and other Member States in its absence, and how they would operate.

We do not require an answer within 10 working days.

25 May 2011

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

Letter from James Brokenshire MP, Parliamentary Under Secretary of State, Home Office, to the Chairman

Thank you for your letter of 8 October addressed to Baroness Neville-Jones. You previously wrote to the Baroness on 1 July 2010 where you advised it was the Committee’s view that the UK should opt in to the EIO. As you are aware the UK opted in to the European Investigation Order on 27 July. I am now writing on behalf of the Baroness to provide you with an update on the negotiations; I will also address the specific issues you raise in your letter.

The negotiations are proving to be complicated and time consuming, and it is proving to be very difficult to find a text that all Member States can agree on. So far, only Articles 1-10 of the Directive have been discussed; the remaining articles, recitals and the legal base have yet to be considered. A new consolidated text has not yet been produced by the Presidency and the Baroness will provide you with a copy when this is the case. While this would still be subject to further negotiation, in particular with the European Parliament, the Government is relatively confident that certain proposed amendments are likely to appear in the final text.

There is no finalised wording as yet and I would like to emphasise that the text is still subject to change. However, we are relatively confident that certain proposed amendments are likely to appear in the final text.

The scope of the EIO looks set to be as wide as possible with the one instrument covering most investigative measures. The UK is generally content with this approach because it will ensure a less fragmented and more practical system than the one that is currently in place.

The question of who may issue an EIO has also been discussed extensively. It is likely that there will be a validation procedure whereby anyone other than a court, judge or public prosecutor who wishes to issue an EIO must have it validated by a judicial authority prior to transmission. In the case of no such validation an EIO will be able to be refused. This will not affect the UK as an EIO will only be issued by a court or public prosecutor. This is considered a further way of ensuring that requests are subject to adequate judicial control in the issuing State – something that can only help with proportionality.

The Government has done considerable work to ensure the EIO will respect our common law system and allow our central authorities to recognise an EIO. The Government produced a room document on the subject which was issued to all Member States and generated a great deal of discussion. We are content with the way the discussions surrounding central authorities are progressing and we think that the new text is likely to accommodate the UK’s position.

Ensuring proportionality is addressed in the EIO is a key concern for the UK and your letters of 1 July 2010 and 8 October 2010 reference that there should be a proportionality safeguard in the instrument. The Presidency has proposed new text that requires the issuing State to ensure the issuing of an EIO to be ‘necessary and proportionate’, and this is supported by the majority of Member States. This inclusion goes further than the European Arrest Warrant and the Government welcomes this proposal and believes it will help to stop the most trivial requests.

The second part of this proposed text requires the issuing State to confirm that the requested evidence could have been obtained by their authorities had it been located domestically. This inclusion will guard against ‘forum shopping’ and the Government fully supports this. We are confident about the way in which this is progressing.

It appears likely that there will be individual provisions that address trivial cases and costs. The UK and Germany issued a paper that directly addressed these issues and the UK is lobbying hard on this matter. These discussions are set to continue and it is too early in negotiations to tell what shape these provisions will take in the final document.

There have been extensive discussions on grounds for refusals, however it looks unlikely that this issue will be resolved quickly. Your letter of 8 October advises there should be a ground for refusal if execution of an EIO will breach fundamental rights and you also urge the Government to consider whether there should be a provision for dual criminality. Whilst both issues have been touched upon
during negotiations there has not, as yet, been a full discussion on either. Other grounds for refusal that have yet to be fully discussed are territoriality and the role of national law in the execution of an EIO.

The Belgian Presidency has proposed text for the inclusion of ne bis in idem as a ground for refusal. This is to be welcomed. Grounds for refusal remain a key point for discussion and we would expect there to be further consideration of the issue under the Hungarian Presidency.

It is important to ensure foreign officers will have no law enforcement powers within the UK. There has been a proposal in the main text that explicitly references that authorities of the issuing State will have no law enforcement powers in the executing State. The Government welcomes the clarification of this position.

Your letter also hoped that the Directive would clarify that an EIO can be issued by defence lawyers as well as prosecutors. This position has been confirmed during negotiations but I agree that it would be useful for this to be clearly referenced in the final text.

The Belgian Presidency will conclude at the end of December and the negotiations will resume under the Hungarian Presidency in 2011. We will work to ensure that discussions on grounds for refusals and provisions for trivial cases and costs are kept on the agenda. We are hopeful that negotiations will also start on the other articles, which include deadlines and legal remedies. I am aware that you retain the EIO under scrutiny and I will continue to keep you updated on the progress of the negotiations.

15 December 2010

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 15 December which was considered by the Justice and Institutions Sub-Committee at its first meeting following the Christmas recess, on 19 January. We are grateful for the latest information on the discussion of this proposal in the Council. We keep the matter under scrutiny.

We note that these discussions still have some way to run and we therefore reiterate that the points which we have proposed should be reflected in the Directive, namely:

— the Directive should contain a proportionality safeguard, having regard to the reported difficulties there have been with the issuing of European Arrest Warrants in minor cases;
— there should be an express ground for refusing an EIO if its execution would involve a breach of fundamental rights;
— the Directive should make clear that the EIO procedure is capable of use by defence lawyers as well as investigating and prosecuting authorities;
— consideration should be given to whether there should be express provision for dual criminality.

We have remarked previously on the breadth of scope of this proposal. Do you consider that the scope for EIOs could give rise to concerns not yet considered, such as actions of agents provocateurs? If, as we proposed and you have agreed, an EIO should be available to defendants, should there be safeguards to prevent disclosure to the defence of matters which should, in accordance with UK procedures, be excluded from disclosure.

We look forward to your response on these points within the usual 10 days, and should be grateful also for your assessment of likely progress on this dossier during the Hungarian Presidency.

20 January 2011

Letter from the Rt. Hon Baroness Neville-Jones, Minister of State, Home Office

Thank you for your letter of 20 January to James Brokenshire MP. I have taken note of the areas that you wish to see addressed in the text of the Directive. As you note, these are areas you have previously raised with the Government and we will continue to keep you updated with any developments on these or wider issues in negotiations.

Your letter also asks to what extent we believe the wide scope of the EIO gives rise to concerns insofar as the actions of agents provocateurs are concerned. In terms of mutual legal assistance we believe this is relevant where a foreign State requests that the UK deploy a covert human intelligence source on their behalf. As such requests already fall within the scope of the mutual legal assistance available between EU Member States we do not view the EIO as raising any new concerns in this
regard. It is the case under current arrangements, and would still be the case under the EIO, that any request for the UK to deploy a covert human intelligence source on behalf of another State must be authorised in line with the UK’s domestic legislation and that the undercover officer must then comply with the operational requirements placed upon him. I am not aware of any recent mutual legal assistance requests to the UK in this regard.

You also ask about whether the EIO should contain specific rules on disclosure. We believe that Article 18(3) of the EIO represents a sensible approach to the question of disclosure and do not think it is necessary to go beyond this. The Government views mutual legal assistance (i.e. the EIO) and rules of disclosure as covering two separate fields of work; rules of disclosure form part of a State’s domestic criminal procedural rules whereas the EIO is a Directive aimed at necessarily international judicial cooperation between EU Member States. It is for this reason that the legal base of the EIO can be found in Article 82(1) of the Treaty on the Functioning of the European Union whereas rules relating to criminal procedure would require an Article 82(2) legal base.

It is also worth noting that under the terms of the EIO the UK will be able to refuse to provide evidence that would harm national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities.

As things stand I do not believe that the Directive is likely to be adopted this year. However, the Hungarian Presidency has indicated that it hopes to agree a general approach in the Council at the June JHA Council. Thus far, negotiations at expert level have progressed to Articles 11 – 19 but there remains a need to return to Articles 1 – 10 as a general approach to these Articles was not agreed under the Belgian Presidency. These discussions are highly complex and technical and likely to require considerable time at the negotiating table. I will ensure that you are kept updated with progress.

4 February 2011

Letter from the Chairman to the Rt. Hon Baroness Neville-Jones

Thank you for your letter of 4 February which was considered by the Justice and Institutions Sub-Committee on 16 February. We are grateful for your responses to the questions we raised. We are keeping the proposal under scrutiny, and look forward to further information as the negotiations continue. Subject to that, we do not expect a response to this letter.

16 February 2011

Letter from James Brokenshire MP to the Chairman

I write to you to provide an update on the current position on a consolidated draft of the EIO. As Baroness Neville-Jones explained in her response of 30 March 2011, no such draft has as yet been produced. In order to provide you with a better understanding of where negotiations have now reached, I attach a recent Working Group document dated 4 May 2011, though this has had to be redacted in some respects. This letter also highlights key amendments made to the original draft of the EIO, document number 9288/10.

At the last Justice and Home Affairs Council (11 – 12 April 2011), the Presidency explained that it hoped to agree Articles 1 to 18 of the EIO at the June JHA Council. Home Office officials have explained the current UK scrutiny position and its importance to the Presidency. We will keep you informed of progress over the coming weeks, as there are further Working Groups taking place prior to the June JHA Council.

ISSUING AUTHORITY (ARTICLE 2)

Article 2(a)(ii) has been amended so that any ‘competent authority’ (rather than ‘judicial authority’), as defined by the issuing State, is able to issue an EIO. This is because in some States police officers may be considered competent to issue an EIO as a result of the quasi-judicial role they play in investigating and prosecuting crime. However, where a ‘competent authority’ which is not a judge, a court, an investigating magistrate or a public prosecutor issues an EIO, that EIO will need to be validated by a judge, prosecutor or investigating magistrate. This validation procedure is established by Article 5a(3). This validation procedure should ensure satisfactory judicial oversight of the issuing of an EIO. This is consistent with UK practice whereby prosecutors and judges will be responsible for issuing EIOs.

ROLE OF CENTRAL AUTHORITIES (ARTICLE 2)

Under the current Mutual Legal Assistance (MLA) system in operation in the UK, central authorities are responsible for acceding to MLA requests and ensuring their execution. As highlighted in the
Explanatory Memorandum of 25 May 2010 the original drafting of the EIO could have necessitated a change to this system. This was because Article 2(b) provided that an executing authority must be able actually to execute the investigative measure requested. Article 8 subsequently provides that only an executing authority can recognise an EIO. Central authorities would therefore not have been able to recognise and refuse an EIO as they do not actually undertake the investigative measure requested.

The most recent drafting of Article 2(b) does not require the executing authority to undertake investigative measures, simply that it is ‘competent to recognise an EIO and ensure its execution’. This amendment resolves any tension between our current system and that proposed by the EIO.

SCOPE OF THE EIO (ARTICLE 3)

The amended Article 3 provides that all investigatory measures come within the scope of the EIO, with the exception of the formation of Joint Investigation Teams. Certain forms of interception of telecommunications were originally excluded from the EIO, but all forms of interception now fall within the scope of the instrument. Further discussions on this article are expected shortly. The appropriateness of such a measure being included in the scope of the EIO is dependent on the grounds for refusal and conditions that may be attached to such requests, and these are yet to be finalised. However, the ground for refusal at Article 10(1)(b) is wide enough to refuse any EIO related to interception or its product. There will also be further discussion on whether the inclusion of undercover agents in the scope of the instrument is appropriate.

PROPORTIONALITY (ARTICLE 5A AND NEW PROPOSALS)

We wish the EIO to be a proportionate instrument and are supportive of any measures that will help to achieve this aim. Consequently, we are pleased that a proportionality test has been introduced at Article 5a(1)(a). This Article requires the issuing State to be satisfied that any EIO they issue is ‘necessary and proportionate’ for the proceedings in question. The inclusion of such a test represents a step forward from Council Framework Decision 2002/584/JHA on the European Arrest Warrant, where no similar provision exists. Clarification of this provision can be found at new Recital 10a.

Article 5a(1)(b) also protects against potential ‘forum shopping’ by requiring the issuing State to confirm that the evidence could have been obtained by their authorities had it been located domestically. This is another important safeguard and there has been widespread support from Member States for the inclusion of Articles 5a(1)(a) and 5a(1)(b).

Another development insofar as proportionality is concerned is the proposed Article X on minor offences (text below). This was included in a Working Group document published on 1 March 2011 but it has not yet been incorporated into the main body of the text. It provides that the executing State may invite the issuing State to withdraw an EIO if it is received for what is considered to be a minor offence. To date, there has not been widespread support for this Article’s inclusion.

**Article X**

Minor offences

Where the executing authority has reasons to believe that

a) the investigative measure concerns an offence which it might considers being very minor, or

b) it is likely that the final penalty in the case may be very minor,

the executing authority shall consult the issuing authority on the importance to execute the investigative measure in the specific case if such an explanation has not been made in the EIO, or in case the executing authority, after having received the EIO, is of the opinion that it may not be proportionate to execute the EIO regarding this minor offence. After such consultation, the issuing authority may decide to withdraw the EIO.

RECOGNITION AND EXECUTION (ARTICLE 8)

Article 8, Recognition and Execution, provides for authorities from the issuing State to attend the execution of an EIO. This has been further qualified by the inclusion of Article 8(3a) which makes clear that any such authorities will be bound by the laws of the executing State and will not have any law enforcement powers unless this has been agreed by the executing State. I should make clear that the UK would not agree to foreign authorities exercising such powers in the UK.

RECOURSE TO A DIFFERENT INVESTIGATIVE MEASURE (ARTICLE 9)

Article 9(1)(b) of the original drafting has been deleted and a revised version of this can be found at Article 10(1b)(b). In the original Article 9(1)(c) the wording has been changed from ‘coercive’ to
'intrusive' and this has been moved to Article 9(1bis). We do not see this as impacting on the way this provision would be applied and think that allowing the executing State to use less intrusive means to achieve the same end will help ensure the EIO is a proportionate instrument.

This Article has also been amended so that recourse to a different investigative measure is possible where the requested measure would not be available in a similar domestic case (Article 9 (1)(b)). It further provides at Article 9(3) that, where this is the case, and there is no other investigative measure which would have the same result, the executing State may inform the issuing State that it is impossible to provide the assistance requested. The introduction of this principle of availability into the instrument will help ensure that a State is not required to use sensitive investigative measures for a foreign investigation more than they would be able to use in a similar domestic case.

**GROUNDS FOR REFUSAL (ARTICLE 10)**

There has been extensive discussion on this point and a number of different proposals have been considered by the Working Group. The most recent drafting substantially amends Article 10 by, amongst other changes, introducing subparagraphs which provide specific grounds for refusal for certain types of investigative measures.

General grounds for refusal can still be found under Article 10(1) and this list now includes double jeopardy (ne bis in idem). New Recital 12a also relates to double jeopardy. The original Article 10(1)(c), which allowed an executing State to refuse a EIO if there was no other investigative measure available (if the measure requested did not exist or was not able to be used in relation to the offence being investigated), has been deleted due to the provisions now found in Article 9. Article 10(1)(a) has been extended to refer to rules relating to freedom of the press and freedom of expression in other media.

The new Article 10(1a) lists certain investigative measures for which Article 9(1) would not be applicable. These include the hearing of a witness, suspect, victim or third party, obtaining information already held by the executing State (including that contained in databases held by police or judicial authorities or accessible by the executing authority in the framework of criminal proceedings) and search and seizures in relation to 32 list offences (as also found in the Framework Decision on the European Arrest Warrant). In these instances, the executing State would be unable to inform the issuing State that the investigative measure requested was unavailable and the grounds for refusal available would be those listed under Article 10(1). The inclusion of search and seizure in this group of investigative measures will lead to the provisions for search and seizure in the EIO being comparable to those found in the Council Framework Decision 2008/978/JHA on the European Evidence Warrant.

Where the investigative measure requested by the issuing State is not one of the investigative measures listed in 10(1a), the grounds for refusal in the new Article 10(1b) will be applicable.

A new Article 10(3) has been added and this provides for the waiver of privilege and immunity. This broadly mirrors UK practice.

Consideration is still to be given to the inclusion of human rights and territoriality within Article 10.

**TRANSFER OF EVIDENCE (ARTICLE 12)**

There has been an additional paragraph included at Article 12(3). This allows for evidence that is already relevant for proceedings in the executing State to be temporarily transferred to the issuing State for an agreed period.

**LEGAL REMEDIES (ARTICLE 13)**

Article 13 has been expanded and provides that any legal remedies available as a result of the investigative measure being used in a domestic case should also be available to parties affected by the execution of an EIO. It further provides that, to the extent that confidentiality is not undermined, interested parties are informed of their opportunity to seek legal remedies. It is yet to be considered if the right to seek legal remedies will be time bound and if the transfer of evidence can be suspended until after this right is exhausted.

**CONFIDENTIALITY (ARTICLE 18)**

Although there have been no amendments to this Article there is a new reference to data protection obligations in Recital 17a. The inclusion of such a recital was recommended by the European Data Protection Supervisor in his opinion on the EIO.
COSTS (ARTICLE Y)

An Article on Costs has also been proposed, but this has not yet been included in the main body of the text. This is set out below and was included at the beginning of the Working Group document published on 4 May 2011.

Article Y

Costs

1. Unless otherwise provided in the Directive, all costs undertaken on the territory of the executing State which are related to the execution of an EIO shall be borne by the executing State.

2. Where the executing authority considers that the costs for the execution of the EIO may become exceptionally high, it shall consult with the issuing authority on whether and how the costs could be shared or the request modified, spread over time or eventually completely or partially withdrawn.

3. Where the issuing authority objects to the withdrawal of the EIO, the EIO shall be executed and the costs which the executing authority considers large or exceptional shall be borne by the issuing authority.

The proposed Article provides that the executing and issuing States may share the costs of executing an EIO if the costs are considered exceptionally high. Alternatively the EIO may be modified or withdrawn by the issuing State. It further provides that, where an issuing authority objects to withdrawing an EIO, large or exceptional costs will be borne by the issuing State. The aim is to encourage issuing States to give greater consideration to whether expensive and resource intensive investigative measures are absolutely necessary.

All the changes highlighted here are still subject to change, as negotiations in Council are continuing and the European Parliament is yet to submit its proposed amendments. As promised at the start of my letter, I will keep you informed of any further progress or changes to the expected timescales of the negotiations.

11 May 2011

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 11 May which was considered by the Justice and Institutions Sub-Committee on 25 May. Your detailed account of the changes in the text made in the negotiations so far was very helpful.

We welcome the fact that a number of the changes we have recommended have now been incorporated in the draft Directive, notably the provision on proportionality. So far as concerns the amendments relating to the grounds for declining execution of an EIO, we welcome the inclusion of double jeopardy. We note that the inclusion of an express ground for declining execution where it would involve a breach of fundamental rights is still under consideration, and trust that this addition will be made. We note also that dual criminality would constitute a ground for declining execution in certain cases, and would be grateful for an explanation why that ground was not made generally applicable.

Progress has clearly been made in the course of the negotiations. As they continue, we urge you to press for agreement to the other changes we have recommended: clarity that the EIO mechanism is available for defendants and an express ground for declining execution if fundamental rights would be breached.

We look forward to further information as matters develop, in particular as to the text which the Presidency will present to the JHA Council next month.

25 May 2011

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

I am writing as the Minister who has recently become responsible for mutual legal assistance policy. James Brokenshire wrote to you on 11 May 2011, providing you with a comprehensive update on the negotiations of the European Investigation Order (EIO). I am now writing to provide you with a further update on the negotiations and I attach an Unnumbered Document dated 20 May 2011. Amendments are underlined and this letter covers this document, drawing your attention to those amendments considered of particular import.

There are still ongoing discussions in Brussels on this text and there may still be some amendments prior to Council discussing the EIO. As you may be aware the Home Secretary will be giving
evidence to the Commons’ European Scrutiny Committee on 8 June 2011 and we will provide you with any further necessary updates, including on the text, on that day.

The Presidency has expressed its intention to reach partial general agreement on Articles 1 – 18 at the June JHA Council. This means that we would freeze work on Articles 1 – 18 of the EIO and use the current text as the basis for work on Articles 19 – 32 and the EIO request form. I would like to emphasise that this does not signify an agreed final text on Articles 1-18 and these can be amended later if agreed. For example, this may arise as a result of discussions on later Articles relating to specific investigative measures and a consensus that given particular difficulties with such measures they would be better being excluded from the scope of the instrument. I understand that should the Presidency not reach a partial general agreement to Articles 1 – 18 the incoming Polish Presidency is extremely unlikely to make future work on the EIO a priority and future progress is likely to be extremely slow.

We have secured several important changes to the text. This includes protecting the common law system (Article 2), the introduction of a proportionality test (Article 5a), as well as ensuring there is no requirement to use a sensitive investigative measure when such a measure could not be used in a domestic investigation (Article 9). In addition, as you will see below, further concessions have been made to the UK in the most recent text; for example, the inclusion of fundamental rights and territoriality as grounds for refusal. However, despite these changes and our wish to move on to discussions on the later Articles there are still areas where we would wish to see further progress. In particular, we will continue to push at Council for the list of 32 offences to be deleted from Article 10(1b) meaning that dual criminality could still be fully considered in relation to the coercive measures falling within the scope of the Article. We also intend to work with the European Parliament, as this a co-decision dossier, to persuade them of our views in relation to Article 13.

Until now it appeared unlikely that the Presidency would be able to agree a text that they could present to Council but as this now appears likely I am asking you to consider lifting scrutiny on these Articles of the EIO. Should you lift scrutiny on these provisions it is our intention to signal our support for reaching partial general agreement on Articles 1 -18 and Y only if the 32 list offences are deleted from Article 10(1b). Should the 32 list offences not be deleted, we will abstain from voting and highlight our reasons for not voting in favour of the text. Given the recent concessions that we have received it could affect our negotiating good will were we to vote against the text. However, I would like to reassure you that if you maintain these elements of the text under scrutiny we will not override but instead abstain making clear that the issues remain subject to Parliament’s consideration.

SCOPE OF THE EIO (ARTICLE 3)

Further to the letter on 11 May, it looks likely that intercept and undercover agents will both be included in scope of the EIO. The only exclusion will be the formation of Joint Investigation Teams (JITs).

The grounds for refusal found in Article 10 would allow the UK to refuse requests for intercept or its product on the grounds that it would compromise national security or involve the use of classified information. Furthermore, Article 27 of the EIO provides that investigative measures implying gathering of evidence in real time, continuously and over a certain period of time, may in addition to the grounds provided in Article 10, be refused if the execution of the measure concerned would not be authorised in a similar national case. It is very difficult to conceive of a situation where there would not be a sufficiently wide ground of refusal for intercept.

Article 27 would also allow us to refuse requests for undercover agents if it would not be authorised in a similar national case. This means that all the standard checks and balances under the Regulation of Investigatory Powers Act 2000 and its codes of practice would be relevant in this regard. Thus where an authorising officer felt that the deployment of an undercover agent was not proportionate, such a request would necessarily be refused. Such requests are already possible under the current MLA system and to-date the UK has never received such a request.

RECOGNITION AND EXECUTION (ARTICLE 8)

I would like to reinforce the point made in the previous letter that the UK would not allow foreign authorities to exercise law enforcement powers in the UK. Without legislation being passed to provide for this it would be impossible for such a situation to arise. I can assure the Committee that such legislation will not be brought forward by this Government as and when we are required to implement the EIO.

Recital 11 has also been amended and clarifies that the executing authority may set conditions as to the scope and nature of the issuing authority’s attendance (Article 8(3)). Clearly where such
conditions are not accepted by the issuing authority they will not be able to attend the execution of the EIO.

RECOUSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURE (ARTICLE 9)

As detailed in the previous letter, recourse to a different investigative measure is possible where the requested measure does not exist under the law of the executing State (Article 9(1)(a)) or would not be available in a similar domestic case (Article 9(1)(b)). Recital 10 has been amended to clarify the term ‘available’ and provides that availability of the measure in a similar domestic case should be assessed only in relation to legal conditions that are essential for the execution of the measure.

GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION (ARTICLE 10)

As you are aware there have been extensive discussions on Article 10. An amendment to the chapeau of Article 10(1) now provides a cross-reference to Article 1(3), which relates to fundamental rights. Whilst we have always considered that Article 1(3) amounted to a de facto ground of refusal, this puts the issue beyond doubt and will allow us to refuse where either the issuing or recognition and execution of an EIO would breach fundamental rights.

As outlined in the 11 May letter, Article 10(1) has been expanded and includes ne bis in idem as a ground for refusal. New recital 12a, provides further information on this ground for refusal.

The question of ‘territoriality’ is also now addressed by the EIO. Article 10(1)(f) ensures that a situation cannot exist in which an individual present in the requested Member State performs is subject to coercive measures, such as search and seizure, in connection with acts which occurred outside the requesting Member State and which are not also an offence in the UK.

An additional ground for refusal has now been provided in Article 10(1b) which means that an EIO can also be refused if the use of the measure in question is restricted under the law of the executing State to a list or category of offences punishable or to offences of a certain threshold, which does not include the offence covered by the EIO.

DEADLINES FOR RECOGNITION OR EXECUTION (ARTICLE 11)

Article 11 provides for deadlines to recognise and execute an EIO. An amendment to this Article now provides that the deadlines do not apply to proceedings issued under Article 4(b) and (c). Any requests that will be received under Article 4(b) and (c) are infringements of the rule of law and are likely to be considered as less serious matters. This could include for example, the non-payment of taxes or theft or fraud below a certain value, which may be dealt with by way of administrative proceedings in certain other Member States.

MINOR OFFENCES (ARTICLE X)

In the letter of 11 May, attention was brought to a proposal on minor offences. You will see in the most recent document that this article has been omitted. The UK pushed for this Article’s inclusion; however, there was only limited support from other Member States. We will now pursue this through the European Parliament, which has yet to submit its proposed amendments. As you are aware, we have secured the inclusion of a proportionality test at Article 5(a) and this is to be welcomed. It is also the case that regardless of whether or not Article X is included in the final text the substance of the Article will represent UK practice. It is worth noting that at this time trivial cases are not a significant problem for the MLA system.

26 May 2011

GREEN PAPER: FREE MOVEMENT OF PUBLIC DOCUMENTS AND RECOGNITION OF THE EFFECTS OF CIVIL STATUS RECORDS (18122/10)

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

Thank you for your Explanatory Memorandum of 3 February. This was considered by the Justice and Institutions Sub-Committee at its meetings of 16 February, 23 March and 6 April. The Committee was grateful for the assistance of an informal briefing from your officials and those of the Identity and Passport Service on 23 March.
We decided to hold the matter under scrutiny pending sight of the Government’s response to the Green Paper.

We are sympathetic to the objectives behind the proposal. However, we should be grateful for further information as to the scale of the problems —

— faced by those when seeking to use a UK public document or UK record of their civil status in another Member State, and

— faced by those seeking to use in the UK a public document or record of their civil status issued in another Member State.

In the meantime we have decided to respond direct to the Commission’s Green Paper and enclose a copy.

06 April 2011

GREEN PAPER: POLICY OPTIONS FOR PROGRESS TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESSES (11961/10)

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

As you are aware, the European Commission published its Green Paper in July last year. This set out seven main policy options for reform concerning the issue of contract law which included continuing with the existing project aims (the creation of a toolbox to aid legislators) to much more radical options which would result in varying degrees of harmonisation of contract law, including the option of a fully harmonised European contract law code.

In August last year, my Department undertook a UK-wide evidence gathering exercise to inform the UK position and response to the Green Paper. That exercise was completed in early-December 2010. A total of 54 responses were received from groups and individuals representing a broad spectrum of interests including academics, legal practitioners, business (both big and small), finance, insurance, shipping and exports and consumer groups.

The results of the evidence gathering exercise showed clearly that most respondents considered there was no clear demonstrable and proportionate need for any of the more radical changes proposed, such as harmonisation of contract laws or even the establishment of an optional contract law code. Most wanted the project to continue working on the previously established aims and not pursue more radical reform. While there was interest from a few respondents to the “optional instrument” proposal (which the Commission has made clear it favours), this interest seemed more in favour of the notion of exploring the option rather than a commitment to such an approach.

The Government agrees that the delivery of what was broadly the previous project aims (those described in Options 1 and 2a of the Green Paper) would be a useful and practical approach. Given the lack of reliable evidence of need for any of the new legislative options and the problems that might be associated with them, you will see the UK response to the Commission did not support any of the other options. Given the Commission’s open support for the optional instrument approach the response also offers some commentary on some of the main issues that might arise in association with such a proposal.

14 March 2011

Letter from the Chairman to the Rt Hon Lord McNally

Thank you for your letter of 14 March which was considered by the Justice and Institutions Sub-Committee on 30 March. We are grateful for sight of your response to the Commission with which we have considerable sympathy. We now clear the Green Paper from scrutiny.

1 April 2011
Letter from the Rt. Hon. Kenneth Clarke MP, Lord Chancellor, Secretary of State for Justice, to the Chairman

As you know, Hungary takes over the rotating European Union Presidency on 1 January 2011. I am writing to give you an overview of the Hungarian 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 Hungarian Presidency is planning to host the following JHA Councils:

- 20 – 21 January (Informal Council) in Gödöllő, Hungary
- 24 – 25 February in Brussels
- 11 – 12 April in Luxembourg
- 9 – 10 June in Luxembourg

In the area of criminal law, the Hungarian Presidency will inherit a number of negotiations. As you are aware, there are ongoing negotiations on the draft Directive on the Right to Information in Criminal Proceedings and the draft Directive on combating the sexual abuse, sexual exploitation of children and child pornography. The Hungarian Presidency will take forward negotiations with the European Parliament and may aim to reach agreement on both Directives by the end of the Presidency. I will write to you to update you on developments as these negotiations move forward.

The Hungarian Presidency may also begin negotiations on a Directive on the right to access to a lawyer. 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 Commission is likely to publish this proposal around June 2011. A green paper on pre-trial detention, another of the Roadmap measures is also expected to be published under the Hungarian Presidency.

Negotiations on the EU’s Accession to the European Convention on Human Rights will continue under the Hungarian Presidency.

Following the adoption of the negotiating mandate for EU-US agreement on the protection of personal data at the JHA Council on 3 December, the Commission has begun negotiations with the United States. When the negotiations with the United States have concluded, the draft agreement will be presented to the JHA Council for adoption.

In June 2011, we expect the Commission to publish legislative proposals for a Data Protection Instrument aimed at revising the legal framework for data protection

We also expect the Commission to publish a package of measures relating to victims of crime in May 2011, which we expect to include a legislative instrument.

In the area of civil judicial co-operation, the Hungarian Presidency will continue negotiations on succession and wills. As you will recall, the UK decided not to opt-in to this proposal.

The Presidency will begin negotiations on the proposal to revise the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). It is expected that the UK decision on whether to opt in to this proposal will have to be made around mid to end of March 2011.

It is expected that the Commission will bring out a proposal on Matrimonial Property Regimes during the Hungarian Presidency. If it does, it is likely that the Presidency will start the negotiations on this proposal.

17 December 2010

IMPLEMENTING POWER: RULES OF PROCEDURE FOR THE APPEAL COMMITTEE UNDER REGULATION 182/2011 (COMITOLOGY) (UNNUMBERED)

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

Further to my letters of 26 July, 28 September and 2 November 2011, I am writing to update the Committee on progress on negotiations of the regulation concerning Member States’ control of the Commission’s exercise of implementing powers (Article 291 TFEU Comitology regulation).
The Belgian Presidency prioritised this regulation and pushed for a first-reading deal. The final triilogue negotiation between the Council, European Parliament and Commission was completed on 30 November 2010, and the Council gave political endorsement to the final text on 1 December 2010 (the UK abstained on scrutiny grounds). On 16th December 2010, the European Parliament adopted the regulation as part of a first-reading deal. Following tidying up of the text by Jurist-Linguists, the final Regulation is scheduled for adoption as an “A” point at the Education, Youth and Culture Council on 14 February 2011.

During the negotiations, the UK along with other Member States secured a number of improvements to the original Commission proposal. As previously explained, our key aim throughout was to ensure the Member States would be able to examine and scrutinise fully implementing acts before they were adopted by the Commission and that proposals on important areas such as financial services and trade were properly examined (while also resisting a strong push from other Member States to make trade rules more protectionist). We secured improvements in the following key areas:

I) APPEAL COMMITTEE (ARTICLE 3(7), ARTICLE 6)

We secured the introduction of the Appeal Committee, which will be comprised of Member State representatives and chaired by the Commission. This provides an additional layer of scrutiny over the Commission’s exercise of implementing powers. In addition, we secured agreement that Member States be able to determine who would represent them at the Appeal Committee. The Appeal Committee can therefore meet at political level, if appropriate. Importantly, we also secured the automatic referral of draft implementing acts relating to tax and financial services to the Appeal Committee in cases of “no opinion” in the expert committee. This means that the Commission cannot go ahead and adopt implementing acts in these areas when there is an inconclusive outcome in the expert committee.

II) COMMISSION TO TAKE INTO ACCOUNT MEMBER STATE OPINION IN EXERCISE OF ITS DISCRETION (RECITAL 14)

We have also secured the inclusion of recital 14 which checks the Commission’s exercise of its discretion. If there is “no opinion” in the Appeal Committee, the Commission has general discretion on whether to adopt the draft implementing act. However for certain key sectors, notably taxation, consumer health, food safety and protection of the environment, the recital specifies that the Commission will avoid wherever possible going against a predominant position in the Appeal Committee which falls short of a qualified majority. The inclusion of taxation in this Recital was absolutely crucial for the UK, and was achieved despite considerable opposition.

III) DROIT DE REGARD FOR THE EUROPEAN PARLIAMENT AND THE COUNCIL (ARTICLE 11)

On 14 October 2010 you wrote asking for my views on whether the European Parliament could be provided with a role in the Regulation. I wrote to you on 2 November indicating that my officials would need to consider this issue and revert. Although Article 291 TFEU itself does not provide a role for the European Parliament in the operation of the Comitology Regulation, we have concluded that a limited role for the Parliament may be provided where this is consistent with its rights under the Treaty. The Regulation provides a droit de regard for the Parliament (or the Council) to indicate whether it considers an implementing measure is ultra vires. This is limited however to situations when the basic act has been agreed by the Ordinary Legislative Procedure. Accordingly, we think that this limited role is acceptable as it is consistent with the role of the European Parliament as co-legislator in regard to the basic act, and the right to bring a legal challenge against a Union act.

IV) TRADE / COMMON COMMERCIAL POLICY (CCP) (ARTICLES 5(5), 6(5))

With the Regulation bringing the adoption of all implementing acts relating to trade into the Comitology regime, voting rules for the adoption of definitive anti-dumping, countervailing and safeguard measures would have been changed. This would mean that instead of a simple majority of Member States being able to block such measures, a qualified majority would be needed.

To mitigate this, we secured additional checks through the Appeal Committee in Article 5(5) and an 18-month transitional period where existing rules would continue to apply to definitive anti-dumping and countervailing measures. This last point was achieved despite considerable and vociferous opposition in Parliament and Council. The Commission also committed to a review of existing trade legislation, set out in an accompanying Declaration – a step which the Commission had strongly opposed.
ADOPTION OF MEASURES IN EXCEPTIONAL CIRCUMSTANCES (ARTICLE 7)

Article 7 allows for the Commission to adopt an implementing act in exceptional circumstances despite a negative opinion by the committee in order to avoid creating significant disruption to financial and agricultural markets. At the UK’s request, the Commission has prepared a statement explaining the limited circumstances in which this power will be used.

EXTERNAL AID

The European Parliament was keen for implementing acts relating to external aid programmes to be omitted from the list of acts which in principle will be subject to the examination procedure as it considered that such implementing acts should be adopted as delegated acts. The Regulation does not preclude whether individual decisions in this area should be adopted as implementing acts or delegated acts.

Overall the UK has made significant progress in securing a Regulation that ensures comprehensive and timely oversight of draft Commission implementing acts by the UK, and other Member States, while resisting changes which would have significantly affected management of several key sectors – notably financial services, taxation and trade – at the EU level. Consequently, when the Regulation comes for final agreement at the Education, Youth and Culture Council on 14 February, I believe the Government should vote for the Regulation and as such, I ask that the Committee lift the scrutiny reserve on this document.

3 February 2011

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

Thank you for your letter of 3 February. This was provided with insufficient time for consideration by the Justice and Institutions Sub-Committee before 14 February. We decided to clear this matter. Given that political agreement was reached on 1 December and the European Parliament voted in favour of a compromise text on 16 December, the delay in providing the update appears unnecessary and we would be grateful for an explanation, within the usual 10 day period.

On the substance of the agreement we welcome the simplification of the existing comitology procedures and the rebalancing of the Commission’s original proposal in favour of the Member States. We accept that giving the European Parliament a right of review is an acceptable compromise in order to achieve this result.

16 February 2011

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

Thank you for your response of 16 February to my letter seeking scrutiny clearance for the Regulation text. I am pleased to read that the Committee has lifted its scrutiny reserve on this dossier.

Firstly, please accept my apologies for not having kept you abreast of the developments regarding this Regulation in November and December. I agree that the delay in providing an update was unnecessary, particularly given the regular and positive contact this Department and the Committee had regarding this Regulation in the preceding months. I have asked officials to take steps to ensure this does not happen again and they will be in contact with Committee Clerks to discuss how this can best be done.

I deeply regret that you were unable to discuss the dossier in Committee ahead of Council on 14 February 2011, where the Regulation was formally adopted as an ‘A’ point. As scrutiny clearance had not been secured, the UK abstained in the vote. In the run up to the Council, I understand that officials did make regular contact with the Committee clerks to ensure that there would be sufficient time for members of the Committee to discuss the dossier ahead of 14 February. We understand that the Justice and Institutions Sub-Committee were unable to meet on 9 February as we had previously expected. The FCO was not informed of this until 3 February, the day my update letter was despatched. On receiving this news, my officials here and in Brussels attempted to have the ‘A’ point moved back to a Council day that would allow the scrutiny committee time to discuss the dossier. Unfortunately this could not be negotiated with the Presidency because the Regulation required co-signature with the European Parliament during plenary week and ahead of 1 March deadline.

I have asked my officials to look again at our internal processes. I apologise once again for errors made.
Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter of 1 March. This was considered by the Justice and Institutions Sub-Committee at its meeting of 9 March.

We are grateful for your apology for the delay in updating the Committee and for taking steps to prevent a similar problem arising in future.

10 March 2011

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

I am writing to update you on the rules of procedure for the Appeal Committee established under the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 (the “comitology’ Regulation) laying down the rules and general principles concerning the mechanisms for control by Member States of the Commission’s exercise of implementing powers. Although these rules of procedure are not formally caught by the Scrutiny Reserve Resolution, we are sending them to you given their importance to functioning of the overall comitology Regulation.

The new comitology Regulation provides for a committee of Member State experts and representatives to convene to discuss a draft piece of legislation. If this committee fails to reach a satisfactory conclusion, the new Regulation provides for an Appeal Committee.

Although the rules of procedure for both individual committees and the Appeal Committee are ultimately adopted by those bodies themselves, the Commission decided to consult Member States’ representatives on the arrangements so that the committees were not starting from a blank sheet of paper.

Based on these consultations, the Appeal Committee adopted its final rules of procedure at its first meeting on 29 March 2011, and the definitive wording was circulated by the Commission on 5 May 2011 (attached at Annex A).

These rules cover: rules for convening meetings (including timescales), the level of representation, quorum, documentation, how the opinion should be delivered and special arrangements for anti-dumping and countervailing measures. They are in line with the Regulation and much of the material is directly drawn from the Regulation itself.

We secured the following objectives during the discussions:

I) LEVEL OF REPRESENTATION

We have secured a provision that ensures representation in the Appeal Committee will be of a sufficiently high level, while retaining a satisfactory level of flexibility. The rules of procedure state (Article 1.5) that “as a general rule, representation should not be below the level of members of the Committee of Permanent Representatives of the governments of the Member States”. The UK could therefore be represented by Ministers, the Permanent Representative or the Deputy Permanent Representative, but retains the possibility to send lower-level officials. This is essential since it is not yet possible to foresee how often the Appeal Committee is likely to meet.

II) QUORUM

The rules of procedure require (Article 5.4) the presence of a simple majority of Member States in order to be able to vote. This ensures that important decisions will not be taken by a minority of Member States.

In addition, these discussions have enabled the UK to put across its views on elements which should be included in the rules of procedure for the individual committees on specific pieces of legislation. These rules will cover general rules for convening a meeting, including special arrangements on definitive anti-dumping or countervailing measures, the documentation to be submitted, ways in which the Committee will deliver its opinion, as well as issues on quorum and representation.

The Commission will now present the rules to the College of Commissioners for adoption, and send them to individual committees so that they can adopt their own rules of procedure based on the standard rules. I will send a copy to your Committee as soon as we receive it.

16 May 2011
Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter of 16 May. This was considered by the Justice and Institutions Sub-Committee at its meeting of 25 May.

We were interested to see the draft Rules of Procedure for the Appeal Committee established under Regulation 182/2011. We welcome the securing of your objectives in relation to the level of representation on the Committee and the quorum for it.

25 May 2011

INSTITUTIONS: CITIZENS’ INITIATIVE (8399/10)

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

Further to my letter of 29 July and your most recent letter of 8 October, I am writing to update the Committee on progress on negotiations of the European Citizens Initiative Regulation. The Belgian Presidency has prioritised the dossier, progress has been swift and the Council and European Parliament are close to reaching agreement at first reading. Trilogue negotiations between the Council, Parliament and Commission were completed on 7 December. The attached text will go to the General Affairs Council for political endorsement on 14 December, EP Plenary on 15 December and should be adopted by the Council as an A point before the end of the year.

The UK has secured a number of improvements to the original Commission proposal during the negotiation. Our key aim throughout was to ensure a workable petitioning system, whilst minimising the bureaucratic burden and cost of implementation. The key improvements cover the following areas:

I) MINIMUM AGE OF PARTICIPANTS (ARTICLE 3.2)
Although the European Parliament had wanted to reduce the minimum age to participate in an ECI to 16, agreement was reached on the voting age as the minimum age. This would tie in neatly with our preferred means of verification via the electoral roll.

II) MINIMUM NUMBER OF MEMBER STATES (ARTICLE 7.1)
A qualifying number of citizens from a least one fourth of Member States is required to submit a valid ECI. This represented a compromise between the EP’s position (one fifth) and the Council’s (one third).

III) MINIMUM NUMBER OF CITIZENS PER MEMBER STATE (ARTICLE 7.2)
The final text has maintained the system of degressive proportionality introduced in the General Approach.

There would be a fixed threshold for each Member State, proportional to population size based on a multiple (750) of each Member State’s number of MEPs. This system will allow a proportionately lower number of signatories for large countries like the UK.

IV) REMOVAL OF THE TWO STAGE ADMISSIBILITY CHECK (ARTICLE 8) & INTRODUCTION OF A CITIZEN’S COMMITTEE (ARTICLE 3.1.A)
The organisers now only need to seek approval from the Commission once before starting to collect statements of support for the proposed initiative. Previously, an organiser had to register their initiative with the Commission at the start of the process, but could only seek a view on admissibility after 300,000 signatures were collected. However, as an additional check to reduce the risk of bogus and trivial petitions, the organisers will need to form a citizens’ committee comprising at least 7 individuals from 7 different Member States to develop and submit their proposal.

V) RANDOMISED VERIFICATION (RECITAL 15 & ARTICLE 9)
Member States will not be required to verify every statement of support; instead they may verify a random sample. This reduces, but does not completely remove, the implementation burden from Member States. However I believe it provides a sufficient deterrent against submission of fraudulent and multiple statements.
VI) REVIEW CLAUSE (ARTICLE 21)

A review of the whole regulation will now take place after 3 years, rather than after 5.

VII) REDUCED VERIFICATION BURDENS FOR THE UK (ANNEX III PART A)

UK citizens are now exempt from the requirement to provide personal ID document data, as set out in Part B of Annex III, to prove their identity. UK citizens will be required to provide name, address, date of birth and nationality. The UK is required only to verify the signatories of residents in the UK.

Despite considerable progress during the negotiations, the proposal still places a considerable burden on Member States and some technical issues had not been resolved to our satisfaction. The government had wished for more movement in the following areas:

I) 12-MONTHS IMPLEMENTATION PERIOD (ARTICLE 22)

The final text sets the implementation period at 12 months which is in line with the General Approach. The European Parliament had argued strongly for a shorter timeframe of just 6 months, which thwarted our attempts to negotiate a longer time period.

We had argued that Member States that lacked existing centralised infrastructure to verify signatories would need additional time to bring in implementing legislation to set up new verification systems.

II) CERTIFYING ONLINE COLLECTION SYSTEMS (ARTICLE 6.2)

The final text stipulates that the Commission provide a common piece of software to ensure that online data collection complies with the EU Data Protection directive 95/46/EC. This is welcome. However it still seeks to have the relevant Member States certify that the online collection system is fit for purpose. We think this is unnecessarily burdensome to ask Member States to certify the online collection systems, as they will be based on the pre-approved software.

III) DATA PROTECTION (ARTICLES 12, 13A)

Each ECI will generate datasets containing over a million items of personal data. The UK has stressed the need for adherence to existing data protection principles and laws. The Commission has built safeguards and sanctions into the text, taking a cautious certification approach rather than a risk based approach to enforcement. However we are not satisfied the Commission has thought through all the risks. The creation of citizens’ committees could mean that data collectors for citizens’ initiatives will have establishments in more than one EU State. The interplay between different Member State data protection laws could lead to a rise in complex, cross-border data protection litigation or pressure for more harmonisation at the EU level, when the data protection directive is revised. We will monitor developments carefully.

On balance, the UK has made considerable strides in meeting its negotiating objectives. The Government has always supported the principle of the European Citizens Initiative. The Government’s own plans outlined in the Coalition agreement to introduce a national petitions system are testament to our belief in the need for greater democratic participation by citizens. However I remain convinced that the EU variant places an unnecessary burden on both Member States and citizens given the purpose and intent of the ECI. It is regrettable that there is insufficient support in Council to push for delay to iron out some of the remaining verification and data protection issues or to introduce a longer implementation period.

I am aware that the ECI remains subject to scrutiny. In light of the remaining concerns and the lack of support under QMV to improve the text further, I plan to abstain at Council on both substantive and Parliamentary scrutiny grounds.

Once the text is adopted, the government will step up its preparations for implementation. Our initial thinking suggests that the electoral roll provides the most comprehensive database with which to meet the minimum verification requirements of the Regulation.

The detail is still to be worked up by whichever Government department leads on the implementation phase. Ministers can update you again once our thinking on implementation has developed.

9 December 2010
Letter from the Chairman to the Rt. Hon. David Lidington MP

Thank you for your letter of 9 December, which was considered by the Justice and Institutions Sub-Committee at its meeting on 19 January. They decided to clear the document from scrutiny.

We are pleased that some of the burdens in the original proposal have been reduced. However, we agree that there are still outstanding issues with regard to data protection. You raise a concern over the implications for data protection of the establishment of citizens’ committees. This being the case, we find it strange that you are opposed to strong Member State oversight of collection websites. Would such oversight not reduce the likelihood of data protection problems in the first place, and therefore the likelihood that resolution of such problems would be complicated by the cross-border nature of the citizens’ committees?

21 January 2011

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

Thank you for your letter of 21 January. I was pleased to hear that the Select Committee on the European Union has cleared the European Citizens’ Initiative proposal.

I acknowledge your point that a Member State’s oversight of data collection websites for the purposes of petitions would be one way to protect their citizens’ data. However, this is not the only approach that can be taken to protect a citizen’s data. For example, organisers could ensure data protection compliance by using one pre-approved piece of software.

This being said, the fact that the Commission has already agreed to provide such a piece of software, in consultation with national experts from all Member States, makes the whole exercise of certifying collection websites by individual Member States rather redundant. I would argue that the Commission is imposing a ‘one size fits all’ solution, which places an unnecessary burden on Member States to certify each ECI regardless of the risk of the individual case. It also does not address all the problems that arise from having a cross-border citizens committee. In particular, those petitions collected by paper can still be shared across borders. The UK will continue to engage with the Commission regarding these issues and will seek to address them all ahead of implementation in March 2012.

15 February 2011

JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (18101/10)

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

Thank you for your Explanatory Memorandum of 21 December. This was considered by the Justice and Institutions Sub-Committee at its meeting of 19 January. We decided to retain the matter under scrutiny pending the results of further Government consideration and consultation.

Subsidiarity and opt-in

In order to meet the relevant deadlines we have given early consideration to the issues of subsidiarity and the UK opt-in.

Like you we consider that most of the proposal clearly complies with the principle of subsidiarity, although we also agree that the specific proposals to replace national rules on jurisdiction in disputes involving a defendant domiciled in a third country merit careful consideration. On present information we consider that this element of the proposal does comply with the principle of subsidiarity, particularly because simplification in this area can be seen to benefit EU citizens and to bring more equal conditions of competition between EU businesses.

We support a UK opt-in for the following reasons:

— As we highlighted in our Report on the Green Paper on the Brussels I Regulation (21st Report of Session 2008-09), there are areas where the current Brussels I Regulation should be improved, in particular by removing the opportunity for a party to a dispute to torpedo proceedings or arbitration by artificially exploiting the lis pendens rule.
Although the Commission proposal has flaws, we consider that the UK will be in a stronger position to seek improvements by participating in negotiations.

We do not believe that there is a serious risk that negotiations on the proposal as it currently stands will lead to unacceptable legislation.

Failure to opt in to the recast would itself create complexity for UK citizens and businesses.

SUBSTANTIVE ISSUES

Many of our comments reiterate points made in our earlier report.

Whilst we support the abolition of the procedure of exequatur we consider that the current safeguards should be available in respect both of recognition and the enforcement of judgments and that the defendant should be given prior notice before a judgment of a court of another Member State is enforced.

Whilst we accept that the EU can legislate in respect of the jurisdiction of EU courts to deal with disputes involving a defendant domiciled in a third country, and agree with the Commission on the lack of a realistic prospect of a multilateral agreement in the framework of the Hague Conference, we consider that the proposal need only provide minimum rules for the exercise of jurisdiction. Furthermore we would support a reversal of the Owusu case by giving an EU court discretion to decline jurisdiction in favour of a third country court which it considers more appropriate to deal with the case.

As indicated above, we consider it important to preclude the opportunity for a party to a dispute to “torpedo” litigation or arbitration. We accept in principle the Commission’s approach in respect of choice of court agreements and arbitration proceedings and can see merit, in other cases, of amending the lis pendens rule to give the first court to which a case is brought six months to determine whether or not it should exercise jurisdiction. We can also see merit in discretionary (but not mandatory) liaison between courts dealing with the same matter in parallel proceedings. However before reaching a concluded view we would be interested to know from you whether there is a significant problem in respect of cases which do not concern choice of court agreements or arbitration.

We note that neither the Commission’s impact assessment nor the Government’s tentative impact assessment accompanying its own consultation provides any assessment of the scale of the problem of the present law on provisional measures nor the impact of the Commission’s proposal in this area. We should be grateful for further information on these matters.

We would be grateful for your response to the issues raised in this letter but would be content for this to be done when you provide the results of your further consideration and consultation. We therefore do not require your response within 10 working days.

20 January 2011

PATENT TRANSLATION AND PROTECTION: IMPLEMENTING ENHANCED COOPERATION (9224/11, 9226/11)

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

Thank you for your Explanatory Memoranda. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 25 May 2011.

We have decided to retain them both under scrutiny.

Like you, this Committee has been a supporter of EU attempts to create a pan-European patent protection system which is acceptable not only to the Member States’ individual interests but also from industry’s point of view. The agreement of a system of uniform patent protection throughout the EU is important especially for the business sector, and we welcome this latest attempt based on enhanced cooperation involving 25 of the Member States as proof of the importance that the Member States also attach to this goal. Indeed, throughout our recent scrutiny of all the measures addressing this area of European cooperation, we have advocated the use of enhanced cooperation as an alternative if all Member States were unable to agree the way forward.
We note that the only substantial differences between the proposals considered in 2010 and these are the fact that these two Regulations are being pursued via enhanced cooperation the knock-on effect of which is that the unitary patent will be a species of patent emanating from the European Patent Convention system rather than, as previously attempted, a stand-alone purely European Union Patent.

Taking each individual proposal in turn, the Regulation dealing with the translation arrangements is, as you say in your Explanatory Memorandum, a straightforward reproduction of the same Regulation dealing with the EUP already cleared by this Committee during the course of 2010 and as such we are happy with its contents.

We also welcome the Regulation creating the unitary patent and we take this opportunity to express our support for your efforts to secure the Member States’ role in setting the renewal fees.

However, the major issue that remains unclear is the judicial supervision arrangements. While it is right that a patent without a Court within which to enforce it is effectively worthless, in reference to paragraph 30 of your Explanatory Memorandum, it remains unclear to us why you think it ought to be possible to reinstate “the explicit link between the patent regulation and agreement on the patent court”; in particular given the recent Court of Justice opinion ruling that the court agreement was incompatible with the Treaties. The Committee would welcome your views as to how you intend to take this matter forward. What suggestions will you be making to the other Member States to solve the judicial supervision arrangements?

If the Member States are unable to agree a solution to the judicial supervision arrangements to cover this latest effort within the European Patent Convention system, what would the Government’s attitude be to pursuing a purely EU based patent protection system?

We look forward to watching this latest effort to secure a EU patent protection system develop and considering your answers to our questions within the usual 10 day deadline.

25 May 2011

PUBLIC ACCESS TO DOCUMENTS (9200/08)

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

You wrote to the Ministry of Justice on 8 April 2010 informing us that you had decided to retain the above matter under scrutiny. You asked that we provide an update on the progress of negotiations as and when the legislative procedure in relation to the revision of Regulation 1049/2001 regarding public access to the European Parliament, Council and Commission documents (the Regulation) revives. Negotiations in the Council have not progressed since April 2010.

As there seems to be no prospect of a new Regulation being adopted in the near future, owing to the diverging views about the recast in the European Parliament and Council, the Commission published on 31 March 2011 a proposal to amend the existing Regulation solely to take account of Article 15(3) of the Treaty on the Functioning of the European Union (TFEU). Article 15(3) extends the right of access originally provided by Article 255 of the EC Treaty so that it now applies to all European Union institutions, bodies, offices and agencies, although this is limited in the case of the Court of Justice of the European Union, the European Central Bank, and the European Investment Bank to their administrative tasks. The proposed revision of Regulation 1049/2001 (which establishes the rules and procedure for administering the right of access) simply seeks to ensure that the Regulation reflects the expanded right given by Article 15(3). This proposal is entirely distinct from, and is without prejudice to, the wider ongoing recast process.

The Commission’s proposal (document 8261/1/11 Rev.1) was deposited in Parliament on 5 April. An Explanatory Memorandum has been sent to Parliament today setting out the Government’s position in relation to it. This proposal is a welcome development. I intend to submit a further Explanatory Memorandum explaining the Government’s position on the wider recast of the Regulation following a meeting of the Council Working Party on Information on 15 April, when the timetable for this process in the light of the Commission’s proposal of 31 March should be clearer.

12 April 2011
Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP, Lord Chancellor, Secretary of State for Justice

Thank you for your Explanatory Memoranda dated 3 and 16 May 2011. They were considered by the Justice and Institutions Sub-Committee at its meeting of 18 May.

We have decided to clear this matter from scrutiny.

We support the Presidency in proposing a non-binding document setting out the way forward for Member States to cooperate on providing assistance to those who fall victim to crime.

In relation to the specific content of the Roadmap, the Committee is particularly pleased to see the inclusion of Measure C—a Regulation on mutual recognition of protection measures for victims of crime taken in the context of civil proceedings—as this was a solution that the Committee expressed support for in our letter to you dated 15 July 2010 during the course of the scrutiny of the proposed European Protection Order.

Like you, we look forward to considering the individual legislative proposals as and when they emerge from the Commission.

20 May 2011

STATUTE FOR A EUROPEAN PRIVATE COMPANY (11252/08)

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

Documents on the above proposal were sent to the Scrutiny Committee in 2008, where the Committee cleared the proposal. I would now like to give you an update as the Hungarian Presidency aims to seek agreement at the Competitiveness Council on 30 May 2011.

Both the French Presidency in 2008 and the Swedish Presidency in 2009 sought agreement on this dossier. The compromise proposal in 2009 included a number of changes from the original proposal. For the UK this achieved our policy objective of removing the reference to directors’ duties which we felt would set an unhelpful precedent. Despite the best efforts of the Presidency and the Commission, Germany and a handful of other Member States were unable to support the compromise.

Contrary to expectations it now appears that the Hungarians may be able to come up with a proposal which Germany can support. Securing agreement on this is now a high Presidency priority, and the Commission are also pushing for agreement as it is the only remaining outstanding issue from the Small Business Act.

The aim of the proposal is to create a new form of company known as the European Private Company or SPE (Societas Privata Europaea), which would be an option alongside existing forms of company. The proposal does not aim to harmonise in the area of taxation, insolvency or employment, or any other aspect of law. Any precedents which may have had a detrimental impact on UK company law have been removed from the proposal. The new form of company will be completely optional for businesses to choose to use. The Government still believe that it is unlikely that many UK businesses will choose the SPE above the UK as our company law is already among the most suitable for small businesses in the EU.

Therefore subject to there being no significant policy changes, I suggest we continue to offer support to the proposal. Should other Member States be unable to accept the final compromise, the UK should obviously allow the proposal to fall once again.

I would like to draw the Committee’s attention to the Treaty base which is Article 352. This brings into question how the proposal fits with the EU Bill. Were negotiations on the proposal to continue until after enactment of the EU Bill, an Act of Parliament would be required before a Minister could vote in favour of any Article 352 decision in Council. However, given this proposal is uncontroversial, purely optional, and imposes no new burdens on UK businesses or citizens, I suggest we agree the SPE under the existing arrangements.

I hope that the Committee is able to support this approach in order for me to be in a position to vote in Council on 30 May.
TEMPORARY JUDGES OF THE EUROPEAN CIVIL SERVICE TRIBUNAL (8786/11)

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

Thank you for your Explanatory Memorandum dated 28 April 2011. It was considered by the Justice and Institutions Committee at its meeting of 18 May. We have decided to retain the matter under scrutiny.

As you are aware this Committee recently undertook an inquiry and published a subsequent Report looking at The Workload of the Court of Justice of the European Union (14th Report of Session 2010-11, HL 128). The section of the Report dealing with the CST’s ability to manage its current workload said: “The statistics and evidence relating to the CST do not indicate a problem with the institution and its ability to manage its workload. The CST is not only coping with its case-load but reducing it”.

At paragraph 56 of the Report we concluded that “The CST is a success story and the Committee has no concerns regarding its ability to manage its case-load”.

However, during the course of his evidence to us the President of the Civil Service Tribunal, Mr Paul Mahoney, noted a certain fragility of the Civil Service Tribunal in relation to its small roster of judges. He argued that if one of the seven were ill, or unavailable for another reason, this would have a greater impact on the CST than it would on a larger court. The President suggested that this problem could be overcome by drafting in retired ECJ judges on an ad hoc basis (see Appendix 4 of the Report at page 56).

We welcome this proposal which seems a simple cost-effective method of dealing with delay in the Civil Service Tribunal.

We would welcome updates from you on the ongoing discussion of this proposal in the Working Groups mentioned in your Explanatory Memorandum and we look forward to considering your answers to our questions within the usual 10 day deadline.

THE DRAFT AGREEMENT ON THE EU AND COMMUNITY PATENTS COURT AND DRAFT STATUTE

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

Thank you for your Explanatory Memorandum dated 30 March 2011 which was considered by the Justice and Institutions Sub-Committee at its meeting on 27 April. In light of the Court of Justice’s view that the agreement is incompatible with the Treaties we would welcome your views on how this matter will be taken forward.

28 April 2011

TFEU: ACTIVITY REPORT FOR THE JUDICIAL APPOINTMENTS PANEL (ARTICLE 255)

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

I am writing to inform the Committee of a recent report published by the Judicial Appointments Panel (the Panel) established under Article 255 TFEU on its activity since it came into operation on 1st March 2010.

The activity report is only published in French so I attach an unofficial summary of it in English for the Committee’s information, as well as the report. The report gives statistics on the Panel’s activity in its
first year and provides an insight into the preparation and consideration of applications. It also gives 
clarification of the criteria used in assessing the suitability of candidates.

Once the panel have given their opinion, Member States have an opportunity to comment on the 
recommended candidate. Under the Treaties, the decision to approve a judicial appointment is to be 
taken by the governments of the Member States.

We will be clarifying with the Panel whether they will publish a report annually.

I hope you find this information useful.

21 March 2011

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

Thank you for your letter of 21 March enclosing the report of the Panel and your summary of it. We 
found the report helpful, in particular in explaining the way in which the Panel undertakes its 
functions, and we welcome its publication as a contribution to openness in EU business and thus the 
legitimacy of the Panel.

06 April 2011

TFEU: IMPLEMENTATION OF ARTICLE 260(3)

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

I am writing to inform the Committee of a recent Commission Communication on the 
implementation of Article 260(3) TFEU. This sets out Commission policy on fining Member States for 
breaches of EU law. The enclosed Communication is not of a type normally deposited for formal 
scrutiny, but I am sending it to you because of its wider significance.

The Communication has one clear aim which is to set out how the Commission intends to apply 
Article 260 (3) TFEU. This is a new Article introduced by the Lisbon Treaty. Under this article, the 
Commission can request in cases of non-notification of national measures implementing directives 
that the Court of Justice impose a fine on a Member State on the first occasion that the Commission 
brings the matter before the Court. This means the possibility of fines in relation to non-notification 
of transposition of directives arises significantly earlier and without the Commission having to go to 
the Court of Justice twice as was previously the case.

The Commission sets out its general approach to implementing Article 260 (3) TFEU. It will consider 
three principles in determining the level of fine that it will seek: the seriousness of the infringement; 
its duration and the need to ensure that the sanction itself is a deterrent to further infringements.

Article 260(3) TFEU gives the Commission a discretionary power to specify the amount of the fine to 
be paid by a Member State and to seek a lump sum and/or penalty payment “when it deems 
appropriate”. In the exercise of this power, the Commission intends to seek fines in all non-
notification cases as a matter of principle. This applies to both total and partial failure to notify 
measures transposing a directive. Partial failure includes where a Member State has failed to notify 
transposing measures in relation to a part of its territory, as well as where it has failed to notify 
transposing measures in relation to a particular obligation under a directive.

In determining the amount of the fine, the Commission has decided that it will be in line with the 
detailed method set out in an earlier Commission Communication of 13 December 2005. In 
calculating the duration of the infringement, the Commission will not take into account the period 
before the Lisbon Treaty came into force (1st December 2009). The Commission intends to seek 
fines in respect of all current infraction proceedings involving non-notification apart from those that 
have already been referred to Court.

The main purpose behind Article 260(3) TFEU is to make Member States transpose directives in 
good time, an aim which the Government supports.

10 January 2011

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

Your letter of 10 January was considered by the Justice and Institutions Sub-Committee on 26 
January. We were very grateful for the information that you provided.
THE TERM OF PROTECTION OF COPYRIGHT AND CERTAIN RELATED RIGHTS
(12217/08)

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

I write with reference to your letter of 5 March 2010 in which you kindly agreed to clear the proposal to increase the copyright term of protection for sound recordings to 70 years.

You may wish to know that matters have progressed and it is increasingly likely that the Hungarian Presidency will call a vote in Council. We recently learnt that Denmark has changed its position and is now in favour of the proposal. The Danish shift in position is sufficient to break the blocking minority. The Presidency has previously confirmed that they stand ready to call a vote if it is clear that the blocking minority has fallen. In this event the Presidency may move quickly to a vote in Council.

I will be glad to write to you again with an update on the issue should a vote be held.

15 March 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 15 March. This was considered by the Justice and Institutions Sub-Committee at its meeting of 30 March.

We are grateful for the advance warning that this matter, which has already been cleared, might now come to a vote in Council.

If, contrary to expectations, further negotiations on the text are necessary within the Council or with the European Parliament we would expect a further Explanatory Memorandum.

We do not expect a reply to this letter.

1 April 2011