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

This edition includes correspondence from 1 June to 30 November 2011.

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

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Thank you for your Explanatory Memorandum of 14 July. This was considered by the Justice and Institutions Sub-Committee at its meeting of 14 September. We decided to hold these proposals under scrutiny.

We note that the Agreement does not make any provision for the EU to lodge a declaration of competence. We regard a declaration as valuable in providing legal certainty.

We should be grateful for further information detailing the nature of your doubts concerning the legal basis.

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

15 September 2011

Letter from Baroness Wilcox to the Chairman

I am writing in response to your letter of 15 September, in which you requested further information on the legal basis of the Anti-Counterfeiting Trade Agreement (ACTA).

At the time of my original letter to you, we were considering whether Article 114 of the Treaty on the Functioning of the European Union (TFEU) needed to be cited in addition to Article 207 TFEU. We are now satisfied that in so far as Article 114 TFEU may be considered relevant, it is no more than ancillary to Article 207 TFEU in relation to the ACTA agreement.

I was pleased to note that the Explanatory Memoranda attached to the European Commission’s proposals made a statement about the division of competence between the EU and the Member States in the field of criminal enforcement, following the clear preferences of the Member States including the UK. In particular, the Commission has not proposed exercising shared competence in
the field of criminal sanctions, which I very much welcome. The House of Lords Select Committee on the European Union has requested an EU declaration of competence in addition. My officials will discuss this issue with the European Commission.

The Presidency is keen to secure agreement on the Council decision for EU signature shortly, to allow signature with other international partners. I would therefore be grateful if the Committee would consider clearing these documents from scrutiny.

5 October 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 5 October. This was considered by the Justice and Institutions Sub-Committee at its meeting of 12 October. We decided to clear these proposals from scrutiny.

In doing so we agree with you that the common commercial policy provides an adequate legal basis for these proposals.

We are pleased that you will pursue our suggestion of a declaration of competence. Ideally this should be incorporated into the Agreement to provide maximum legal certainty and transparency.

We should be grateful for an update on the outcome of your discussions with the Commission in due course.

14 October 2011

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

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

Thank you for your letter dated 16 May 2011 which was considered by the Justice and Institutions Sub-Committee at its meeting of 8 June 2011. We have decided to clear this matter from scrutiny. We are grateful for the information you included and look forward to receiving the full Council Conclusions.

Your letter left unanswered our question about how the Commission’s work regarding the Charter relates to the work of the European Union Agency for Fundamental Rights and whether in compiling their Report the Commission drew on the work of this agency? We look forward to receiving your answer to this question within the usual 10 day deadline.

10 June 2011

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

Thank you for your letter dated 25 May 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 29 June 2011.

We have already cleared this matter from scrutiny.

Our most recent letter to you on this matter dated 10 June did not take into account your reply dated 25 May in which you answered the Committee’s question regarding the interaction of the work of the Commission and the European Agency for Fundamental Rights. We apologise for this administrative oversight and are grateful to you for the information you provided.

30 June 2011

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

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

In my capacity as Chairman of the House of Lords EU Select Committee I am writing to ask if you are able to furnish the Committee with a definitive list of those measures in the field of police co-
operation and judicial co-operation in criminal matters, adopted before the coming into force of the Treaty of Lisbon, which remain subject to notification by the United Kingdom pursuant to Article 10(4) of Protocol 36 to the European Union Treaties.

This matter has been the subject of interest and questions in the House for some time, in particular by Lord Bowness both in his capacity as a Member of the House (26 April Question for Written Answer, and a supplementary question on 10 May) and latterly in the debate on the UK’s opt-in on June 22 as the Chairman of the Justice and Institutions Sub-Committee. During the course of the debate it was suggested by the Minister, Baroness Browning, that a list of these measures would be forthcoming soon. I understand that the Chairman of the Home Affairs Sub-Committee, Lord Hannay of Chiswick, has expressed interest in this subject and would also welcome your response.

4 November 2011

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

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

You wrote to me on 20 May recommending that the UK should not opt in to these proposals and asked a number of questions about the detail of the proposed Regulations.

Before answering your questions I can confirm that the Government has decided not to opt in to these proposals and that a written ministerial statement to that effect has been made today. I enclose a copy of that statement for your information.

My answers to each of your questions are as follows:

DO YOU CONSIDER THAT THE DISTINCTION BETWEEN MAINTENANCE OBLIGATIONS AND MATRIMONIAL PROPERTY IS SUFFICIENTLY CLEAR IN THESE PROPOSALS?

As matters stand the proposals themselves are clear that “maintenance” is outside scope. However there is an issue about how the European Court of Justice might in the future develop the definition of maintenance which currently derives chiefly from the case of Van den Boogaard v. Laumen (case C-220/95). The key concern is to ensure that there is no attempt to define maintenance within these instruments and, rather, rely on the jurisprudence of the Laumen decision which seems to work well.

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 PARTNERSHIPS. DO YOU AGREE?

Certainly, neither marriage nor civil partnership in the UK has in itself the universal effect of altering the property ownership of each party. However it is unclear whether that is the case in the Commission’s proposal. In the case of de Cavel v. de Cavel (Case C-143/78) the ECJ considered the meaning of “rights in property arising out of a matrimonial relationship”. The Court concluded that the concept included “proprietary legal relationships between spouses resulting directly from the matrimonial relationship or the dissolution thereof”. Therefore the fact that proprietary legal relationships might not arise out of the contracting of a civil partnership does not mean that those arising out of its dissolution are outside scope. We believe the Commission’s intention will be clarified during the negotiations. As the UK will not be participating there will be no effect on UK civil partnerships.

WHAT ARE YOUR VIEWS ON USING THE SAME CONNECTING FACTOR TO DETERMINE APPLICABLE LAW AND JURISDICTION, OR ALTERNATIVELY LINKING JURISDICTION TO THAT TO DEAL WITH DISSOLUTION OF THE RELATIONSHIP, THE MAINTENANCE, OR THE SUCCESSION (IN THE CASE OF A DECEASED PARTNER OR SPOUSE)?

The provisions of the matrimonial property regimes instrument do allow parties to choose to align their chosen applicable law with the jurisdiction (Article 5(2)). However, that choice is not available to registered partners. Their applicable law must be that of the State where the partnership was registered (Article 15) but they are not able to choose the same State as the place of jurisdiction. Under Article 5 the State of registration is the final default position. The Government sees no good
reason to deny registered partners that choice given that the State of registration will undoubtedly “know” the concept of a registered partnership.

I consider it unlikely that other Member States will share the Committee’s views that alignment of the jurisdiction and the applicable law should be an absolute priority. I think it is also unlikely that they would agree that the issues identified by the Committee are indeed problems (albeit that the UK might consider them as such). From previous experience and the initial reactions during these negotiations they are likely to view identification of the best jurisdictional rules as a separate matter from the identification of the applicable law rules, seeing the latter as essentially a “portable” matter, and such portability as desirable in a Europe founded on free movement. They would be likely to see an insistence on the two being aligned as either undermining predictability of applicable law (because it would need to change based on change in jurisdictional conditions), or affecting the quality of the jurisdictional connecting factors chosen (because they would reflect the availability of the applicable law not the connection of the couple to a particular territory).

Your Committee also raises the issue of aligning jurisdiction with that in divorce and maintenance. Article 3 of each proposal aims to align the succession jurisdiction for the couple with that of the succession in general. The UK has already suggested that Article 4 of each proposal (the jurisdiction of the divorce/dissolution court) should be available whether the couple agree to that jurisdiction or not. Certainly, from a UK perspective, it would be desirable that there is as much alignment of jurisdiction as possible between the cases arising out of these proposals and the divorce/dissolution they are founded upon, and where possible the maintenance jurisdiction. The Government believes this has not been given adequate consideration in the draft proposals.

**Does the fact 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 proposed Regulation in that area preclude the UK from opting-in to these legislative proposals (because the UK has not opted into the Succession proposal), 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?**

I agree this is a difficult issue. All three proposals are intended to operate in a properly co-ordinated way and this would not be possible if a Member State continued to operate its own private international law rules in the succession context. It is not easy to imagine how provisions might be designed purely to take account of the UK’s difficulties with the succession proposal. However as the UK is not opting in to the matrimonial property and registered partnership property proposals this point will not now arise.

**One of the 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?”**

Habitual residence is a common connecting factor in many Regulations and how appropriate it is depends upon the context of the individual instrument. As your Committee highlights, the way habitual residence has been used in the Commission’s proposal on succession does cause particular problems. That is because it is the sole connecting factor and has no appropriate clarification. This causes particular problems in terms of legal certainty for those who divide their time equally between two Member States or for individuals who may have recently moved to another Member State, perhaps on a work secondment, and become habitually resident there, but where the application of the law of that Member State would be inappropriate in the light of the continuing and overwhelmingly strong connections with the Member State from which they may have just moved. While some problems may arise in a broadly similar way in the matrimonial property and registered partnership proposals, in particular in relation to the division of property on death, different considerations apply because the jurisdiction rules in these proposals are broader and the issues cover wider circumstances than death.
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.

The Government’s initial assessment is that the following areas are likely to be affected:

— (a) Property held subject to a joint tenancy – unlike the succession proposal, joint tenancies are not excluded from scope of these proposals. This raises the particular concern that, although excluded from the succession proposal, a joint tenancy between spouses or registered partners will nevertheless be taken as part of succession matters as between those persons and thereby be subject to the applicable law of another state. Because of the specific context of these proposals (succession as between spouses or registered partners rather than generally) we are not confident that it would be possible to negotiate the exclusion of this category from the proposals. Although Article 1(3)(d) of the matrimonial property proposal and Article 1(3)(e) of the registered partnership proposal exclude “succession rights of a surviving spouse” this does not cover joint tenancies and other interests which devolve by survivorship.

Even if it was possible to negotiate an exclusion it is unlikely that the adverse impact on property law in relation to succession might be mitigated. We have not been able to identify “succession” issues suitable for inclusion within the scope of these proposals and which should therefore properly fall outside the scope of the succession proposal and, on the other hand, not be determined in accordance with our national property law.

— (b) Interests subject to a trust – in particular beneficial interests under a discretionary trust. It is unclear whether or not these are included in the scope of the proposal.

— (c) Forms of ownership of a business between spouses/registered partners – although “companies set up between spouses” are excluded by Article 1(3)(e) of the matrimonial property proposal (and the registered partnership proposal has an equivalent provision), it remains unclear what sort of companies are included within this category. It appears that the Commission had in mind “commercial companies”, but in some Member States there is a form of company holding which is a “family company” where the ends are not necessarily commercial in the usual way. It is not apparent why other forms of business sharing are included in scope while “companies” are not. Further, it is not clear what extent of spousal/registered partnership element is required – for example, whether the exclusion is designed to catch the small shareholdings of each spouse in a publicly listed company.

— (d) Pensions – the Commission has indicated that pensions are not within scope of the proposals, but this was on the basis that “pension rights relate to the relationship between one spouse and a public authority”. It remains unclear what the position is in relation to private pension schemes.

It is difficult to be more specific about the areas of property holding likely to be affected at this stage precisely because of the lack of certainty as to what “matrimonial” or “registered partnership” property regimes mean at EU level, and as to what the exclusions really encompass. It is clear from the first working group meetings that a number of Member States are concerned about the potentially broad scope, especially as it affects the rights of third parties.

In relation to the possibility of limiting the scope of the proposals in order to alleviate concerns, that is also very difficult to assess where that scope is so unclear in the first place. However, from the point of view of dissolution of a partnership or marriage, the existing exclusions already cause difficulties from the point of view of our law because of the wide discretion our courts have in readjusting provision, in particular in identifying “resources” available to each party. For example our courts would certainly take into account gifts and interests under trusts, as well as family companies, in coming to a decision. That is subject to the meaning of maintenance in EU law, as discussed above. Therefore, exclusions may alleviate some difficulties (for example, in relation to succession cases regarding spouses) but cause others.
AS A SUBSIDIARY MATTER WE WOULD BE GRATEFUL FOR FURTHER INFORMATION AS TO HOW THE PROPOSAL WOULD AFFECT THE UK SYSTEMS OF LAND REGISTRATION.

Article 1(3)(f) of the matrimonial property regimes proposal indicates that it does not include within scope “the nature of rights in rem relating to a property and the disclosure of such rights”. Article 1(3)(g) of the registered partnership proposal contains the same exclusion. The reference to “disclosure of such rights” is a reference to systems such as land registration in the UK and so the proposals do not affect the existing systems and their requirements. Were the UK to participate in the proposals, it would be necessary to consider carefully the possibility (reflected in Article 35(2) and (3) of the matrimonial property proposal and the registered partnership equivalent) of introducing legal requirements on couples to notify third parties of the existence of their property regime, and/or a system of registration, which might include amendments to the land registration system to enable the existence of such regimes to appear on registers. In short, the proposals do not require changes to existing registration systems, but the effect on third parties should the UK participate would require consideration of whether changes were in fact desirable.

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. DO YOU ENVISAGE A SOLUTION BEING FOUND IN AMENDMENT OF THIS PROPOSAL OR THE PROPOSAL ON SUCCESSION?

In those Member States which have a matrimonial property regime, it is customary on the termination of a marriage on death for those assets which fall within the scope of such a regime to be distributed in accordance with the law applicable to that regime. Only once that has been done will the rest of the estate fall to be dealt with in accordance with the generally applicable law of succession. This practice is well established in those Member States and does not generally appear to give rise to problems. This is not the current situation within the UK where in principle the applicable law of succession generally governs the distribution of the whole of the estate. The exceptions to this relate to certain property rights, such as joint tenancies, which are dealt with under our law of property. On this basis it is not at all easy to envisage how these proposals, in any form, might safely operate without either undesirably fragmenting our current arrangements on succession or disrupting the operation of our national property law. It is equally difficult to envisage amendments to the proposed Regulation on succession which would overcome this intractable problem of classification.

DO YOU CONSIDER THAT THERE IS SCOPE IN LIMITING THESE PROPOSALS TO JURISDICTION, RECOGNITION AND ENFORCEMENT?

The Government does not consider that there is such scope. Rules on applicable law are likely to be non-negotiable for other participants in these negotiations. Further, other Member States currently make use of applicable law rules in these matters and will continue to do so regardless of whether or not there is a Regulation in the area. There is, therefore, at least an advantage in having uniform EU rules (whether or not the UK participates) in order to make the law applied predictable (and even subject to a range of choices) where UK citizens find themselves subject to proceedings in other Member States.

WILL DECISIONS OF NOTARIES PUBLIC/AUTHENTIC INSTRUMENTS PRODUCED BY NOTARIES BE ENFORCED AS IF THEY WERE DECISIONS OF A COURT?

Authentic instruments are certainly subject to the recognition and enforcement regime of the proposals (Article 32 of the matrimonial property regime proposal and Article 28 of the registered partnership proposal) and there is no specific restriction relating to whether these have been drawn up by a notary. However it is becoming clear from the negotiations on the proposed Regulation on succession that under that instrument the only notarial decisions that will be recognised and enforced throughout the EU on the same basis as court decisions are those which emanate from those few Member States where notaries are effectively tasked with undertaking judicial functions in the succession context. Such notaries will have to comply with the rules of jurisdiction contained in that instrument. On this basis it is generally accepted that their decisions should be entitled to be treated in the same way as court judgments. The generality of notarial decisions, expressed in the form of authentic instruments will not be treated in this way and will only have the legal effects which they have in the Member States where they are made. Generally speaking these effects are evidentiary in nature. Although the negotiations on the proposed Regulation on succession have not been concluded, it seems reasonable to assume that broadly similar conclusions will be adopted in the context of these proposals.
In your letter of 20 May you also asked for an update on the results of our consultation on these proposals and sight of our Impact Assessment (IA).

Following the publication of these proposals my Department consulted more than 100 individuals and organisations across a number of areas including the judiciary, legal professions, academics, business and finance and the charity and advice sectors. The consultation paper was also available on the Justice website. Of the 15 responses received, 14 commented specifically on the opt in and 12 recommended the UK should not opt in. Most of those who responded agreed with the concerns that had been highlighted in both the consultation paper and the Explanatory Memorandum. In addition the proposals were discussed at a special meeting of the Lord Chancellor’s Advisory Committee on Private International Law chaired by Lord Mance. The judges, lawyers and academics who attended agreed unanimously that the UK should not opt in.

An initial IA was produced for the consultation on these proposals and I enclose a copy. The majority of those consulted agreed with the conclusions in this IA that UK participation was likely to lead to increased costs. For individuals this would be because of the possible fragmentation of jurisdiction between courts dealing with different aspects of financial provision on divorce or dissolution or in cases of succession. Costs for individuals would also likely increase if foreign law was to be applied in family cases because of the need to use experts to prove that law. For third parties there would be increased costs in establishing the existence of the relevant applicable law and applying it to any contract with the couple. For the Government costs would be generated through the need to change the legal systems of the UK and to train judges and court staff. Other costs would arise, as your Committee identified, if the UK had to create a registration system so that third parties could be aware that their transaction may be affected by the application of a foreign law. The IA also identified possible benefits such as the ability of parties to apply a different law and in some circumstances to have a choice of jurisdiction if they wished and easier recognition and enforcement of decisions across borders. Interestingly, however, some of those consulted were not convinced such benefits would arise.

I note that while your Committee took the view that the UK should not opt in to these proposals you considered that we should contribute to the negotiations with a view to achieving Regulations to which the UK could opt in later. Given the significant differences between the legal systems of the UK and most other Member States I believe that it is unlikely that the negotiations could be influenced to a sufficient extent to make the terms of any amended proposals acceptable. Nevertheless we will follow the negotiations carefully to protect UK interests.

30 June 2011

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

Thank you for your letter of 30 June. We are grateful for your full response to the issues we have raised, and the Government’s Impact Assessment. We decided to retain this matter under scrutiny pending the development of negotiations.

We welcome the fact that the Government, in line with our suggestion, have not opted in to these proposals and note that the majority of stakeholders also oppose the UK opting in.

Like you we consider that the nature of the UK property and succession regimes make it extremely difficult to formulate proposals which can apply in the UK without unacceptable disruption to UK law in these areas. Therefore we agree that the prospect of the UK deciding to opt in to the adopted Regulations is remote.

Subject to that, it is opportune to record some more specific areas of concern to us, as they emerge from our correspondence, in order to inform any negotiations that the UK might enter into and to inform any possible future opt-in decision.

SCOPE OF THE PROPOSALS

Thank you for drawing our attention to the cases of Van den Boogaard v Lauman and de Cavel v de Cavel, interpreting wording of the Brussels Convention similar to that found in these proposals. We are not confident in relying on these cases as aids to interpretation of these proposals. We note too your concern that the Court of Justice may depart from its Van den Boogaard judgment and your expectation that the Commission will provide further clarification of the civil partnership proposal notwithstanding the Cavel judgment. We therefore consider that both proposals should include more precise delineation of their scope and more precise definitions of their exceptions in respect of
maintenance. Like you we would favour a broad definition of maintenance to limit the disruptive impact of the proposals on UK law.

JURISDICTION

We note that other Member States do not prioritise the alignment of jurisdiction and applicable law. However, we remain of the view that the overall objective should be to align, as far as possible, the rules of jurisdiction for matrimonial property to those for divorce, maintenance and succession; and that as far as possible courts with jurisdiction should apply the law of their own Member State.

RELATIONSHIP OF THESE PROPOSALS WITH THAT ON SUCCESSION

We note and agree your assessment that it would be very difficult in the absence of substantial changes to exercise the opt-in to either of these proposals without doing so for the succession proposal.

USE OF HABITUAL RESIDENCE AS A CONNECTING FACTOR TO DETERMINE JURISDICTION OR APPLICABLE LAW

We note your assessment that the problems of lack of certainty arising from the use of the concept of habitual residence as a test for determining jurisdiction are less acute than in the succession proposal. Nevertheless we consider that greater clarity in defining habitual residence is desirable, not least because this would reduce the potential for litigation.

KEY AREAS OF UK PROPERTY LAW ADVERSELY AFFECTED BY THE PROPOSALS

We are grateful for the identification of key areas of UK property law that would be adversely affected by the proposals. We regard solutions to these as imperative if the UK is to consider opting in.

AUTHENTIC INSTRUMENTS AND DECISIONS OF NOTARIES

We note the progress that has been made in negotiation of the succession proposal where the same issue arises. However, even if those negotiations are reflected in these proposals there will still be some instances where authentic instruments and a few other notarial decisions would have to be recognised and enforced. We remain wary of this at present because of the absence of sufficient mutual confidence that such decisions are made with full notice to the parties affected and in full knowledge of the facts.

We do not expect a reply to this letter.

20 July 2011

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

I am writing formally to provide you with a copy of the response paper in relation to the Government’s consultation on these proposals conducted between 15 April 2011 and 20 May 2011. A copy is attached to this letter [not printed].

I wrote to you on 30 June 2011 to confirm that the Government had decided not to opt-in to these proposals. As I said at the time, because of the significant differences in the legal systems, it is unlikely that the UK will participate in these proposals post-adoption. However, we will monitor the negotiations to ensure that the interests of the UK are protected.

I will keep you updated of any significant developments on these proposals.

28 November 2011
Letter from the Chairman to the Rt. Hon. Nick Herbert MP, Minister of State for Policing and Criminal Justice, Ministry of Justice

Thank you for your Explanatory Memorandum of 29 September 2011. This was considered by the Justice and Institutions Sub-Committee at its meeting of 19 October. We decided to clear the matter.

In doing so we support the development of EU judicial training which fully respects the role of Member States and the independence of the judiciary.

We would however be grateful for further information, within the usual 10 days, on the following:

— Do you consider that the objectives set out in this Communication can be achieved without identifying the specific increase in financial resources required?

— You indicate in paragraph 16 of your Explanatory Memorandum that any financial implications fall upon the EU. Is this consistent with the acknowledgement in the Stockholm Programme that Member States will need to provide financial backing; and the Commission conclusion that all actors will need to take appropriate action, including the setting of budgets?

21 October 2011

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

Thank you for your letter of 21 October to the Minister of State for Policing and Criminal Justice giving clearance to the Commission’s Communication on Judicial training. In your letter you raise two specific questions:

— Do you consider that the objectives set out in this Communication can be achieved without identifying the specific increase in financial resources required?

— You indicate in paragraph 16 of your Explanatory Memorandum that any financial implications fall upon the EU. Is this consistent with the acknowledgment in the Stockholm Programme that Member States will need to take appropriate action, including the setting of budgets?

I am replying as the Ministry of Justice Minister responsible for EU business.

Stepping up training does not necessarily mean more funding and the Commission recognises this - the Communication calls for increased training opportunities but through existing national and EU-level training institutions. One suggestion, for example, is for exchanges between Member States, which could be part of training schemes that are already in place. The Communication is quite specific on how the Commission envisages to achieve the increased financial support - by reinforcing this activity as a priority in its existing work programmes; by focusing criteria on the development of practice oriented, large-scale and long-term projects; and by improving accessibility of European funds, rather than by calling for budgetary increases.

Current EU funded programmes already include judicial training as a funding priority, and the overall budget for these programmes has already been set under the current EU Financial Perspective covering the period up to 2014. The main shortcoming of these programmes has been not the level of available funding, but rather its accessibility to eligible organisations, and we welcome the Commission’s commitment to address this.

Paragraph 1.2.9 “Financing” of the Stockholm Programme also makes it clear that the Programme should be financed within the headings and ceilings of the current financial framework and that many of the measures and actions can be implemented through a more effective use of existing instruments and funds.

To answer your second question – there is no acknowledgement in the Stockholm Programme that Member States would need to increase their, or the EU’s, budgets for this activity. The Programme
does call for increased training opportunities but it has specified that this should be done through existing national and EU-level training institutions. It acknowledges that the EU Member States have the primary responsibility in this respect, but is not prescriptive as to how they should approach this. It also emphasises that the Union must give their efforts support and financial backing and also be able to have its own mechanisms to supplement national efforts. This does not necessarily translate into increased funding, and especially in the current economic climate Member States and the EU should be looking at how to utilise existing funds more efficiently, cut out bureaucracy and wastages.

Domestically, training can be incorporated within existing training programmes and within existing budgets, supplemented by available EU level funding and activities – for example through increased participation in the European Judicial Training Network sponsored training and exchanges. There is also much that can be done to improve the capacity of UK training providers to bid successfully for available EU funds – for example improving the knowledge and understanding of the applications processes and drawing on existing expertise from successful bidders.

The MoJ is already working to increase information sharing and the quality of UK bids and organises annual stakeholder events for all interested/eligible organisations with participation from the European Commission’s funds managers to improve understanding of the application processes, exact requirements for project proposals, share best practice and provide networking opportunities. Planned improvements on the Commission’s website and awareness raising activities would be also beneficial.

7 November 2011

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

Thank you for your letter of 7 November. This was considered by the Justice and Institutions Sub-Committee at its meeting of 23 November.

The Committee understands the reluctance of the Government to increase either the national or EU budget devoted to judicial training and agrees that improvement should first be sought through reprioritisation of existing funding and its efficient use.

However we remain sceptical that the objectives set out in this Communication can be achieved without at least identifying the costs involved, even if those costs are to be met within existing EU and national budgets. This is particularly so given statements in the Communication that Member States should commit to reinforcing their financial contribution to the EJTN (Part 4 of the Communication) and that the funding provided between 2007 and 2010 to support judicial training is not now enough (Part 5 of the Communication).

We do not expect a reply to this letter.

24 November 2011

COMITOLOGY: STANDARD RULES OF PROCEDURE FOR COMMITTEES UNDER REGULATION (EU) 182/2011

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 update you on the rules of procedure for ordinary committees 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, as promised, sending them to you given their importance to the 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. The rules governing an individual committee of Member State experts is decided by that committee when it is first convened. However, the Commission decided to consult Member States’ representatives on the arrangements for ordinary committees so there was a common basis from which they can work. The rules for these committees will follow the template of the Standard Rules of Procedure, which were published in the Official Journal of the European Union on 12 July 2011 (please find attached) [not printed].
The UK was involved in the discussions on the Standard Rules of Procedure and some of our suggestions were included in the final text. For example, the UK secured a provision at the end of Article 7(3) that ensures a simple majority of committee members can prevent the Chair of the committee inviting a third party or expert, with whom the committee is not comfortable. These discussions also allowed the UK to make clear its views on what should be considered by an ordinary committee when they first convene to decide their particular rules of procedure. For example, the UK argued that where tax matters arise in a non-tax committee, that committee should look to hold joint meetings with the relevant tax committee.

The rules of procedure include 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.

2 August 2011

Letter from the Chairman to the Rt. Hon David Lidington MP
Thank you for your letter of 2 August which was considered by the Justice and Institutions Sub-Committee at its meeting of 14 September.

The Committee noted that the new standard rules for comitology committees differ in minor respects from those previously in force, with the bulk of the changes being those needed to ensure consistency with Regulation 182/2011.

We do not require an answer to this letter.

15 September 2011

COMMISSION ANTI-FRAUD STRATEGY (12141/11)

Letter from the Chairman to Justine Greening MP, Economic Secretary, HM Treasury
Your Explanatory Memorandum on this Communication and the accompanying Action Plan were considered by the Justice and Institutions Sub-Committee on 14 September. Thank you for your account of these documents.

Like you, we welcome these Commission initiatives. The strategy provides a sound basis for future action, based on sensible principles and on identifying prevention as the priority. We share your concerns about the need to tailor initiatives to specific spending programmes and to consider value for money, and would be cautious in relation to any proposal for EU measures to set criminal penalties.

We note that the Commission is already active in the area of combating fraud. We have under scrutiny the proposals for reform of OLAF and the use of criminal law to combat fraud. We will examine any further specific proposals in this field on their merits, but now clear the present document from scrutiny. No reply to this letter is expected.

15 September 2011

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

Letter from the Chairman to the Rt. Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice
Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee at meetings on 9 and 23 November. We are grateful for your summary of the proposal and the Commission’s case for proposing it, and for your detailed (though preliminary) assessment of its implications.

This is clearly an important proposal, the culmination of some ten years work by the Commission and others in the area of general contract law, and the first proposal for substantive law in that area. It is clear from comments made by stakeholders during the Commission’s preparatory work that the proposals give rise to controversy and we have already seen a range of comments in press briefings.
We will not formally raise an objection to the proposed Regulation on grounds of non-compliance with the principle of subsidiarity, but we have concerns whether it offends against that principle. In particular, we note that the evidence of the need for the proposal relied on by the Commission has been challenged by stakeholders, such as Which? and the Law Society. Moreover, it is not clear that the supposed benefits for consumers would be achieved. We intend to subject the proposal to detailed scrutiny and would be grateful for your views on the following points.

We note that you will undertake a wide-ranging consultation on the proposal. We should be grateful for a copy of the consultation when it is published.

While acknowledging that your final views will be developed in the light of your consultation, we should be grateful for your current thinking on the following points and questions in order to assist our consideration of the proposal.

As to the Commission’s case for the draft Regulation, how strong is the evidence of the dissuasive effect of national laws on businesses to which the Commission refers? We note that briefing from Which! suggests that the Commission may have misinterpreted its surveys of businesses, whereas the British Retail Consortium and the Federation of Small Businesses have welcomed the proposal and appear to accept the Commission’s analysis.

What is your assessment of the relative importance of the differences in national laws as a factor which dissuades businesses and consumers from trading and buying across borders? How robust is the Commission’s estimate of the costs of doing business in a state outside a trader’s home state?

Do your previous consultations and more recent information suggest that an additional law of contract, common to all the Member States, will help in practice? Even if there is a risk that traders and consumers may not choose the common sales law, what would be wrong in leaving a decision on its usefulness to the market?

Consumer organisations are, unsurprisingly, concerned that the proposal would weaken consumer protection at least in some Member States. What is your assessment of the consumer protection rules of the common sales law? How do they compare with existing EU rules? Would they be more or less as favourable to consumers as UK legislation?

The proposal would make the use of the common sales law optional. Do you consider that, in practice, consumers will be able to exercise genuine choice? Will the choice be made by businesses which will present consumers with the choice of “take it or leave it”? If so, how would that affect the likelihood of increased trade across borders?

At a technical level, how does the approach to contracts in the rules of the Sales Law (such as the importance given to parties acting in good faith) differ from UK law? Are the differences significant for businesses or consumers?

The Sales Law would not affect other areas of law which may be relevant to sales transactions, for example, rules on property law and product liability. How significant would those other aspects of national law be for businesses and consumers?

The Commission says that the provision of the Rome I Regulation, which secures for consumers the benefit of mandatory rules of consumer protection of their home state, would be displaced by the draft Regulation. Do you consider that the Commission’s analysis, that the rules of Rome I would not be engaged by the use of the common sales law, is correct?

Finally, in your Explanatory Memorandum you say that the Government have some doubts about the appropriateness of Article 114 TFEU as the Treaty base for the proposed Regulation. We should be interested to see the reasons underlying those doubts.

We retain both Commission documents under scrutiny and look forward to a reply to this letter within the usual ten days.

24 November 2011

CONDITIONS OF EMPLOYMENT OF OTHER SERVANTS OF THE EUROPEAN UNION

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 4 August 2011 was considered by the Justice and Institutions Sub-Committee at its meeting of 12 October 2011. We decided to clear this matter from scrutiny.
In doing so we support the approach taken by the Government to achieve radical reform and savings. We will, of course, be scrutinising the Commission’s formal proposal including its Explanatory Memorandum and Impact Assessment. When providing your Explanatory Memorandum for that document we would be grateful if you could provide a detailed analysis of the Government’s approach to the conferral of delegated powers on the Commission, a matter on which we share your concern. We do not expect a reply to this letter.

14 October 2011

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

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 in response to your letter of 25 May 2011 requesting an explanation of the purpose and operation of the reading of the Juge-Rapporteur’s report and also addressing the need for urgent reform of the General Court.

You asked about the purpose of the Juge-Rapporteur’s report, how it has operated and what the potential consequences of the abolition of the reading of the report as proposed by President Skouris in his letter of 7 April 2011 would be. The purpose of the Juge-Rapporteur’s report for hearing is to set out the facts, give an outline of the procedure up to the date of the hearing and provide a summary of the forms of order sought and of the parties’ pleas and arguments. Also the judgment of the Court of Justice or of the General Court will be largely based on the report for the hearing and so it is important for the parties that its contents are accurate.

The report for the hearing is circulated to the parties in advance. They therefore have an opportunity to check that their position has been accurately set out, and to ask for correction where necessary. The judges of the Chamber hearing the case will also have had sight of the report in advance of the hearing. Although the Statute requires the report for the hearing to be read out, the Court “takes the report as read” at the start of the hearing, and saves considerable time by not actually reading it out. Typically a Report would take between ten and twenty minutes to read aloud at an oral hearing, bearing in mind translation requirements. So in practice, and for sensible reasons, the Court has for many years not observed this requirement, and now wishes to remove the formal legal obligation.

The removal of the obligation in the Statute to read out the report for the hearing is a separate issue from the drawing up of the report for the hearing itself, as provided for in the Rules of Procedure of the Court. The Court published proposals to revise the Rules of Procedure on its website on 25 May 2011. The commentary to the revision states that one of the amendments which is being proposed “is the abandonment of the report for the hearing”. We have not reached a formal view on the proposed amendments to the Rules of Procedure, but we would have concerns about removing the requirement for a report for the hearing itself, given its utility in ensuring that our arguments have been properly understood by the Court.

You also raised the need for urgent reform of the General Court and highlighted your preferred solution of increasing the number of General Court judges. Whilst we recognise that the workload of the Court is high, Member States clearly need sufficient time to consider the Court’s proposals in detail. The proposals would see a major structural reform to the General Court, and Member States need to be satisfied that the solution proposed will address the workload issue, and be cost effective taking into account better regulation principles. In your report into the Workload of the Court of Justice of the European Union, you identify that structural reform “could be pursued by creating one or more specialised tribunals” (paragraph 126). Member States need adequate time to consider alternatives such as this. In addition, any budgetary implications relating to the President of the Court’s proposals would need to be consistent with the UK’s overall stance on the EU’s budget.

I have responded to your report of 6 April and would like to thank the Committee again for their efforts in compiling this timely report and for its evaluation of the Court’s handling of its workload.

15 June 2011
Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter dated 15 June 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 29 June 2011.

We retain this matter under scrutiny.

JUGE-RAPPORTEUR’S REPORT

We are grateful to you for your explanation of the significance of the role fulfilled by the Juge-Rapporteur’s report. We note your fears in relation to the apparent suggestion by the Court in its recently published “Draft Rules of Procedure” that its rules be amended in order to abandon the report in its entirety. We look forward to considering the Explanatory Memorandum from you on the Court’s proposed amendments to its rules of procedure.

THE GENERAL COURT

In relation to your comments regarding the General Court, we note your plea for the Member States to be given time to consider the alternatives and your comment that reform needs to be “cost effective”. It is our view that, given the important role performed by the Court, the cost involved in increasing the number of judges serving the General Court relative to the overall EU budget is not great. We reiterate the fact that the situation regarding the need for structural reform in the General Court remains urgent, and acknowledge that the urgency of the situation is the subject of correspondence between us in the context of your formal response to the Committee’s Report.

Finally, in relation to the question of addressing the General Court’s problems via the creation of specialist tribunals, we note that once again you have quoted selectively from our Report. Whilst you are correct that in paragraph 126 we say that structural reform “could be pursued by creating one or more specialised tribunals” at paragraph 135 we conclude:

“A proliferation of specialist tribunals separate from the GC would not be desirable ... [W]e do not recommend this course, provided the problems facing the GC are alleviated by other means”.

We look forward to the forthcoming debate of our Report.

30 June 2011

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

At its meeting of 12 October the Justice and Institutions Sub-Committee considered the President of the Court of Justice of the European Union’s document entitled “Further information concerning the proposal to increase the number of judges of the General Court” dated 11 July 2011 (Document number 12719/11).

We retain the document numbered 8787/11 under scrutiny.

We note that the President has submitted this document to the Council because a number of Member State delegations have “questioned the reasons for the proposal to increase the number of Judges in the General Court” and have proposed the creation of specialised courts as an alternative.

As you know, given the Committee’s recent Report on this subject we have taken a keen interest in all the recent proposals for reform of the Court of Justice of the European Union. We note that many of the Court’s arguments against the creation of specialised tribunals echo many of those put forward in our recent Report and we endorse the detailed reasons put forward by the President to support his request for an increase in the General Court’s judiciary.

Is the UK one of the national delegations which has proposed the creation of specialised courts, in particular, as in your correspondence with this Committee you have not as yet committed the UK to either an increase in the General Court’s judiciary or the creation of a specialised tribunal? Are you convinced by the President’s arguments for an increase in the General Court’s judiciary and are you now persuaded to support the Committee’s recommendation to increase the Court’s judiciary and press for the necessary transfer of funds from elsewhere in the EU budget? If you do not accept the case for increasing the Court’s judiciary do you have proposals for reducing the General Court’s caseload?

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

14 October 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 Explanatory Memorandum dated 24 June 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 20 July 2011.

We have decided to retain the matter under scrutiny.

Whilst this complete revision of the Court’s Rules of Procedure running at 212 Articles is daunting in its size, we agree with the President of the Court of Justice of the European Union that the draft document is clearer and, with the introduction of titles to each individual Article, easier to understand and navigate than the Court’s current rules.

Regarding the two substantive issues raised by you in your Explanatory Memorandum. In relation to the abolition of the Juge-Rapporteur’s report, the Committee has already noted the Government’s concerns in this regard in our letter to you dated 30 June 2011 addressing the proposed reforms of the CJEU’s statute. We take this opportunity to express our agreement with your view that a complete abandonment of the Juge-Rapporteur’s Report is not to be advocated; in particular “given its utility in ensuring that [the parties’] arguments have been properly understood by the Court”.

As for the proposed power of the Court to limit the translation of written observations or pleadings to those deemed by the Court as “essential” (Article 58), we note that the relevant Article, headed “Documents of excessive length”, reads:

“... the Court may, by decision, determine the criteria for the translation of written pleadings or observations lodged in a case to be limited, on account of their excessive length, to the translation of the essential passages of those written pleadings or observations ...” (emphasis added).

Given our conclusion in our recent Report that the CJ is on the verge of its own workload crisis (see paragraph 44 of the Report) and the Court’s stated reasons for including this Article, this Committee has sympathy with the motives underlying the Court’s inclusion of Article 58 in its proposed draft Rules of Procedure. Whilst you too raise a legitimate concern i.e. that it is for the parties to determine which passages in their pleadings are essential and not the Court’s, the Committee understands that in the UK context this right would not be absolute and would be limited by the Court’s substantial case management powers in the current Civil Procedure Rules. In light of this apparent tension between the Court’s proposed case management rule and the Government’s position we ask you to give a more detailed explanation of your concerns and to outline your preferred way forward.

However, given the importance of preliminary ruling requests to all the Member States it is the Committee’s view that the current translation regime relating to them should be maintained.

One final substantive issue, the Committee notes that in his introductory comments to the draft Rules of Procedure the President refers to the Court’s power under Article 59 of the draft to decide the case without a hearing “if it considers that it has sufficient information on the basis of all the written observations lodged” (page 3 of the President’s notes). The Court only enjoys this power under the current rules if “none of the parties has submitted an application setting out the reasons for which he wishes to be heard” (Article 44a). We note that your consideration of these draft rules is ongoing but your Explanatory Memorandum is silent on this reform, the Committee would therefore welcome your views on it.

Beyond these three issues, we also wish to accept your offer of keeping the Committee informed of the progress of your review of this substantial document.

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

20 July 2011

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


You raised two issues of concern.

With respect to the Court’s proposed power to select essential passages for translation, our concern in this area is twofold.
First, as it stands at present, the proposed article gives the Court power to determine by decision the criteria for the translation of written pleadings to be limited to the essential passages. Unlike in the UK legal system, there is neither a requirement nor a mechanism whereby Court users are to be consulted on the criteria to be employed (there is no CJEU equivalent of a Rules Committee). The wording therefore potentially enables the Court to lay down criteria which are overly restrictive and/or permit errors to be made without the possibility of advance correction.

Second, what appears to the Court to be the essential elements of pleadings may not seem so to the parties. It would be possible for something which a party regarded as fundamental to be omitted because the Court failed to appreciate its significance.

Our preferred option would therefore be a power for the Court to indicate a maximum length for pleadings, to be exceeded only with the consent of the Court following a reasoned application.

On oral hearings, the actual revised provision relating to oral hearings is Article 77. The proposed Article 77(3) provides that, ‘On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may nevertheless decide not to hold a hearing if it considers that the parties or the interested persons referred to in Article 23 of the Statute have been able adequately to present their point of view’.

It is not at this stage clear what criteria the Court will apply in deciding whether parties have been able adequately to present their point of view or whether the criteria will prevent Member States who, for whatever reason, did not originally submit written observations from subsequently requesting a hearing. Conversely, we also require clarification on what criteria will be applied when the Court decides that an oral hearing is necessary but no party has requested one.

We value the opportunity we have to present oral submissions in a case where we did not originally submit any observations. This is the only means available to address points of concern which have been raised subsequently in the written pleadings. We will endeavour to ensure that our scope to do this is not limited to any significant extent.

4 August 2011

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

Thank you for your letter dated 4 August 2011. It was considered by the Justice and Institutions Committee at its meeting of 12 October.

We retain this matter under scrutiny.

Regarding your preferred solution to the Court’s power to limit the translation of pleadings, as you know, our recent Report looking at the Court of Justice of the European Union found an institution operating under significant time pressures and endeavouring to limit the length of time litigation before them takes as much as possible. Indeed, this is one of the President’s stated aims underlying the Court’s complete revision of its Rules of Procedure. Given these pressures do you agree that allowing litigants to apply to the Court to exceed the stated maximum length of pleadings could potentially increase the time litigation takes before the Court of Justice and defeat one of the purposes underlying the Court’s revision unless it be made clear that the procedure could only be used in exceptional circumstances?

In relation to the Court’s power to dispense with an oral hearing we note that you will be seeking clarification of the criteria the Court will use in the operation of this provision; and we look forward to receiving a detailed answer from you as and when you have received clarification.

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

14 October 2011

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

Thank you for your letter of 6 April. I am writing to update you on progress on the above Directive and to seek your agreement to release this proposal from scrutiny to allow the Government to agree to a first reading deal with the European Parliament (EP). I would be grateful if you were able to
consider this as soon as possible as the Hungarian Presidency is hoping to achieve a political agreement for a first reading deal with the EP before the end of their tenure this month.

Formal trilogue discussion with the EP has resulted in a number of changes being made to the text that was agreed by the Council in December. During a short period of intense negotiations we have been able to ensure that these amendments are acceptable to the UK. Whilst I am unable to send a copy of the final text, which is still subject to some negotiation on a number of limited elements, I wish to highlight the main changes for your consideration. I will also send you a copy of the final text of the draft Directive as soon as it is available.

The most significant changes to the text in the Directive since my previous letter are outlined below.

**ARTICLE 2 DEFINITIONS**

The EP proposed that a definition of sex tourism be added to this Article. However, because their proposed definition was unclear and, in terms of the Directive as a whole, did not have a function, it will not form part of the definitions. The final outcome is however likely to result in a stronger provision (Article 19a) requiring Member States to act to prevent or prohibit activities which support or are part of sex tourism in addition to a recital explaining the phenomenon of sex tourism and the need for the EU as a whole to tackle this phenomenon. We are content with this, as we consider sex tourism to be a serious matter which can only be tackled through international co-operation.

**ARTICLES 4-6 (OFFENCES AND PENALTIES)**

With regard to the penalties for the offences in Articles 4 to 6, the EP proposed to require Member States to provide for fines in conjunction with minimum maximum terms of imprisonment, and higher levels of penalties than those endorsed by the Council in December. Negotiations have highlighted that Member States are generally content with the levels of penalties agreed in December, however there is a willingness to compromise with the EP and raise penalties in a couple of areas. The UK has high levels of penalties for these offences and we expect our existing framework of offences to be able to meet the sentencing obligations.

Fines are unlikely to be included in the operative text but the desirability of Member States including fines as a penalty alongside periods of imprisonment is likely to be included in the recitals. Our law already permits fines to be imposed for these offences and it is therefore acceptable to the Government.

There is also an ongoing discussion between the Member States and the EP about the need for the solicitation offence in Article 6 to include offline solicitation and situations where an offender solicits pornographic pictures from a child without actually meeting them. As these situations are already covered by UK legislation, including through an attempts offence in the case of attempting to get an indecent photograph of a child the Government has been flexible on this and can accept this. However this is not the case for all Member States and negotiations continue in an effort to resolve this.

**ARTICLE 8 (CONSENSUAL SEXUAL ACTIVITIES)**

There have been some textual changes to Article 8 which enables Member States to exempt certain consensual sexual activities from the offences. These changes have not changed the scope of these exemptions, which we believe are important for children over the age of consent, nor fettered Member State discretion in this area so the Government is content with the changes.

**ARTICLE 9 (AGGRAVATING CIRCUMSTANCES)**

The EP originally proposed a number of new aggravating circumstances for inclusion in this Article. It is now likely to include an aggravating feature of 'a state of physical or mental incapacity' which already exists in the Sentencing Guidelines produced by the Sentencing Guidelines Council. The Article will make clear that the consideration of any aggravating feature remains a matter for the courts in any particular case.
**ARTICLE 10 (DISQUALIFICATIONS)**

The EP sought to broaden the requirements around the exchange of information concerning criminal records and disqualifications from working with children to some voluntary activities, and also suggested that Member States introduce registers of sex offenders. It is unlikely that Member States will accept the requirement for a sex offender register in the operative text but there is now a common view that the exchange of information between Member States concerning criminal records and disqualifications from working with children should be extended to include some voluntary activities. Whilst the Vetting and Barring Scheme for England and Wales has been under review it will continue to cover 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 ‘sex offenders register’. The Government is content with this solution.

**ARTICLE 10A (NEW – SEIZURE AND CONFISCATION)**

The EP’s proposition to require Member States to be able to seize and confiscate the proceeds of child sex offences is one which we and other Member States agree to. We are content with this approach which already exists under our legislation. The EP would also prefer a recital to suggest that Member States encourage the use of confiscated assets for victim support. Member States are opposed, as we, like the other States, prefer the recital to remain silent on how the proceeds are used.

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

The EP originally proposed a number of amendments to provide for rules on training, child-friendly awareness 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 Non-Government Organisations. A new separate Article that requires Member States to take “appropriate measures”, such as education and training, to discourage sexual exploitation is likely to appear in the final text, rather than be included in Article 15. The Government is content with this suggestion, as preventing these crimes is a high priority, and the obligations proposed by the EP are proportionate and reasonable in this case. The UK already does a considerable amount of work in this area including through the inter-agency work set out in the Working Together to Safeguarding Children guidance.

**ARTICLE 16**

Whilst the EP proposed broad rules of jurisdiction, including extending extra-territorial jurisdiction over habitual residents without a dual criminality criterion, it is likely that this Article will replicate that already agreed for the Trafficking Directive. Member States will only be required to take jurisdiction over the specified offences if they are committed by one of their nationals anywhere in the world or takes place on their territory. The UK already has extra territorial jurisdiction in respect of UK nationals who commit sex offences against children overseas and can therefore accept this article.

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

A number of victim protection measures, including particular assistance in cases where abuse was within the family, were put forward by the EP. Some additional support measures, which already exist in the UK for victims or witnesses, have been agreed and will be incorporated in the final text.

**ARTICLE 21**

The EP 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 that it should also be subject to legislative and judicial control, transparent procedures and adequate ‘safeguards.’ We understand the EP amendments to apply only to blocking carried out by the Member State rather than blocking carried out by the industry. Industry in the UK uses blocking to prevent abuse of their systems and disrupt the distribution of this illegal material. The system is self-regulated but supported by Government. Negotiations on this Article continue but we are confident that we have achieved our aim, namely to ensure that the successful UK approach is not affected by this Article. We are disappointed however that the EP is not more supportive of blocking generally.
As I have highlighted, the negotiations on this Directive have been fast moving but I am pleased that they are coming to a conclusion and that a First Reading deal with the EP now seems achievable. I hope that you will agree that the changes I have highlighted are acceptable and build on the text agreed at Council in December. I therefore hope you will agree to clear this Directive from scrutiny.

14 June 2011

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

Thank you for your letter dated 14 June 2011 updating the Committee on the proposal’s negotiation. It was considered by the Justice and Institutions Sub-Committee.

We have decided to clear this proposal from scrutiny. When we last wrote to you on 6 April we said we were content with the text that we cleared from scrutiny in November last year and we hoped that any amendment to it would be clear and improve the Directive’s operation. We agree with you that these latest changes build on the text agreed in December.

We look forward to considering the agreed text when it is available. We do not expect an answer to this letter.

22 June 2011

CRIMINAL JUSTICE: EU DIRECTIVE ON HUMAN TRAFFICKING (8157/10, 16945/10)

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

Thank you for your letter dated 16 May 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 8 June 2011.

We are grateful to you for the information you have supplied and the answers to our questions. Whilst we are pleased that you will shortly be applying to opt in, the various reasons you have given us for not opting in have not altered the Committee’s view that we should have opted in from the outset.

We do not expect an answer to this letter.

9 June 2011

CRIMINAL JUSTICE: EUROPEAN PROTECTION ORDER (17513/09)

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

Thank you for your letter dated 13 May which was considered by the Justice and Institutions Sub-Committee at its meeting of 8 June 2011.

We retain this matter under scrutiny.

As we said to you in our letter dated 20 May addressing the Roadmap on victims’ rights:

“...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...during the course of our scrutiny of the proposed European Protection Order”.

We look forward to considering both the civil and the criminal European Protection Order proposals as they develop.

9 June 2011
I am writing to inform the Committee of the latest developments on the European Protection Order (EPO) and seek agreement in principle to release this proposal from scrutiny.

The Polish Presidency is seeking a rapid conclusion of the legislative proposal. There is a CATS (senior official level) meeting scheduled on the 6 September which will discuss the EPO. It will then be submitted to Coreper (Ambassador level) with a view to swift finalisation of the Directive. There is an expectation that it will feature on the JHA Council agenda on the 23 September. This means progress may have been made before Parliament returns from recess. That is why I am, exceptionally, asking you to consider releasing this draft Directive from scrutiny now. I also enclose the latest draft of the text for this proposal.

In your letter of 9 June you endorsed the solution that had been found to the legal base issue; the original draft Directive has been limited to criminal matters whilst the Commission have brought forward a draft Regulation on mutual recognition of protection in civil matters. The fact that the UK stood firm on the issue of legal base and formed part of a blocking minority was a major factor in achieving this solution and we, like you, are pleased at the outcome.

This has been a dossier where our substantive concerns have chiefly focused on technical legal base issues. At a very early stage of negotiations we achieved amendments needed on key areas such as jurisdiction, the roles of the issuing and executing State and the rights of the person causing danger. We are now content with the approach adopted in the Directive which sees the State responsible for executing the EPO able to take a measure under its own national law in order to give effect to the EPO (Article 9bis). Originally the proposal stated that the issuing State retained jurisdiction for the protection measure in the executing State. This did not accord with the UK’s approach to territorial jurisdiction. We worked with other Member States to remedy this and have found an effective solution that would work with our system.

In early drafts of the Directive there was also nothing to guarantee that the person causing the risk would know about the order against them. Again, during negotiations, we worked to resolve this and now there are safeguards in the text at Articles 5(3)bis and 8(2).

There is an outstanding question about whether negotiations on this Directive should be closed down and the final text agreed whilst the Regulation on mutual recognition of protection in civil matters is in its infancy, given their interrelation. The Government’s initial view was that there was a logic to keeping both these instruments open, rather than finalise the criminal EPO Directive, so that there will be an opportunity to assess it alongside the Commission’s civil Regulation. However it has become apparent there is little appetite for this from the European Parliament, the Commission or from the majority of Member States. Indeed a number of Member States have expressed concern that keeping the criminal Directive open may risk undoing many of the concessions gained from the European Parliament to make this instrument workable and suitable for the differing systems of protection found throughout Europe.

Given this context, we have considered the most recent texts and concluded that although some variation is inevitable given the difference in the subject matter and particular sensitivities surrounding criminal matters, the existing differences are not such as to demand that the criminal instrument be kept open at this stage. The two instruments are not interdependent (for example, they do not both apply to each case, and each represents a complete scheme without reference to the scheme of the other). Both require recognition in a similar manner in the executing State, and allow a form of adaptation of the order in the legal system of the executing State to enable protection which is as closely equivalent as possible to the original order. Both contain protections for defendants’ rights which are broadly equivalent. Because one applies to protection measures in "civil matters" and the other to such measures in "criminal matters", they combine together to ensure as wide a coverage of victims in the European Union as is feasible. During negotiations on the civil instrument officials will pay close attention to ensuring that coverage of victims in the EU is kept as comprehensive as reasonably possible; on ensuring that the protection provided to victims is sufficiently equivalent to that given in the criminal instrument; and that defendants’ rights are protected and an appropriate equivalence with the criminal measure retained there too.

In response to the concerns of the UK and other Member States, the Polish Presidency has drafted a declaration which is found at Annex II of the Directive. This sets out a commitment to ensuring that the civil and criminal instruments will complement each other. I support the inclusion of this declaration.
Given that the UK has achieved the concessions and revisions required to the text, and a solution has
be found to the legal base issue, I would ask the Committee to agree in principle to release this
instrument from scrutiny. I appreciate that the text we are asking you to clear is not the formal
version for adoption. The text is, however, in a very advanced state and few changes are anticipated.

If you are minded to clear this Directive from scrutiny, we will only agree the final text if there are no
further radical alterations and it accords with the position the UK has been taking throughout
negotiations on legal base. If for any reason adoption is not sought until Parliament returns from
recess we will, of course, put the final version of the text before you for clearance.

I hope that this letter provides you with sufficient assurances to clear the Directive from scrutiny.

24 August 2011

Letter from the Chairman to the Rt. Hon Lord McNally

Thank you for your letter dated 24 August 2011 which was considered by the Justice and Institutions
Sub-Committee at its meeting of 14 September.

We have decided to clear the proposal from scrutiny.

Like you, in an ideal world we would have liked an opportunity to have considered this proposal and
its sister Regulation on the mutual recognition of civil protection measures together as a complete
system of EU-wide victim protection measures. However, we are grateful for your explanation as to
why it is necessary to clear this matter from scrutiny at this juncture. We note your assurance that
“officials will pay close attention to ensuring that coverage of victims in the EU is kept as
comprehensive as reasonably possible”.

We do not expect an answer to this letter.

15 September 2011

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

Thank you for your letter of 15 September clearing the Directive on European Protection Order
from scrutiny. I am now writing to provide an update on the Directive.

The Directive received political agreement by Council at the meeting of the Agriculture and Fisheries
Council on 20 October. Provisional political agreement had previously been obtained at the
September Justice and Home Affairs Council. I have attached the text of the Directive as agreed,
which is unchanged in substance from the version cleared from scrutiny. Formal adoption of the
Directive will be made after review of the text by jurists-linguists. At this point the Council will also
adopt a Declaration committing to ensure that this Directive and the draft Regulation dealing with
civil protection orders will complement each other, as was mentioned in our previous
correspondence.

3 November 2011

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

Thank you for your letter dated 3 November 2011 which was considered by the Justice and
Institutions Sub-Committee at its meeting of 23 November. The Committee welcomes the agreement
of this proposal and the Member States’ intention to adopt the Declaration to ensure that it “will
complement” its sister proposal dealing with the mutual recognition of civil protection measures.

As we have already cleared this proposal from scrutiny this letter brings matters to a close. We do
not expect a reply to this letter.

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

Thank you for your letter of 20 May and your broad agreement to our approach to the proposed amendments of the European Parliament. I am writing to you to address the three issues that you raise pursuant to your meeting of 18 May.

With regard to the information to be given to a person arrested pursuant to a European Arrest Warrant (EAW), we share the Committee’s view that arrested persons should be given full and specific information on their rights. The issue here is largely one of drafting. The published Commission version of the Directive simply stated that “the rights as laid down in the Framework Decision” should be included in the Letter of Rights. However, some Member States were concerned that in the interests of clarity, the Directive should set out clearly which provisions of the Framework Decision constitute the rights that should be communicated to the arrested person. Because of this, the text agreed at the General Approach specifies articles 11, 13(2) and 14 of the Framework Decision. The European Parliament took a similar approach to the Commission and took the position that the Directive should state that “all the rights as laid down in the Framework Decision” should be included within the Letter. Whilst in the interests of clarity we have a preference for the Council approach, in effect the obligation would be the same and we are therefore able to take a flexible approach. Of course, as per the indicative model letter in annex A to the Directive, the Letter or Rights will need to set out the right in a meaningful way.

With regard to the wish of the European Parliament to extend the information to be given in the Letter of Rights to enable a person to challenge the lawfulness of his arrest or detention, we share the view of the Committee that this would be an undesirable development. We believe that the Letter of Rights should set out in clear and understandable terms the key information that a person needs when he is arrested for a criminal offence. Because a person can only be held for a short period of time before being brought before a court, we do not consider that it is necessary to provide detailed information on the right to challenge the lawfulness of detention and we consider that providing such information would be an unnecessary complication in what is supposed to be a brief and user friendly letter. We therefore would be disinclined to accept such an amendment in its current form.

Finally, you note that the draft report of the Rapporteur, Birgit Sippel MEP, also includes a suggestion for a new article 8.3 which would require evidence gathered in breach of the proposed Directive to be inadmissible. I did not make reference to this amendment as it was subsequently not taken forward by the European Parliament. The Government would not have supported such an amendment as it considers that admissibility of evidence is a matter for the trial judge, having regard to overall fairness of proceedings.

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

6 June 2011

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

Thank you for your letter of 6 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 15 June. We are grateful for the helpful responses you provided.

With regard to the information to be given to a person arrested under a European Arrest Warrant we support a requirement that he or she be informed of all rights under Framework Directive 2002/584. However it should also be clear that the letter of rights actually handed over describes those rights fully and does not simply cross-refer to the Framework Directive. The Commission proposal achieved this by including an indicative model letter.

We look forward, in due course, to further information on the progress of negotiations on this proposal.

17 June 2011
Letter from the Rt. Hon Lord McNally, Minister of State, Ministry of Justice, to the Chairman

Further to the letter from the Justice Secretary of 6 June, I am writing to provide an update on negotiations on this draft Directive and to ask you to clear this document from scrutiny. The most recent version of the text is enclosed.

Negotiations with the European Parliament have taken longer than foreseen on this Directive. However, the Polish Presidency is keen to complete negotiations as soon as possible so agreement can be reached under its tenure. This Directive will be on the agenda at the Justice and Home Affairs (JHA) Council on 28 October and although we do not expect final agreement to occur before the December JHA Council, it is possible that ministers will be asked in October if they can in principle agree the text.

The wording of the Directive has been subject to some change in the trilogue process. However, the text as a whole remains very close indeed to current practice in England, Wales and Northern Ireland and as such we are minded to agree the text. As you are aware, currently a letter of rights is not routinely issued to those subject to criminal proceedings in Scotland.

The key changes proposed by the European Parliament are as follows:

Article 1 has been clarified to make clear that the rights apply to suspected or accused persons.

The words “by official notification or otherwise, as established by national law” have been deleted from Article 2. We do not think that this is a substantive deletion.

Article 3 now makes it clear that information should be provided “promptly”, “in order to allow for their effective exercise”. Article 3.1a of the General Approach text, which set out the information should be provided when the rights become applicable and in due time to allow their effective exercise, has now been deleted. Article 3 now requires that the person should be told of their right to be informed of the accusation in accordance with Article 6. This will require a small change to the PACE Notice of Rights and Entitlements. Article 3 also requires that the information shall be provided orally or in writing and in simple and accessible language, taking into account any particular need of vulnerable suspected or accused persons. This is in accordance with current practice.

Article 4 now makes it clear that information shall be given to a person who is arrested or detained in the course of criminal proceedings. The reference to the ability to remove the Letter of Rights in exceptional circumstances has been removed and replaced by a recital which sets out that the Directive is without prejudice to the provisions of national law concerning safety of persons remaining in detention facilities. This deals with a concern we had about the ability of law enforcement authorities to remove a letter of rights if the detained person is using it to harm himself or others (for example attempting to choke himself). Article 4 now stipulates a longer list of rights to be listed in the Letter of Rights as they apply under national law. These are:

— the right to access the materials of the case
— the right to have consular authorities and one person informed
— the right of access to urgent medical assistance
— for how many hours/days the person may be deprived of liberty before being brought before a judicial authority
— basic information about any possibility to challenge the lawfulness of the arrest, obtain a review of detention, or ask for provisional release.

This will require minor change to the PACE Notice of Rights and Entitlements, for example requiring a general reference to disclosure of evidence, should the person be charged with a criminal offence.

Article 5 now sets out that the person should receive an appropriate Letter of Rights containing information on his rights according to national law implementing the Framework Decision on the European Arrest Warrant. It no longer specifies the articles which set out those rights.

Article 6 has changed in structure. It has a general reference to the need to provide information on the criminal act promptly and in such detail as is necessary to safeguard the fairness of criminal proceedings and for the person to effectively exercise his rights of defence. It stipulates that a person who is arrested or detained should be given the reasons for his arrest or detention including the criminal act he is suspected of having committed. It also requires that detailed information should be provided on the accusation including the nature and legal classification of the offence, as well as the nature of participation by the accused. This must occur, at the latest, upon submission of the merits of the accusation to a court. A recital requires that this information should include, where known,
the time and place. We are currently working to clarify the recitals so that it is absolutely beyond
doubt that the time, place and legal classification need not be given before the moment of charge. No
reference is now made to the need to provide information before police interview. Finally, the new
text now makes it clear that if information about the accusation should change, the person shall be
informed. The latter is a helpful addition to the Directive. Overall, article 6 reflects current practice
in the UK.

Article 7.1 has now been changed to read that Member States shall ensure that “documents related
to the specific case…which are essential to effectively challenge according to national law the
lawfulness of the arrest or detention” should be made available to the arrested person or his lawyer
rather than “all information related to the specific case”. This is to prevent authorities providing such
information orally. Article 7.4 now stipulates that the decision not to allow access to certain materials
should, in accordance with procedures in national law, be taken by a judicial authority or at least be
subject to judicial review. Article 7 in its new form continues to reflect UK practice.

Article 8 now sets out that where information is provided in accordance with articles 3, 4, 5 and 6 of
the Directive, this will be noted in accordance with the recording procedure in national law. The
Council text referred only to articles 4(1), 5 and 6(1a). A recital sets out that this should not
necessitate “additional administrative burden”.

The final articles are unchanged in substance. We are working to clarify some of the recitals to ensure
that they do not widen the obligations arising out of the main articles and will share the final text with
you as soon as we are able.

13 October 2011

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

Thank you for your letter of 13 October which was considered by the Justice and institutions Sub-
Committee at its meeting of 26 October.

You asked for this matter to be cleared. This is unnecessary as we cleared it in December last year.

We are grateful for sight of the latest text, which we support.

We note that the text of Article 3 makes specific provision concerning the information to be given to
vulnerable persons, without dealing specifically with illiterate persons for whom written information
would be inappropriate. We hope that the forthcoming EU legislation on the procedural rights of
vulnerable persons and national legislation implementing this proposal will ensure their adequate
protection.

In previous correspondence we supported the Government’s opposition to providing information to
an accused concerning the right to challenge or seek a review of his or her detention, now found in
Article 4. We should be interested to know the reasons for the Government’s change of heart.
Nevertheless, we consider that this element of the proposal can be accepted in the interests of
achieving agreement on a text which we consider could benefit the operation of the criminal justice
across EU borders.

We should also be interested to know whether the Scottish Government have been consulted on this
latest draft and their views.

We look forward to a reply to this letter within the usual 10 days.

27 October 2011

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

Thank you for your letter of 27 October about the above-mentioned Directive and for your support
of the latest text. We agree with you that this measure could benefit the operation of criminal justice
across EU borders.

You note that there is no specific reference to illiterate persons for whom the provision of written
information on rights would be inappropriate. We agree with you that this is an important matter,
but feel that it is adequately dealt by article 3, which as you note requires authorities to take into
account any particular need of vulnerable suspected or accused persons, and recital 19c, which sets
out that competent authorities should pay particular attention to a suspected or accused person who
cannot understand or follow the content or the meaning of the information, owing, for example, to
their young age, mental or physical condition.
In England and Wales, Police and Criminal Evidence Act (PACE) Code C makes particular provision for persons who are unable to read. The Custody Officer is required to ensure that if a person cannot read, his solicitor, relative, appropriate adult or some other person likely to take an interest in them should be available to help check any documentation. Recordings of the PACE Notice of Rights and Entitlements are available as is an easy read version of the document. We however note your desire to ensure that the forthcoming EU legislation on procedural rights for vulnerable persons ensures adequate protection for such individuals.

You mention the provision in article 4 which requires basic information to be provided about any possibility under national law to challenge the lawfulness of the arrest, to obtain a review of detention, or to ask for provisional release. This provision has been included at the insistence of the European Parliament during the trilogue process. It is now drafted in such a way as to make clear that only basic information about the possibility to challenge the lawfulness of arrest, to obtain a review of the detention or to ask for provisional release should be included in the letter and that information should only be given on those rights insofar as they exist under national law. The PACE Notice of Rights and Entitlements already includes basic information on the way in which review of detention is carried out and the fact that the person can have his say on the matter.

You asked about whether the Scottish Government has been consulted on the latest draft and what their views were. The Scottish Government have been very supportive of the principles underlying this Directive and Ministry of Justice officials have engaged very closely with Scottish Government officials them during the negotiation process. They are content with the latest draft.

Finally, we expect that this measure will be on the agenda for political agreement at the JHA Council on 13 – 14 December 2011. As set out in previous correspondence, final discussion is ongoing on the content of the indicative annexes and some minor technical amendments to annexes. We will provide the final document as soon as we are able.

9 November 2011

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

Thank you for your letter of 9 November which was considered by the Justice and Institutions Sub-Committee at its meeting of 23 November.

We are grateful for the further information you have supplied and look forward to receiving the final document when this is available.

24 November 2011

CRIMINAL POLICY (14613/11)

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

Thank you for your Explanatory Memorandum dated 12 October 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 2 November 2011.

We have decided to clear the Communication from scrutiny.

We note that the new legal base in the Lisbon Treaty providing for criminal legislation as a tool to secure the effective implementation of EU policies forms the main focus of the Communication. Like you, we welcome the Commission’s specific acknowledgments addressing:

— The fact that the EU should only enact criminal law legislation “where there is a convincing evidence base that the offending activity constitutes serious cross-border crime” accompanied by a consensus for common action.

— The UK’s opt-in arrangements.

— The availability under Article 83(3) of the emergency brake.

— That any future legislation will be assessed against subsidiarity, fundamental rights, proportionality and necessity. And,

— That Member States’ individual legal systems must be respected.
The Committee will shortly be launching an inquiry considering the direction and development of the EU’s criminal justice policies.

We do not expect an answer to this letter.

3 November 2011

CROSS-BORDER DEBT RECOVERY IN CIVIL AND COMMERCIAL MATTERS (13260/11)

Letter from the Chairman to Crispin Blunt MP, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for your Explanatory Memorandum of 8 August. This was considered by the Justice and institutions Sub-Committee at its meeting of 14 September. We decided to hold this proposal under scrutiny.

Like you we support in principle measures which facilitate the cross-border enforcement of judgments. We note that the Government will be producing a UK impact assessment and will be consulting the banks and other stakeholders specifically on this proposal and we look forward to receiving a copy of the assessment and further information on the outcome of this consultation. In particular we are interested in how a free standing European Account Preservation Order (EAPO) will in practice operate with the existing UK freezing orders. For example, is it likely that the EAPO will supersede the need for a national order in cross-border cases: and will creditors in practice apply for EAPO’s from the courts of other Member States?

In the meantime and in order to meet the relevant deadlines we have considered the issues of subsidiarity and the UK opt-in on the basis of the information currently available.

Like you we do not consider that the proposal is objectionable on the grounds of subsidiarity. Different Member States have different procedures for creditors to obtain freezing orders and their effect varies. There is therefore a benefit to citizens and businesses participating in cross-border transactions to be able to call upon a standard free standing EU form of freezing order if circumstances demand. This is reflected in the generally favourable climate of stakeholder opinion towards this proposal. As the Commission points out the objectives of this proposal are unlikely to be achieved through wider international action.

In relation to the UK opt-in we are sympathetic to the Commission’s objective and note that you have not identified any element of the proposal which raises an objection of sufficient gravity to present a risk that the outcome of negotiation could be legislation which was unacceptable to the UK. Therefore, we would not object to the UK opting in to this proposal provided the Commission is satisfied that there is no adverse impact from the fact that the UK has not opted in to the proposals on succession and matrimonial property.

We should be grateful for further information on the following points of detail:

Article 6.2 of the proposal would enable an EAPO to be issued to facilitate enforcement of an authentic instrument. In the context of succession and matrimonial property we have been cautious of legislation to recognise and enforce authentic instruments. Do you consider that the proposal should facilitate the enforcement of authentic instruments without further protection?

Article 7.1 requires a court with jurisdiction to issue an EAPO if the claim appears well founded and the likelihood of impediment to enforcement is established. There is no discretion as is exercised by UK courts currently asked for a freezing order. Should the proposal provide for discretion to prevent the EAPO procedure being used oppressively?

Article 11 limits oral evidence and allows courts to admit written evidence. In the UK evidence in support of an application for a freezing order is normally required to be by sworn statement. Does an unsworn statement provide adequate protection for a debtor?

Article 17 does not impose any condition limiting the request for details of bank accounts to be provided. There may be a danger of an application for an EAPO with a request for account details being used by a creditor for a “fishing expedition.” Is this another case where the court hearing the application should have greater discretion in order to prevent an oppressive request?

Article 25 sets out the process for service of an EAPO on a defendant domiciled in a Member State, but makes no provision for service on a defendant domiciled in a third country.
Article 32 provides for a debtor to have access to amounts in a frozen account necessary to ensure livelihood and for companies to pursue normal business. It does not make any provision for legal costs to be available from frozen funds.

Articles 49 and 50 enable the Commission to amend the Annexes (setting out the standard forms of application, order, bank declaration and application for review) by means of delegated legislation. However these Articles do not explicitly define the objectives of this delegation as required by Article 290 TFEU.

We do not require the answer to this letter within the usual 10 days.

15 September 2011

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

You wrote to Crispin Blunt on 15 September in response to the Explanatory Memorandum on this proposal of 8 August. You said that your Committee was sympathetic to the Commission’s objective and therefore did not object to the UK opting in to this proposal provided the Government was satisfied that there was no adverse impact from the fact that the UK had not opted in to the proposals on succession and matrimonial property.

As explained in the Explanatory Memorandum, the Government welcomes, in principle, the Commission’s proposal. I agree that action in this area has the potential to be a very valuable tool in the working of the internal market. Many of those who responded to the Government’s recent consultation on this proposal welcomed its aims and agreed with the Commission that a procedure which made it easier for claimants to take protective measures in cross-border cases would be useful to both individuals and businesses in helping them to recover debts. However, as the majority of responses to the consultation raised significant concerns about the Commission’s text, the Government has decided not to opt in to the proposal. A written ministerial statement to that effect has been made today. I enclose a copy of that statement for your information.

During the six week period from 3 August to 14 September my officials contacted over 130 individuals and organisations including academics, the legal profession, judiciary, the banking sector, debt charities, consumer organisations and court users. The consultation paper and impact assessment were also available on the Ministry’s website. 50 responses were received. Of those, 13 (26%) recommended that the UK should opt in to the proposal, 25 (50%) thought the UK should not opt in and 12 (24%) did not comment on or did not express a firm opinion either way on the opt in. However, 6 of those recommending an opt in and 4 of those who did not express a firm view raised significant concerns which they believed needed to be addressed during negotiations. Therefore 35 of those consulted (70%) believed that the proposal as drafted presented difficulties for the UK legal systems.

The main concern raised in the consultation was that, unlike our domestic systems, the Commission’s proposal is weighted too heavily in favour of claimants. As an order which freezes the bank account of an individual or a business can have serious consequences to reputation and livelihood most respondents believed there should be more safeguards for defendants. In particular the following concerns were highlighted:

— The threshold for obtaining orders is too low. While a court must be satisfied that there is a well founded claim (similar to an English freezing injunction where there needs to be a good arguable case) unlike our domestic procedure there is no requirement to show that there is a real risk that the defendant will frustrate payment of the debt by dissipating assets. This is just one of the issues a court can consider and the test is omitted entirely when a creditor already has a judgment which is enforceable in the Member State of enforcement.

— Orders will be available without notice to the defendant. The expectation is that they will be considered on paper and there is no requirement that the claimant should make full and frank disclosure of all relevant facts. Compare this to our domestic procedure where orders are usually made without notice but a return hearing date is set to enable a defendant to respond. The duty of full and frank disclosure under our domestic law means that the creditor must provide all relevant information, including issues that may adversely affect his/her application.
There is no requirement for the claimant to provide any security to compensate a defendant for losses suffered from the wrongful grant of an order. Too much discretion is left to the courts of the Member State issuing the order. Compare this to our domestic procedure where, in all but the most exceptional circumstances, a claimant is required to provide an undertaking to the court to pay any damages which the defendant sustains.

While there are grounds on which a defendant can challenge an order, in many situations this will require a defendant having to apply to a court in another Member State with the extra cost and difficulties that will entail and, given the time limits in the proposal for claimants and courts, it could be a couple of months before an order is set aside. In the meantime the defendant will have no access to the amounts frozen.

Given the potential benefits of this procedure the Government intends to participate fully in the negotiations with the hope of being able to opt in after adoption if sufficient changes are made to the text that resolve our concerns. I shall keep your Committee informed of significant developments during the negotiations.

I will now answer the points you raised in your letter of 15 September.

The relationship with the proposed Regulations on succession, matrimonial property and the property consequences of registered partnerships

The Government agrees that if the UK decides to opt in to this proposal after it is adopted it will be important to clarify the relationship with these other proposed Regulations if the UK decides not to opt in to them.

How will an EAPO operate with existing UK freezing orders?

The Commission’s proposal creates a procedure which is meant to be an alternative to existing domestic procedures for cases with cross-border implications. It will not prevent a creditor from using, for example, a freezing order from England and Wales which he/she can seek to have recognised in other Member States. However, given that there is no automatic recognition for domestic orders and that the tests for obtaining an EAPO are not as high as for a freezing order here, it seems likely that if the Commission’s proposal stays in its current form, and the UK was to opt in, most creditors would find it more advantageous to apply for an EAPO where jurisdiction lies with our courts. We can only speculate at the moment as to how willing creditors would be to apply for an EAPO to the courts of another Member State but the relative ease with which an order can be obtained in the Commission’s proposal suggests that many would be prepared to.

Enforcement of authentic instruments

When considering how an order can be granted in the context of an authentic instrument it is necessary to distinguish between the two procedures under which orders are available under the Commission’s proposal. Section 1 deals with applications in circumstances before the initiation of proceedings, at any stage during proceedings or where a judgment, court settlement or authentic instrument has been obtained which has not yet been declared enforceable in the Member State of enforcement. In such circumstances, Article 6(1) stipulates that an EAPO shall be issued by a court which must decide whether the relevant tests for obtaining an order under Article 7 have been met. The Government believes that is an appropriate procedure. Under section 2 it is possible for an EAPO to be granted where the claimant has a judgment, court settlement or authentic instrument which is enforceable in the Member State of enforcement. In such circumstances, under Article 14(1) where the claimant has obtained a judgment or court settlement the court which issued it must issue the EAPO and under Article 14(2) it will be the responsibility of the designated competent authority in the Member State where the authentic instrument has been drawn up to issue the EAPO. The problem is that irrespective of whether the claimant has a judgment or authentic instrument, the test under Article 7(1)(b) (that subsequent enforcement is likely to be impeded or made substantially more difficult, including because there is a real risk that the defendant might remove, dispose of or conceal assets) does not have to be met. The Government believes that this is inappropriate and will be seeking to ensure that this test should be met for all applications under both sections 1 and 2. The Government’s preference is that a court should consider this test in all circumstances.

Discretion for courts when considering EAPO applications

The Government agrees that it is inappropriate not to allow courts at least some discretion when considering an application for an EAPO. Under Article 21 a court shall issue an EAPO if the requirements of the Regulation have been met. The Government believes that where a court
considers that the grant of an order would have the potential to cause significant harm to the defendant it should retain a discretion as to whether to grant the order or whether to grant it for a lower amount than the claim or judgment etc.

The provision of evidence

The Government understands the Commission’s objective to restrict the circumstances in which oral evidence is necessary. In cross-border proceedings the need for oral evidence increases costs and difficulties for parties, especially if they have to attend a court in another country. However, balanced against that is the need to ensure adequate protection for the defendant. As mentioned above, the Government believes that the absence of a requirement for full and frank disclosure of information from the claimant is a significant failing of the Commission’s proposal. It is not necessary for such a disclosure to be made orally but a court should be able to satisfy itself in the manner most appropriate to the circumstances of the case that it has all the relevant facts before an order is made.

Danger of fishing expeditions when account details are requested

The Government shares these concerns and intends to raise the issue during the negotiations.

Provision for service for a defendant domiciled in a third country

It is as yet unclear to what extent defendants in third countries will be caught by this procedure. The Government agrees that clarification is needed of the provisions that should apply if it is necessary to serve documents outside the EU.

Access to funds to meet legal costs

The need to make provision for legal costs to be made available from frozen funds has been raised by many responses to our consultation and the Government intends to pursue that point during the negotiations.

Objectives of delegated authority

The Government agrees that this is a point which requires further clarification and intends to raise it during the negotiations.

In your letter of 15 September you also asked for a copy of our Impact Assessment (IA). An initial IA was produced for the consultation and I enclose a copy. The majority of those consulted agreed with the conclusions that UK participation was likely to lead to increased costs for the Government (through competent authorities) and banks in processing orders, including in having to comply with the disclosure of information provisions. However several respondents thought that the potential for extra costs had been understated because the likely relative ease with which EAPOs would be obtained might encourage significant use. For banks many of their extra costs would be recoverable through charges but as the proposal allows only for fixed charges it was not clear whether these would be sufficient in all cases to cover the necessary costs. There were also doubts as to how these could be recovered if they were not paid upfront. There were also outstanding issues with regard to the potential liability of banks where a claimant obtains an order which is subsequently shown to have been wrongly granted. For the Government it was considered that the competent authority in England and Wales could be established within an existing authority, thereby minimising extra costs. A competent authority would also be able to charge for its services but as with banks it is not yet clear whether such charges will meet the costs incurred.

31 October 2011

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

Thank you for your helpful letter of 31 October. This was considered by the Justice and Institutions Sub-Committee at its meeting of 23 November. We decided to hold this proposal under scrutiny.

The Committee noted that the Government have decided not to opt in to this proposal in the light of the adverse response to their consultation on this issue, focussed on the rights of defendants to proceedings for a European Account Freezing Order. This response contrasts with the generally favourable response that the Commission reported on its consultation. We also note that the Government intend to participate fully in negotiations with a view to securing a text to which the UK can opt in on adoption. We support this approach, particularly in the light of your assessment that many UK creditors seeking to enforce a cross-border debt would likely want to make use of an EAPO.

We should be grateful to be kept informed of progress on negotiations in due course. In the light of this correspondence we shall be particularly interested in progress in the following areas:

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The application of the proposal to third country defendants.

The need for an applicant to show some likelihood of a defendant frustrating an existing judgment before an EAPO is granted to facilitate its enforcement.

The disclosure obligations on an applicant for an EAPO.

The security such an applicant would have to provide for any damage an EAPO wrongfully causes a defendant.

A residual discretion for a court not to issue an EAPO, or to issue one for a lesser sum, if it would otherwise be oppressive, as we suggested in our letter of 15 September, or would otherwise case significant harm, as suggested in your letter.

Access to frozen funds to meet legal costs.

Preventing the information provisions being used for “fishing expeditions”.

The level of the fees to be charged by banks and Member States’ authorities.

Setting explicit objectives for delegated legislation.

Clarification of the application of an EAPO to debt with a UK cross-border element in the fields of succession and matrimonial property.

24 November 2011

DELEGATED LEGISLATION: COMMON UNDERSTANDING ON THE DELEGATION OF POWERS TO THE COMMISSION (9713/11)

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

Thank you for your letter of 17 May and the subsequent Explanatory Memorandum of 21 June. These were considered by the Justice and Institutions Sub-Committee at its meeting of 13 July. We decided to clear this matter.

14 July 2011

DRAFT AGREEMENT ON A UNIFIED PATENT COURT AND DRAFT STATUTE (11533/11)

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

Thank you for your Explanatory Memorandum dated 21 September 2011. It was considered by the Justice and Institutions Sub-Committee at its meetings of 26 October and 2 November.

We have decided to retain the document numbered 11533/11 under scrutiny. We clear from scrutiny the draft numbered 7928/09 which was deposited in Parliament in November 2009 as it has now been superseded. In addition, we clear the Explanatory Memorandum dated 30 March 2011 deposited in relation to the Court of Justice’s opinion 1/09 on the Draft Agreement on the European and Community Patents Court and draft Statute.

The Sub-Committee has long been a supporter of the EU’s attempts to create a European patent protection system; indeed the Committee published its first Report into this issue in 1986. When the last attempt failed in early 2010 the Committee suggested the Government consider pursuing this policy via enhanced cooperation. We welcomed and cleared from scrutiny the Decision authorising enhanced cooperation and the two Regulations designed to give effect to the system.

Like you this Committee would like to see a viable business-friendly European patent protection system and we are supporters of the attempt to address the concerns of the Court of Justice as expressed in Opinion 1/09 on the compatibility with the Treaties of the Draft Agreement on the European and Community Patents Court and draft Statute.
We note your comments that the negotiations are at an early stage but it is the Committee’s view that as currently drafted the Agreement is so incoherent and poorly drafted that it is not possible to make a clear assessment of precisely how the Unified Patent system and the accompanying judicial supervision arrangements will operate in practice. This problem is unfortunately exacerbated by an inadequate Explanatory Memorandum which merely describes the Agreement’s many provisions but does not explain how the Agreement would work nor what the Government’s view of the system is. We therefore feel unable to express our view at this time on the merits of this Agreement. We should be grateful for further information on the Government’s explanation of how the Agreement would work and the Government’s view on its merits. In the meantime we have a number of specific questions.

Given that one of the ramifications of the Court of Justice’s opinion is that it is not possible to include the non-EU European Patent Convention States in this latest attempt to create a viable patent protection system, why is this Agreement being pursued as an international agreement between the 25 participating States outside the auspices of the EU’s structure? Given that all participating States are EU Member States would it not be more efficient and make better economic sense in the current climate to pursue the judicial supervision arrangements within the EU’s existing institutional/judicial structure? The system could, for example, mimic the structure of OHIM? The Committee would welcome an explanation as to why we need a separate Court structure for patents and why this needs to be established by international agreement? We would also appreciate an explanation as to why it is necessary to have a two-tier Court structure?

Also in relation to the concerns expressed by the Court of Justice, this Agreement includes provisions allowing the Unified Patent Court (UPC) to refer questions on the interpretation of EU law to the Court of Justice under the Treaty’s existing preliminary ruling mechanism. We assume that in order to reinforce this point the Agreement states at Article 1 that “The Contracting States regard the [UPC] to be part of the judicial system of the European Union and is subject to the same obligations as a national court with regards to the respect of Union law”. In addition Article 14b(1) states that “In the same way as national courts, the Court shall cooperate with the Court of Justice”.

The current treaty rules allow “any court or tribunal of a Member State” to request preliminary rulings. Whilst the UPC is not a court or tribunal of a Member State, there is a decision by the Court of Justice allowing the Benelux Trade Mark court to make preliminary ruling requests (case C-337/95 Parfums Christian Dior v Evora BV of 4 November 1997). Do the contracting states intend to rely on this decision to argue that the UPC should be allowed to use the existing preliminary ruling mechanism i.e. to be classed as Member State Court or Tribunal and will this argument satisfy the Court of Justice’s concerns?

Under the heading “Split Jurisdiction” your Explanatory Memorandum highlights your concern with the provisions in the current draft which allow validity and infringement actions to be dealt with separately. If as you say in most Member States these related actions are dealt with together, why does the current draft Agreement separate them?

Finally, the Committee notes the aspiration that the Court will be self-financing but because the EU will not be a party to the Agreement there will be no contribution from it. Your Explanatory Memorandum describes the problem at paragraph 43 but does not include much detail. The Committee would welcome an indication of the costs involved in setting up the Court, in particular for the individual States, and how long it will take for the Court to finance itself?

At this time we have not raised specific drafting issues but we may do so in the light of your response to the major issues raised in this letter. We look forward to considering your response within the usual 10 day deadline.

3 November 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 3 November concerning the unified patent court and statute.

In terms of how the court will work in practice there is little more that I can provide other than what is included in the Agreement, especially given that the detailed Rules of Procedure need further elaboration. However I would be very happy to set out why the Government is supporting this latest attempt to create a viable patent protection system and answer the specific questions you have raised.

When UK stakeholders responded to the European Commission’s consultation in early 2006 about the way forward on European patent reform, following failure to agree on the earlier proposals for the Community patent, they made very clear that they had a strong interest in a single court to deal
with disputes on existing European patents granted under the European Patent Convention. This would eliminate the differences which arise between judgments delivered by individual national courts in relation to the same basic patent. Such a court had already been the subject of international negotiations on a draft European Patent Litigation Agreement and a substantial text had been prepared.

A system as set up under the current draft Agreement would ensure that disputes on unitary patents and on patents under the existing European arrangements, which will continue, can be heard in the same jurisdiction. Otherwise there is a further risk of divergent judgments in different instances, adding even more complexity and uncertainty for business in Europe.

A structure based on the arrangements for Community trade marks and designs granted by OHIM would not serve the needs of industry in providing for a single specialised jurisdiction. Under the current arrangements for Community trade marks and designs, national courts are designated as Community courts and have jurisdiction over disputes relating to infringement and validity of these European-wide rights. The Court of Justice of the EU rules on appeals from decisions of OHIM and preliminary questions referred by national courts, but does not have jurisdiction over direct actions between parties.

While competence could be conferred on the Court of Justice of the EU to rule on disputes relating to EU (unitary) patents, this would require an instrument based on Article 262 of the Treaty. Such a Treaty base could not be used to confer competence on the Court of Justice in relation to European patents granted under the European Patent Convention which are not unitary patents, as these are not created by acts adopted on the basis of the Treaties.

Bearing in mind that states outside enhanced cooperation could still be party to the court agreement in respect of disputes on non-unitary (bundle) patents, we want to avoid two parallel systems for litigating European patents with the risk of divergent judgments and development of case law. One could imagine a situation in which the unitary patent version of a European patent would be litigated before the Court of Justice, whereas the bundle version (say for Spain and Italy) of the same patent would be litigated before the unified patent court. This would not create the legal certainty that we are hoping to achieve.

Moreover conferring competence on the Court of Justice would not be without cost. Patent cases require specialist legal and technical knowledge, and the number of cases is significant (between one and two thousand per year across Europe, although statistics are not comparable between countries). These cases are commercial disputes which require speedy resolution for business confidence. It would appear from previous and recent discussions that there is little appetite within the Court of Justice itself for creating specialist divisions or panels to deal with such matters.

You ask why the court would need a two-tier structure. According to the current draft agreements there would be a court of first instance, consisting of a central division and possibly local and regional divisions, and a court of appeal. This is normally the minimum in any judicial system; for the jurisdiction of England and Wales there are three instances (the Patents Court or the Patents County Court, the Court of Appeal and the Supreme Court). And the WTO TRIPs Agreement provides in Article 41(4) that “Parties shall have an opportunity for review by a judicial authority... of at least the legal aspects of initial judicial decisions on the merits of a case.”

In relation to the structure of the court of first instance, while there would be benefits of consistency and cost-effectiveness in having a single division, it is argued that having local and regional divisions would increase access to justice for SMEs. The advantages, particularly for defendants, relate not only to distance but also to working language arrangements which would be based on the location of the division concerned.

You mention Articles 1 and 14(b)(1) of the draft agreement and case C-337/95 in relation to the ability of the UPC to use the existing preliminary ruling mechanism. It is certainly our expectation that the UPC will be able to make preliminary references in relation to matters of EU law; the exact wording of the Agreement in this respect is still under discussion.

Provisions on split jurisdiction, or bifurcation of cases between validity and infringement questions, have been the subject of detailed discussion. This is because the German courts (in particular) are set up to have responsibility for infringement only at state level, with validity being decided in the Federal patent court. Although the UPC will be an international court, and the local or regional divisions are not national courts, German negotiators are keen to reflect what they see as a well-functioning system in the draft Agreement. UK and other users take a different view. This is why there is a range of options available to local divisions set out in the draft Agreement, as agreed at the December 2009 Competitiveness Council.
The issue of financing is yet to be discussed among participating states now that the EU is not a party to the Agreement. The Commission is developing a detailed study; how costs and liabilities will be divided between the participating states is still for negotiation. The UK’s position is that the UPC should be self-financing from its own revenues in the steady state.

16 November 2011

DRAFT DIRECTIVE ON ACCESS TO A LAWYER (11497/11)

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

Thank you for your Explanatory Memorandum dated 29 June 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 20 July.

We have decided to retain the proposal under scrutiny.

THE OPT-IN

It is the Committee’s view that this proposal has the potential to be of great benefit to the millions of UK citizens who travel within the EU; in particular for those who will inevitably become suspects in criminal proceedings in other Member States, and we welcome your view that it is important that UK citizens travelling abroad should be “afforded a high level of protection with respect to criminal procedural rights”.

We note that the content of the Directive largely mirrors the rights enjoyed under Article 6 ECHR as outlined by the European Court in the Saldzu case. However, the requirement under the ECHR that victims seeking a remedy must first exhaust national remedies, coupled with the fact that as of 1 June 2011 there are over 152,000 pending cases before the ECtHR, create significant difficulties in those Member States where the standards fall short, for EU citizens seeking an effective remedy for breach of their rights to access a lawyer. Viewed in this light, it is the Committee’s view that this proposal aims to ensure that all EU Member States protect the rights contained in the ECHR where the ECtHR is unable to do so.

In your Explanatory Memorandum you acknowledge that current practice in the UK is broadly compliant with the proposal but we note that you say that many aspects of the draft are “potentially negotiable”. In their response to your discussion paper on this proposed Directive the Law Society of England and Wales argue that: “the proposal is an essential measure to contribute to the protection against abusive coercion or ill-treatment on the part of the authorities, to ensure equality of arms between the investigating or prosecuting authorities and the suspect or accused and to prevent miscarriages of justice”. They also call on the Government to opt in from the outset and “to take a leading role to ensure that the rights of its citizens are no longer under threat”.

Whilst we accept the principles which underpin this proposal the current draft does raise significant issues. Provided you are confident that the concerns outlined in your Explanatory Memorandum and those raised by the Committee in this letter can be met, we suggest you opt in to the negotiations from the outset.

THE PROPOSAL

We note the policy implications for the UK that you raise in your Explanatory Memorandum, for example the requirement that access to a lawyer be granted before the start of questioning (Article 3(a)), the presence of a lawyer at evidence gathering (Article 4(3)), the increased use in the UK of telephone advice for minor non-imprisonable offences whilst the proposal is based on face-to-face consultation, and the potential for the UK’s current rules on the confidentiality of lawyer/client correspondence being in conflict with the proposed Article 7. In addition, you question whether the UK’s current practices will be compatible with the proposed Directive’s rules on the derogations (Article 8), on remedies (Article 13), and on the right of suspects to waive their access to a lawyer (Article 9). Many of these concerns you anticipate will be shared with other Member States and will in your view be negotiable.

Until you are able to give the Committee a clearer explanation of the stance you intend to take on these issues we delay expressing our views.
We take this opportunity to raise with you our own concerns with the proposal as currently drafted. In relation to Article 10(2), the Committee believes that there may well be circumstances where the national authorities may decide that in the interests of the investigation there will be circumstances in which they do not wish to alert an individual that they are in fact a suspect. During the course of our scrutiny of the Commission’s Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility (Document 17691/09) we expressed the view that EU rules should not be introduced on whether evidence is admitted (see our letter dated 25 March 2010). We think that Article 10(2) should be omitted.

What impact do you foresee on the workload of the Court of Justice of its post-Lisbon jurisdiction for Justice and Home Affairs (JHA), bearing in mind the other JHA matters into which we have opted in? Also, what do you think will be the impact on the operation of the UK’s legal system of importing Court of Justice jurisdiction in respect of these matters?

We look forward to receiving an account of the negotiations of this proposal which began on 4 July.

EAW

Finally, in relation to the proposed reform of the EAW’s system (Article 11), whilst we note that the Government’s review of the UK’s extradition responsibilities is due to report later in the summer, your Explanatory Memorandum was restricted to acknowledging this reform as “a new concept”. In your view, is this reform a welcome addition to the EAW’s system?

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

20 July 2011

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

Thank you for your letter to the Secretary of State of 20 July 2011 concerning the above-mentioned draft Directive. We note your assessment that the current draft raises significant issues and your conclusion that providing we are confident that the concerns outlined in the Explanatory Memorandum (EM) and set out by you in your letter are met, the UK should opt in to the negotiations at the outset. The Government has until 29 September to decide whether or not it should opt in to the negotiations at the outset. The Government has until 29 September to decide whether or not it should opt in to the measure.

With regard to your question in relation to how we intend to address the issues that we raise within the EM, we intend to work with other Member States to achieve a text that meets the requirements of the ECHR but which does not have a disproportionate or adverse impact on the investigation and prosecution of crime. Although the general principle of access to legal advice is a fundamental ECHR right, some of the provisions in the draft Directive do not sit well with UK domestic practice and go beyond the minimum requirements of the ECHR with potential undesirable impacts. I set out our overall approach on the issues you raise below, but would also note that at this stage of the negotiation process we are still exploring options as to the best way in which our concerns – which often mirror those of other Member States - can be met.

You note our concern that the requirement that access to a lawyer should be granted to a suspect before the start of “any questioning”. This could potentially prevent the police asking some very basic preliminary questions that are necessary to ask immediately: such as asking someone involved in a drink driving incident key questions pertaining to the reliability of samples given (for example whether the person has used mouthwash which contains alcohol). This is a concern that other Member States share and we would wish to work together with them to find an appropriate way forward which is better reflective of domestic practice. There are several ways in which this might be achieved but it is of note that the ECHR case law (for example Salduz v Turkey) focuses on the right to access a lawyer in the context of interviews conducted by the police once a person has been taken into custody.

You note our concern that the Directive requires that there should be a right of access to a lawyer upon carrying out any procedural or evidence-gathering act where the person’s presence is required or permitted. This goes significantly beyond domestic practice and might prevent the police from performing a simple body search on an arrested person or the taking of fingerprints without a lawyer being present. We would also argue that it is neither necessary nor proportionate to have a lawyer present at, for example, every house search where a suspected person might be present. This concern is shared by many Member States and we are seeking for this article to be significantly changed so that it is more in line with UK practice.
As you note, we have concerns about the provision which states that a person should always have the right to meet with the lawyer. In England and Wales and to some extent Scotland, telephone access to a lawyer is provided for in cases of low level crime and indeed arrested persons may prefer this as it can reduce the time spent in custody. It is not always possible to provide immediate physical access to a lawyer in all circumstances. Again, this concern is shared by other Member States and we are currently exploring language which would address this point and allow for the continued use of telephone access in appropriate circumstances. We also have an additional concern which we did not identify in our EM that the current draft could potentially preclude the use of accredited representatives who are not qualified lawyers. Accredited representatives are frequently assigned police station work on behalf of law firms and any change to that practice would have resource implications. We are working with others within the Council to find an appropriate solution on this.

You note our concern with regard to lack of a derogation to Article 7 on confidentiality of meetings and communications between lawyer and client. Although this is a fundamental principle, there are exceptional circumstances in which it is considered appropriate and justifiable to depart from it. There is provision in domestic law which provides, for example, for the interception of letters in exceptional circumstances where there is reason to believe that the communication is furthering criminal activity or may endanger prison security. It is also possible to monitor meetings and communications including where necessary for the purposes of preventing or detecting serious crime or where there is reason to believe that illicit enclosures are being sent. The practical implications of an absolute lack of derogations would be significant in terms of making it more difficult to investigate crime where a lawyer is involved and would impact on the ability of the police to investigate serious organised crime. We are working with other Member States to find a solution on this article and to allow for derogations in these exceptional circumstances.

We are also concerned about the lack of derogations in Article 8 to the right of access to a lawyer and the right to communicate with third parties in circumstances where it is necessary in order to allow evidence to be preserved or to prevent the furtherance of criminal activity. This concern is shared by other Member States. We are also concerned that the Directive requires decisions on derogation from immediate access to a lawyer to be taken by a judicial authority. This contrasts with current law and practice where such decisions, which are operational in nature, are taken by a police officer of an appropriate rank. These changes would have a significant impact on investigations and would be resource intensive and we are therefore working with other Member States to find a solution which would be more in line with domestic law and practice.

As you note, we question the exact extent to which current UK practice would meet the requirements of article 9 on the right of suspects to waive their access to a lawyer. The right to access a lawyer is, as we note above, a fundamental principle, and suspected and accused persons should be given ample opportunity to avail themselves of this right. However, we do not think it is necessary for a person to receive legal advice in order to make a decision that he does not require a lawyer. We would want to ensure that it is adequate for a person to be informed of what he can expect from a lawyer, for example by means of information provided in a letter of rights, for him to be able to make a decision as to whether or not he would like a lawyer. Although a person may be given some opportunity to change his mind, this should be within reason. Given the meaning of "proceedings" in Article 2 on scope which includes any eventual appeals process, it is important that the waiver article is proportionate.

With regard to Article 10, the Police and Criminal Evidence Act 1984 Code C requires that where there are grounds to suspect a person of an offence, that person must be cautioned before any questions about the offence, or further questions if the answers provide the grounds for suspicion, are put to them, if either the suspect's answers or silence may be given in evidence to a court in a prosecution. It is for that reason that we do not have concerns about 10(1) as it stands. The scope of the Directive only covers those individuals who have been informed, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. We do, however, share your concerns about 10(2). We are concerned that 10(2) would have the result of fettering the ability of judges to make decisions on the grounds of fairness of proceedings and would require, for example, any voluntary statement made by a person when he presents himself to the police as a witness to be ruled inadmissible. We are concerned about the impact of this provision on the ability to effectively prosecute crime and therefore intend to work with other Member States to ensure that the provision is either deleted or modified so that it allows judges appropriate discretion. A similar concern relates to Article 13(3).

You ask a general question about the impact on the workload of the Court of Justice of its post-Lisbon jurisdiction for Justice and Home Affairs bearing in mind the other JHA matters into which the UK has opted in. This is clearly a question which goes beyond the present measure and would
depend on the final shape of the Directive and the extent to which Member States are found to be in breach of its provisions. If the UK were to take the decision to opt in to this Directive and if the Directive is adopted then the UK would be subject to ECJ jurisdiction and could be subject to infraction procedures in the event of non-compliance. The extent of risk and the subsequent impact on the UK’s legal systems would depend on the final wording of the Directive.

Finally, with regard to the concept of providing access to a lawyer in the requesting state in EAW proceedings, this is a matter which will be explored further following the publication of an independent review of the UK’s extradition arrangements. One of the issues being examined by the panel conducting the review is the operation of the EAW and this draft directive has been brought to their attention. It is right therefore that we await the panel’s findings (due at the end of the summer) before reaching a final view on these provisions. We will revert later with a fuller response to your question on Article 11.

I shall write to you in due course with regard to our decision on the opt in.

8 August 2011

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

The Ministry of Justice last wrote to you about the above mentioned draft Directive, on 8 August 2011, in response to the questions that you had raised in your letter of 20 July 2011. I am writing to let you know that the Government has decided not to opt in to the Directive at the start of negotiations. Parliament will be informed of the Government’s decision by a Written Ministerial Statement when it next sits in October.

In your letter of 20 July 2011, you set out that the Justice and Institutions Sub-Committee were of the view that the Government should opt in to the negotiations at the outset, providing that we were confident that the concerns set out in the Explanatory Memorandum dated 29 June 2011, could be met. We agree with the Sub-Committee, that in principle, a Directive in this area has the potential to be of great benefit to UK citizens who become suspects in criminal proceedings in other Member States. We also believe that such a Directive has the potential to build greater trust and confidence among the competent authorities of all EU Member States that judgments handed down by courts in other Member States, which they may be expected to recognise, have been made on the basis of sound procedural standards. However, given the extent of our concerns with the text published by the Commission, which we have set out in earlier correspondence, we cannot at this early stage of the negotiations be entirely sure that all of them will have been resolved in the final instrument, notwithstanding the positive approach that the Polish Presidency is taking to the negotiations.

However, because of the value we attach to ensuring fair trial rights across the EU, we intend to work very closely with our European partners to develop a text which takes greater account of the practical realities of the investigation and prosecution of crime and reflects the flexibility which Member States need in order to meet the requirements of the ECHR in a way which is consistent with the nature of their justice systems. If our concerns about the initial draft of the Directive are taken into account and satisfactorily dealt with during the negotiations, we will give serious thought to whether we should apply to opt in to it once adopted. We will consult Parliament about any decision to apply to opt in to the final text.

In response to a request from the European Scrutiny Committee, a debate was held on the Floor of the House of Commons on Wednesday 7 September, on the Government’s decision whether to opt in to the draft Directive. On 14 September, the Commons voted to uphold the Government’s recommendation not to opt in.

A copy of the Government’s preliminary Impact Assessment of this proposal in enclosed. We will continue to update you about the progress of negotiations. Further official level meetings have been scheduled by the Polish Presidency. Officials will attend those meetings with a view to influencing the negotiations to ensure that our concerns with the current text are resolved. The Presidency have said that they intend to seek a General Approach on an amended text at the Justice and Home Affairs Council on 13 and 14 December 2011.

20 September 2011

Letter from the Chairman to Jonathan Djanogly MP

Thank you for the Government’s letters dated 8 August and 20 September 2011. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 19 October 2011.
We have decided to retain the proposal under scrutiny.

The Committee is grateful for the detailed explanation of the Government’s concerns about this proposal set out in your letter dated 8 August. However, only in relation to the requirement that access to a lawyer should be granted to a suspect before the start of questioning (Article 3(1)(a)) do you specifically state that the proposal goes beyond current ECHR requirements. Given that the UK is already subject to ECHR standards are you able to tell the Committee which of the other provisions of this proposal would in your view require the UK to enact standards that go beyond it?

The Committee does recognise that some of the Government’s concerns are justified, for example the anticipated addition to the legal aid budget of £32-£34 million as a consequence of the requirement that access to a lawyer be face-to-face rather than by telephone, and the requirement that a lawyer be present at every house search where a suspect might be present. We take this opportunity to express our support for your attempts to address these concerns with the other Member States.

In relation to our questions addressing (i) the impact of the post-Lisbon JHA jurisdiction on the UK’s and the CJ’s respective jurisdictions, and (ii) the proposed reform of the EAW’s system, we note your reason that it is too early to answer either question. We will return to these issues once the proposal’s content is clearer and the Government’s review of the UK’s extradition responsibilities has concluded.

THE OPT-IN

As we said in our letter of 20 July to Kenneth Clarke, whilst this proposal has the potential to be of great benefit to UK nationals who travel within the EU, the UK should only opt in if the Government are confident that their concerns could be met. We therefore note the Government’s reasons and the conclusion that it is not in the UK’s interests to opt in to the negotiation of this proposal from the outset. We propose to take evidence on this matter in order to better inform our view.

We look forward to receiving periodic updates from you in due course as the negotiation of this matter unfolds.

21 October 2011

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

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

Thank you for your letter of 20 May noting your agreement with my criticism of the principle of equivalence within the above report, and requesting an update on the terms of Council Conclusions responding to this report. I appreciate your support on and interest in this dossier, and attach for your information the final text of Council Conclusions agreed on 12 July.

These Conclusions describe and respond to some of the key problems highlighted by the findings within the report on equivalence, and the UK was therefore pleased to support them. I look forward with interest to the Commission’s response to the requests within the Conclusions, in particular to the assessment of the financial savings of the 2004 reform.

In this context, I’d like also to take this opportunity to advise you that on 29 June the Commission issued a draft proposal further amending the Staff Regulations. Following a period of consultation with staff and trade unions over the summer months, the Commission will issue its final proposal in the early autumn. The current version of the proposal falls short of the requirements of both the UK and other Member States for significant reform. We have outlined these requirements to the Commission in a joint non-paper, also issued on 29 June and attached for your information [not printed], and will continue to lobby for a much stronger proposal. I will be providing you with an Explanatory Memorandum on the Commission’s final proposal in due course.

18 July 2011
Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter of 18 July. It was considered by the Justice and Institutions Sub-Committee at its meeting of 14 September.

We are grateful for the further information you provided and support the Government efforts to achieve a more efficient and cost effective EU public service. The paper prepared by the United Kingdom and 7 other Member States will be a useful document against which to judge future proposals for amendment of EU Staff Regulations, a draft of which has been deposited for scrutiny.

We do not expect a reply to this letter.

15 September 2011

EUROPEAN ANTI-FRAUD OFFICE (OLAF): REGULATION AMENDING REGULATION 1073/1999 (7897/11)

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

Thank you for your letter of 25 May regarding EM 7897/11.

With regards to the proposed term of office for OLAF’s Director General, it is the Government’s view that the seven years (non-renewable) rather than five years (renewable) could create problems should the Director General prove unsuitable and ineffective in carrying out the duties of the post. At a time when the threat of fraud is growing faster than the resources available to combat it, OLAF’s mission to effectively fight fraud against the EU budget and to protect the EU’s financial interests is more important than ever. OLAF cannot afford to have an ineffective leader in place. We agree that the long and arduous appointment process and the need for more time in post are valuable points to make on this issue, but do not think them sufficient to justify increasing the length of the term of office.

The Government’s position has been supported by a number of Member States. During recent discussions in Council working group, the Netherlands, Germany, Portugal, Austria and Poland have all intervened in the same vein as the UK. However, it appears that other Member States are prepared to support the Commission’s proposal as a means of lowering the frequency of appointments, a process which as you know has become increasingly politicised.

In the meantime, the Council’s Anti-fraud working group has gone through the Amending Regulation on an article-by-article basis. The Hungarian Presidency will seek to produce a compromise text for the group’s discussion on June 17 with the aim of reaching agreement on a Council position before the end of June. The European Court of Auditors has produced a follow-up to their first report on the management of OLAF, for which I submitted Explanatory Memorandum 9843/11 on 21 May 2011. The Scrutiny Committees will be informed of further developments as they occur.

Regarding the late submission of my Explanatory Memorandum 7897/11, my officials and I always do our utmost to ensure that explanatory memoranda are submitted on time as a matter of course. However, there are regrettably times when this is not possible. On this occasion, the delay was caused by the technical nature of the ‘legal implications’ section. Treasury Legal Advisers needed additional time to fully assess the section on the proposal’s compliance with Fundamental Human Rights. This was in order to ensure that the EM could comprehensively address the issues rather than requiring a later addendum, not least as the Lords’ report had raised concerns about this when considering the original proposal in 2005.

10 June 2011

Letter from the Chairman to Justine Greening MP

Thank you for your letter of 10 June which was considered by the Justice and Institutions Sub-Committee at its meeting on 29 June.

We note your view on the proposed change to the Director General’s term of office. We agree that the present provision is preferable.

We keep the proposal under scrutiny and pending further developments.

30 June 2011
Letter from Justine Greening MP to the Chairman

I am writing to update you on developments concerning the Commission’s proposed amendments to the Regulation that governs investigations conducted by OLAF, as requested in your last letter dated 30 June 2011.

The Council’s Working Party on Combating Fraud examined the amendments at several meetings between April and June 2011 on article-by-article basis. The Hungarian Presidency subsequently produced a compromise text at the end of June, which was agreed by the Permanent Representatives Committee on 7 July.

As you are aware, the Government’s priorities centred on four articles: confidentiality and disclosure of information to institutions (Article 4); procedural guarantees (Article 7); the role of the Supervisory Committee’s in the protection of individuals’ rights (Article 11); and the term of office for OLAF’s Director General (Article 12). A brief summary of the outcome in each area is below.

On the requirement for OLAF to notify institutions and bodies about investigations concerning their staff (Article 4), the Government secured text that emphasises the importance of guaranteeing confidentiality of investigations via institutions’ procedures for handling potential cases of fraud once notified by OLAF. We hope this will help to mitigate the risk that evidence may be endangered by premature disclosure.

With regards to our shared concerns about access to legal assistance for those involved in OLAF’s investigations, as set out in the procedural guarantees (Article 7), the Commission felt that the provisions in the Regulation exceeded the European Charter on Human Rights Article 6 requirements. The Government secured text that highlights the right to any form of representation during interviews, though no explicit provision is made for legal aid.

Proposals for the role of the Supervisory Committee (Article 11) have not been changed. The UK and two other Member States voiced concerns about its enhanced role, which extends its previous mandate to scrutinise, monitor and assess OLAF’s performance. However, this position was not widely shared and was counterbalanced by support from the European Parliament (EP) and the European Court of Auditors for the proposals, which the Commission raised during negotiations.

Finally, the length of term of office for OLAF’s Director General (Article 12) has been extended to seven years without the option of renewal. I indicated in my letter to you of 10 June that most Member States supported a longer, non-renewable term for OLAF’s Director General as a means of reducing the frequency of senior EU appointments. However, the UK secured a new reference to procedures that ought to be followed in the event of unsatisfactory performance by OLAF’s Director General.

The Government is broadly content with this outcome, given the challenging negotiating environment. All Member States had specific concerns but these overlapped relatively poorly, complicating coalition-building. I would note that this outcome is provisional in two senses. First, it does not represent the final position of the Council on the dossier, but rather an initial mandate for trilogue discussion with the EP. Second, the EP is likely to amend the Regulation significantly, given prior differences of opinion with the Council. As you are aware, this dossier has been under negotiation, in some form, since 2006. We anticipate tough negotiations ahead. An EP working document on this dossier is expected by the end of August, but a timetable for the EP to adopt its position remains unclear. As a result, it is difficult to say exactly when the dossier will return to Council. When it does, however, the UK will have another opportunity to review it. I will, of course, continue to keep you updated on developments as negotiations progress.

2 August 2011

Letter from the Chairman to Justine Greening MP

Thank you for your letter of 2 August on the latest position in relation to these proposals, which was considered by the Justice and Institutions Sub-Committee on 14 September. We keep the proposal under scrutiny and look forward to further information as matters develop.

In the meantime, we should be grateful for a copy of the Presidency text, recognising that it may have to be edited to remove confidential material, with an explanation of where amendments have been made to the original proposal. We should also be interested to know in which areas of the proposed reforms the European Parliament is expected to seek changes. We should be grateful for a reply on those points within the usual ten days.

15 September 2011
Letter from Justine Greening MP to the Chairman

Thank you for your letter of 15 September on the Commission’s proposed amendments to the Regulation that governs investigations conducted by OLAF, following my update letter of 2 August 2011.

A Presidency text recording the outcome of proceedings in Council to date is enclosed. We have not yet received a version of the text that compiles all changes made by Council to the Commission’s original proposal, but my officials are completing a comprehensive comparison, which will be forwarded to your Committee as soon as possible.

I thought it would also be helpful to outline the amendments that were made to the Government’s priority areas, as set out in my letter of 2 August to your Committee. There are presented in the annex below.

The European Parliament (EP) has not yet reached a firm position on this dossier. The EP’s Committee on Budgetary Control met on 22 September to discuss its preliminary analysis. Based on this discussion, we believe the EP might focus inter-institutional debate on: rights of defence and procedural guarantees for persons concerned by OLAF’s investigations; the role and independence of a review adviser or review procedure; and the role and powers of the Supervisory Committee. We expect the EP to return to this dossier in October, in order to finalise a mandate for future trilogue discussions with Council. I will, of course, update both scrutiny committees on further significant developments.

28 September 2011

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

The letter of 28 September from Justine Greening and the Government’s Explanatory Memorandum covering the Court of Auditors’ Opinion on the Commission’s proposals were considered by the Justice and Institutions Sub-Committee on 19 October.

We are grateful for the further information on the changes in the text made so far, and for the comparison of texts which your officials have provided.

With the Government we welcome the contribution of the Court of Auditors to consideration of the proposals and endorse the Court’s wish to ensure speedier investigations and proper safeguards for those under investigation. We agree that there is no need to add a review officer to OLAF’s system of governance, and we do not share the Court’s concerns about the proposed provision of regular exchanges of views between OLAF and the EU Institutions.

We keep the proposal under scrutiny and look forward to further information as matters develop, in particular following the European Parliament’s consideration of the proposal.

21 October 2011

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

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

Thank you for your letter of 26 May providing a further update on negotiations on the draft Directive. It was considered by the Justice and Institutions Sub-Committee on 8 June.

It would have assisted us if the changes to the text were referable to the text enclosed with your predecessor’s letter of 11 May.

We decided to clear Articles 1-18 as we consider that the text as it stands would be beneficial overall and goes a long way to meeting our previous concerns. We have taken account of your intention, which we support, to press for no limit on the right to refuse to execute an EIO on grounds of dual criminality; and to abstain from political agreement if this is not achieved.

Whilst we welcome the fact that the right to refuse to execute an EIO on grounds of the protection of fundamental rights has been clarified, we should be grateful for clarification, within the usual 10 day deadline, of new recital (12b) which complements Article 10(1)(a). What UK privileges and immunities would be covered by these provisions? Can you give examples of other significant provisions and immunities which might be claimed in other Member States?
We note that the text is still not clear that the EIO should be available for the benefit of defendants and we urge the Government to continue pressing for greater clarity on this point.

9 June 2011

Letter from the Chairman to Damian Green MP

Thank you for your letter of 22 June and your detailed account of the state of the draft Directive following the Council meeting on 10 June. The letter was considered by the Justice and Institutions Sub-Committee on 13 July. We note that the draft now substantially takes account of the points with which we were concerned in relation to Articles 1 to 18.

We look forward to hearing of the further negotiations which will now take place on the remainder of the draft Directive and, subject to that, do not expect an immediate response to this letter.

14 July 2011

Letter from Damian Green MP to the Chairman

As you will recall, a partial general approach to Articles 1 – 18 of the EIO was reached at the June 2011 Justice and Home Affairs Council. Since then negotiations under the Polish Presidency have focussed on Articles 19 – 34. I am writing to provide you with an update on how negotiations are progressing on these Articles. Articles 19 – 27 make specific provision for a number of investigative measures which are particularly complex or sensitive. These include provisions on the temporary transfer of prisoners, evidence given via video link, banking evidence and evidence collected in real time. Article 28 – 34 relate to the implementation of the EIO, including how it relates to other agreements. Discussions on these Articles are very much at the initial stage. Since July 2011 there have been three working groups and one Friends of the Presidency meeting on these Articles, as well as two expert meetings on intercept. No agreement on these Articles has yet been reached and there has not been any indication from the Presidency that they wish to escalate discussions to the Justice and Home Affairs Council.

Much of the discussion in the working groups has focused on how the provisions in Articles 19 – 27 will work in conjunction with the Articles agreed in the partial general approach to the EIO. For example, whether there is a need for additional grounds for refusal or provisions on costs, given what was agreed in Article 10 (Grounds for refusal) and Article Y (Costs). In addition there has been discussion on whether and how covert investigations, controlled deliveries and intercept should be addressed in the EIO. The main issues being discussed in relation to each of these Articles are summarised below.

Articles 19 and 20 (temporary transfer of people in custody) – negotiations have centred on whether the lack of consent of the person being temporarily transferred should be a ground for refusal. The UK has been clear that it should be. Discussions have also focussed on what the impact should be if the issuing and executing States cannot reach an agreement on the practical arrangements of the transfer and how to ensure the drafting of Article 19 does not lead to confusion or overlap with the European Arrest Warrant. Some Member States, including the UK, have supported proposals to merge Articles 19 and 20, given their similar purposes.

Article 21 (Hearing by video conference) – there have been similar discussions to Article 19 and 20 in relation to whether lack of consent should be a ground for refusal. Questions have been raised about how these provisions relate to suspects and accused persons. Discussions have highlighted how commonplace the usage of video conferencing is, which has lead to suggestions that any additional grounds for refusal, other than those relating to suspect or accused, should be removed.

Article 22 (Hearing by telephone conference) – there has been minimal discussion on this Article and there are questions raised as to whether there is any need for bespoke provisions on telephone conferencing or if it can just be dealt with in accordance with the provisions covered by the earlier Articles. There has also been some discussion about whether this provision could impact on current practice where telephone conferencing is used in an informal manner between Member States.

Article 23, 24 and 25 (Provision on banking evidence) – discussions have centred on whether these provisions can be extended to include financial institutions other than banks. The original drafting, particularly of Article 23, was very convoluted, and it is being considered how this can be simplified which is something the UK would support.
**Article 26 and 27 (Investigative measures in real time)** – initial discussions have centred on what should be included in these Articles. The UK’s view is that some forms of investigative measures, such as controlled deliveries, undercover operations and intercept, do not fit neatly within the structure of the EIO and our preference would have been for these to be excluded from its scope. However, negotiations have indicated that these investigative measures will most likely remain in the EIO. Our focus is now on ensuring executing States have sufficient flexibility and capacity to refuse an EIO relating to these measures, or to control its execution. As a result of the particular complexities and sensitivities with intercept, a group of experts from a number of Member States have been meeting outside the negotiations to discuss issues and help inform the drafting of the relevant Articles. UK experts have been taking part in the meetings which have been beneficial in reaching a common understanding of the issues. However the complexity of the issues, coupled with the different approaches and legal regimes in Member States', means that further discussion will be required.

I understand that the Committee would appreciate the opportunity to consider a text of these Articles and we will provide one when available. I hope that this will be possible within the coming month.

The EIO has not been discussed in the European Parliament again since 17 March, when it was discussed in the Civil Liberties, Justice and Home Affairs (LIBE) Committee. However, in mid-October there was a Rapporteur and Shadow Rapporteur meeting on the EIO. As well as having received the UK Government briefing on the partial general approach to Articles 1 – 18, Shadow Rapporteurs were orally briefed by UK officials in advance of this meeting. The UK’s position received a sympathetic hearing and these briefings have helped prompt the production of the interim report by the Rapporteur which is expected soon. Once I have received the report I will write to you again with it.

I also attach the report [not printed] by Justice on the Articles 1 – 18 of the EIO which may be of interest.

8 November 2011

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

You will recall that when I wrote to you on 8 November regarding EIO negotiations the Polish Presidency had not indicated that they wished to escalate discussions to the Justice and Home Affairs Council. However in a Working Group meeting on 14 November 2011 the Presidency announced their intention to seek a General Approach to the EIO at the 13-14 December JHA Council.

No depositable text has been produced by the Presidency and we continue to impress upon the Presidency the importance of a depositable text for our Parliamentary processes. As an interim measure the most recent text of Articles 19 - 34 and a separate document containing Article 27b-27d have been redacted and deposited with an accompanying unnumbered Explanatory Memorandum (EM). I hope that this text may be considered by your Committee prior to the December JHA Council and that, if possible, we may answer any queries you have in relation to it. The EM highlights our negotiating aims in relation to these Articles. There are further negotiations taking place prior to the December JHA Council and the text on these Article will therefore continue to change. We will keep you informed of progress and aim to provide the Committee with any new text.

21 November 2011

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**EUROPEAN OBSERVATORY ON COUNTERFEITING AND PIRACY (10668/11)**

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

Thank you for your Explanatory Memorandum of 22 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 13 July. We decided to hold the matter under scrutiny.

We consider that the Commission's proposal complies with the principle of subsidiarity in that there are, as you indicate, clear benefits to be derived from pan-European action in this field.

We are sympathetic to the overall objective of countering infringements of intellectual property. However, we note that neither the Commission's nor the Government's impact assessment give a quantitative assessment of the impact on intellectual property infringements of increasing the
resources of the European Observatory on Counterfeiting and Piracy significantly. Whilst you indicate that the proposal has the potential to positively influence the reduction and enforcement of counterfeiting and piracy, we would be interested in any assessment you can give of the scale of that influence in order to assess whether the considerable increase in resources would be worthwhile.

We would also be interested in the views of stakeholders you have consulted on this point; and on the use of a charge ostensibly for registering and renewing Community trade marks for the wider purposes of funding an expanded Observatory.

We support your concerns that the Observatory should be subject to robust governance and that the information requirements should not impose additional burdens. We look forward to an update on these aspects of the proposal as negotiations progress.

We should be grateful if you would outline your concerns on the legal basis of this proposal.

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

14 July 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 14 July 2011. I note that the Committee has retained the document under scrutiny and has asked to be kept informed as negotiations continue on the proposal. I will of course, keep you updated and will write to you again as this matter develops. In your letter you also ask several questions relating to the document, which I will seek to answer now.

As you identify, neither the Commission’s publication nor our own Explanatory Memorandum and accompanying impact assessment contain a quantitative assessment of the likely impact of the proposal. Unfortunately the lack of common and consistent data on the nature of infringements of intellectual property rights (IPRs) and their impact makes it difficult to quantify the benefits to UK business that increased investment in the Observatory might bring. These difficulties were acknowledged in the recent Independent Review of IP and Growth by Professor Ian Hargreaves which the government will soon respond to.

One of the key areas of work for the Observatory and OHIM going forward will be to improve collective understanding of the scope and scale of IPR infringements and of efforts to combat them. The development of credible and comparable data is essential if we are to ensure that enforcement efforts are well targeted and properly prioritised by both public and private sector. We expect the provision of such data to be one of the key outputs of the Observatory and should form one of the criteria for the evaluation of the Observatory provided for in Article 8.

In addition to delivering improvements in the area of data we expect that the Observatory will raise awareness and skills, and help to spread best practice and information. In some countries, like the UK, where work in this area is already taking place these new resources will provide an additional source of information and advice. In other countries, where limited enforcement related activity has occurred to date, its impact may be more significant. Improvements in enforcement across the Community potentially help UK businesses trading there.

Turning to the views from stakeholders on the proposal, IPO’s consultations to date with stakeholders suggest that they are generally supportive of measures to enhance our enforcement efforts as long as they are proportionate and do not place unnecessary burdens in terms of legislative requirements or data provision. Some concern has been expressed about the need to ensure that OHIM remains properly focused on its core business, which is a view shared by the Government. The use of existing OHIM funds has not raised significant concerns with stakeholders to date, although some have commented on the importance of making sure that the work is properly focused and is suitably scrutinised and that it does not require an increase in the fees charged by OHIM for the grant of EU wide trade mark and design rights. We will be seeking further, more detailed views, from stakeholders as this work progresses.

Finally on the legal base I can confirm that lawyers have completed their analysis of the legal base and are content with the legal base set out in the proposal.

28 July 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 28 July. This was considered by the Justice and Institutions Sub-Committee at its meeting of 14 September. We decided to hold the matter under scrutiny.
We understand your difficulties in quantifying the potential impact of the proposal on infringements of intellectual property and share your hope that the 5 year review of the legislation should provide data on which the value for money of the expansion of the EOCP can be properly considered.

We note that the Government no longer have concerns over the legal basis of this proposal.

We also note that the point we raised over the funding arrangements is reflected in the emerging stakeholder response to the extent that some have expressed a concern that OHIM registration fees should not increase. We should be grateful for further information, in due course, as to the mechanism for controlling OHIM fees, as we can envisage pressure to increase them in response to any future increase in the costs of the EOCP.

We look forward to receiving, also in due course, the further detailed views of stakeholders that you are seeking and an update on negotiations. We will be particularly interested in developments.

— in respect of the governance of EOCP within OHIM which should not just keep tight control over the activities of EOCP but also meet the emerging stakeholder concern that OHIM is not diverted by EOCP from its core activity of registration and administration of patents and designs; and

— the burden upon Member States and businesses of any requirements for the EOCP to be provided with information.

15 September 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 15 September. I note that the Committee has retained the document under scrutiny and has asked to be kept informed as negotiations continue on the proposal.

First, an update on negotiations and I will then address the specific questions you raise in your letter. I am also attaching a new draft text provided by the Presidency on 20 October. We expect a further text to be issued within the next week which I will provide once it is available.

Discussions on this Regulation have been relatively slow until the past few weeks, with only two half day Council Working Groups arranged since the return from the summer break. Most member states are supportive of the proposal although some have raised limited concerns about the provisions on data within the Regulation, the arrangements for meetings of the Observatory and the need for improved governance arrangements.

In view of the limited issues being raised by member states and the emerging positive views from the European Parliament, the Presidency have announced a new timetable for this work with a view to a first reading deal in early January 2012. They are seeking to complete discussions in the Council on the text and commence informal dialogue between the Council, the Parliament and the Commission at the end of November 2011. Clearly this is an ambitious timetable and one we may not be able to meet but as this is a QMV process and there is broad support our ability to influence this timetable is limited.

Turning to the Regulation, while we support the proposed transfer of the Observatory to OHIM, which should provide an additional important tool to aid the protection of IP rights, we have been seeking changes. These changes are intended to address the concerns that I set out in my original Explanatory Memorandum and to generally improve the text. There has been limited substantive comment or debate from member states on the proposal which has meant that the UK has had to take a fairly proactive role to make sure that our key issues are understood and to influence its content. The UK scrutiny position has however been made clear during those discussions. In particular our efforts have focused on:

— ensuring that OHIM’s role and its relationship to the work being carried out by member states, industry and others is clear;

— establishing a clear governance framework to ensure that OHIM’s activities are planned, well targeted and deliver value for money;

— preventing the imposition of mandatory data provisions on member states.

As you will see from the new text released by the Presidency on 20 October some progress has been made within Council in these areas, although there is more work to be done. On the issue of data, my officials anticipate that further changes will be made to Article 5 in the next draft which will make it clear that member states are not obliged to provide data. I still want to see some further changes
on governance, in particular on approval and on prioritisation of activities and resources and my officials are continuing to work with the Council and Presidency to secure improvements to the text.

Moving on to the specific questions you raised in your letter. My officials have been engaging with stakeholders from a range of interests which have included anti-counterfeiting groups, trade mark attorneys, brand owners and copyright interests. The views expressed in these discussions align with what we had learned from our preliminary dialogue with them which I outlined in my letter. There was general agreement that OHIM could play a positive role here, in particular in view of their expertise and experience in working with offices from across the EU and on best practice and training. However there were some concerns that OHIM should not overextend itself in terms of the volume of work it takes on and that it should be mindful of its areas of expertise, especially when considering work on some of the wider IP rights. In these discussions stakeholders have been supportive of our calls for clearer governance arrangements and for recognition of the need to prioritise.

Direct customers of OHIM have been particularly interested in ensuring that expenditure in this area does not lead to an increase in the fees charged for the grant and renewal of Community wide trade marks and designs. I agree that we need to ensure that there are effective mechanisms in place for overseeing and approving the work that will be carried out under the Observatory and its cost and that is why we have been seeking to ensure that the governance regime recognises the importance of prioritisation. OHIM’s expenditure in this area will be subject to approval by the OHIM Budget Committee which comprises the 27 EU member states. In considering budget proposals for this work it will be important that member states, acting as the Budget Committee, understand its relevance within the wider OHIM budget and any impact that the budget may have on fees.

However I do not foresee such an increase as a result of these new activities. OHIM’s revenue exceeds its expenditure year on year by a significant sum, for example in 2009 it had a surplus of €56 million for the year with a further €200 million in a structural reserve. Demand for Community marks is high and OHIM continues to produce an annual surplus. OHIM’s budget is expected to become more balanced over the coming years as we see the impact of an agreed fee reduction in 2008 as well as increased expenditure on infrastructure and IT projects and the commencement of new activities like OHIM’s expected role in supporting the Observatory.

You asked in your letter about the mechanism for controlling OHIM’s fees. Any alteration of fees is made by Commission Regulation as provided by Article 144 of the Community Trade Mark Regulation who must present proposals to a committee of member states. The Commission must act in accordance with Council Decision 1999/468/EC which sets out the procedures for the exercise of implementing powers conferred on the Commission, including the referral of the matter to the Council of Ministers if member states cannot agree the proposal.

2 November 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 2 November. This was considered by the Justice and Institutions Sub-Committee which decided to clear this matter.

We are grateful for sight of the latest text. We note however that the changes indicated in this text relate to a previous text which the Committee has not seen. It would be helpful in future for the text provided to the Committee to show changes from the previous text seen by us.

We are grateful for your explanation of how OHIM’s fees are controlled, should there be pressure to increase them in order to finance EOCP’s activities. We support your continuing efforts to secure tighter governance of EOCP, which should help to restrain its expenditure.

Whilst we support your objective of achieving a further relaxation in the obligation on Member States to provide information to EOCP, we regard this as less important than securing tighter governance, given the improvements that have already been secured to Article 5.

We should be grateful if you would keep us informed of developments as negotiations progress.

24 November 2011

Letter from Baroness Wilcox to the Chairman

Further to my letter of the 2 November 2011 I am writing to provide you with an update you on the progress of discussions on the EU Observatory on Counterfeiting and Piracy to the Office of Harmonisation in the Internal Market (Trade Marks and Designs). As highlighted previously the
Presidency are seeking to make rapid progress and are working towards a 1st Reading Deal at the beginning of 2012. To support this they have now commenced an informal trilogue discussion between the institutions following verbal agreement of a negotiating mandate at COREPER. The JURI Committee in the European Parliament is expected to vote on its report in mid-December 2011 with a broader plenary in the European Parliament planned for early 2012. If negotiations proceed as the Presidency anticipates, we may be asked to formally signal our decision on the text at COREPER in December.

The UK retains a Parliamentary scrutiny reserve on this dossier but I am keen that we are able to participate in final voting decisions, particularly as the UK has played a proactive and pivotal role in managing to secure improvements to the text and address some of the issues that I have considered important from a UK perspective. In view of the speed with which they are proceeding the Presidency do not intend to issue another non-LIMITE text in the near future. There have only been a small number of changes made from the text that I shared with you on 2 November, and those changes that have been made are favourable to the UK. Unfortunately, the current documents that are being released from the Presidency are not depositable, as they carry comments made by Member States and the European Parliament which should remain confidential.

During the negotiations progress has been made within Council, particularly on Recitals and Articles that concern governance, data, scope and prioritisation, where UK interventions have achieved what I believe to be an acceptable compromise. On the issues of scope and governance (Articles 2 and 7), additions have been made that require the Observatory to work with Member States in its activities and to develop a work programme to aid governance by Observatory members. Since the 20th October text the Council has agreed that a further amendment should be made to Article 7 which will require that this work programme is presented to the OHIM Admin Board for information. The UK has been negotiating for a reference to the need for prioritisation of Observatory activity given the range of rights considered under the proposal and to ensure value for money considerations are made. The Council has now agreed to amend the text to accommodate this in Article 7, which I consider to be a welcome addition to the Council's position.

While we consider that OHIM and the Observatory have an important role to play in the enforcement of IPRs we wanted to be clear that this was not in place of Member States' activity and that work should be done in full and proper consultation with Member States. Additional text has been included that also addresses this point.

Other beneficial changes, from a UK perspective, are Recital (7a) that references the need to develop new business models and enlarge the creative offering – which are key pillars in the successful enforcement of IP rights. There have also been additions to Article 4 which clarify participation in meetings of the Observatory and which seek continuity of representation, which should benefit the workings of the Observatory.

On the issue of data provision (Article 5), we have not secured the complete removal of obligations but officials have negotiated a series of amendments relating to this provision. In particular a recital that clearly states that data obligations should not create unnecessary administrative burdens and more recently that OHIM should endeavour to avoid duplication where data has already been provided to other EU institutions (e.g. DG TAXUD). Article 5 also now provides that Member States will only be required to provide data relating to infringements which is in statistical form and which is available i.e. there will be no obligation to gather new data. Furthermore the obligation does not extend to personal data or to data in respect of which there are public interest reasons for non-disclosure. Finally there is also a general caveat that information need only be provided where it is “appropriate” and a clear statement that each Member State’s competency to decide what it collects is not affected.

I believe that this text represents a good outcome for the UK and for UK businesses. As such I would be grateful if you would consider clearing the latest text from scrutiny in order that, on the basis of the text and the concessions my officials have achieved remaining unchanged, we are able to vote to approve the proposal when the time comes. The speed of the process in Europe is likely to mean that we will be unable to seek ad-hoc clearance but if significant policy changes were to emerge from the ‘trilogue’ process, we would of course revert to the Committee.

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

Your Explanatory Memorandum (EM) on this proposal was considered by the Justice and Institutions Sub-Committee on 26 October. We note that the EU has a long practice of such designations and agree with you that providing information to make our citizens more aware of the rights and benefits that EU citizenship entails is a good thing. We agree also that the programmes in this proposed Year should take account of both citizens’ rights and responsibilities. We hope that the Year may result in citizens being better informed of the working of the EU.

We retain this matter under scrutiny in anticipation of the update following your consultation within Government. In the meantime, we should like an explanation for the late submission of your EM. The Commission’s proposal was published in August yet the EM was not completed until 10 October. Had we wished to take up a subsidiarity issue, this long delay would have made the timely submission of a Reasoned Opinion impossible.

We look forward to hearing from you within the usual 10 days.
27 October 2011

Letter from Damian Green MP to the Chairman

Thank you for your letter of 27 October in which you requested an explanation for the timing of my recent Explanatory Memorandum (EM) on the proposal for a decision of the European Parliament and of the Council on the European Year of Citizens 2013. This EM was submitted to you on 10 October.

The proposal for a European Year of Citizens relates to the free movement of people and the range of rights they are entitled to in cross-border situations, including rights as consumers, access to education and healthcare, and voting rights. I welcome the Committee’s view that providing information to make our citizens more aware of the rights and benefits that EU citizenship entails is a good thing and that programmes should take account of rights as well as responsibilities.

As a cross-cutting issue the proposal did not map onto the responsibilities of one Department. A Departmental lead had to be agreed in the first instance. Following discussions between the Home Office, Foreign and Commonwealth Office and the Ministry of Justice, the Cabinet Office allocated the proposal to the Home Office. Cabinet Office records show that the Home Office accepted responsibility for this EM on 16 September, with a formal commissioning note sent on 19 September.

The proposal was initially deposited on 31 August with a due date of 16 September for the EM. Having accepted responsibility for the EM, my officials immediately sought clearance for an extension to deposit to ensure appropriate consultation across interested Departments could take place. A week’s extension to October 10 was agreed by the Committee Clerk on 21 September. The EM was deposited on time in line with the revised timetable, although I do recognise that had the Committee wanted to seek further evidence from the Government on the subsidiarity implications and deliver a Reasoned Opinion, the delay would have made that very difficult.

I am of the view that the Home Office exercised due diligence in upholding its responsibilities to provide both Parliamentary Scrutiny Committees with full and accurate information on this matter. My Department attaches great importance to scrutiny and takes seriously its responsibilities to submit EMs promptly, especially on issues relating to subsidiarity and proportionality. As soon as it was clear that the Home Office had assumed responsibility for this matter my officials acted quickly to consult other Departments and to provide the required information.

I apologise on behalf of the Government that the process of identifying a lead Department in Whitehall meant the Committee did not receive the EM as quickly as you or we would have hoped.
9 November 2011

Letter from Damian Green MP to the Chairman

Further to my recent Explanatory Memorandum (EM) on the proposal for a decision of the European Parliament and of the Council on the European Year of Citizens 2013, submitted to you on 10 October, I am writing now with my promised update on the Government’s proposed approach.
As you noted in your letter of 27 October the EU has a long practice of such designations. Having completed our consultation across Government we intend to support the legislative proposal. We agree with the Committee that providing information to make our citizens more aware of the rights and benefits that EU citizenship entails is a good thing. We should ensure that no obstacles are placed in the path of EU citizens who are genuinely entitled to exercise free movement rights.

However, as set out in my EM the proposed European Year of Citizens should take account of citizens’ responsibilities as well as their rights. It is important to balance promoting these rights with clear messages on the rules and conditions which apply to their exercise, including on access to benefits. Accurate information should be presented to citizens across Europe, including those who choose not to exercise their right of free movement.

To that end we are seeking the inclusion of language that emphasises how these rights entail responsibilities and duties with regard to other persons, to the human community and to future generations. Other Member States have expressed support for this position.

21 November 2011

EXCEPTION CLAUSE: ARTICLE 10 OF ANNEX XI TO THE STAFF REGULATIONS
(12919/11)

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

Your Explanatory Memorandum of 13 September 2011 was considered by the Justice and Institutions Sub-Committee at its meeting of 12 October 2011. We decided to clear this matter from scrutiny.

As you know, we support the Government’s objective to control the pay and pension of EU Officials and we would have welcomed the use of Article 10 of Annex XI to the Staff Regulations to help achieve this in the short term.

We consider that the existing legal framework hinders the achievement of this objective and urge the Government to use the opportunity of the forthcoming discussions on the amendment of the Staff Regulations to press for a better alternative to the present method for calculating annual revision of EU salaries.

We do not expect a reply to this letter.

14 October 2011

FIGHTING CORRUPTION IN THE EU (11237/11)

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

Your Explanatory Memorandum on this Communication was considered by the Justice and Institutions Sub-Committee on 13 July. Thank you for your account of the Commission’s review and its proposals.

The Communication presents a comprehensive, and useful, account of the current efforts to combat corruption and, like you, we welcome the Commission’s initiative and endorse its objectives. The Commission is surely right to say that the EU and the Member States must show the necessary resolve to prevent the potentially insidious effects of corruption on the economy and on political institutions.

The Communication shows that, for the most part, mechanisms already exist to tackle corruption within the EU and in third countries where that would affect the Member States. We support the Commission’s call for all Member States to ratify and implement the relevant EU and international instruments, and the proposed use of the EU’s leverage in trade and development policies, and more widely through its partnership agreements, to improve standards through the application of conditionality. The accession process is now recognised as a powerful method to raise standards in candidate countries.
The Commission’s proposals to produce regular anti-corruption reports and to join the Council of Europe’s monitoring group GRECO both appear to us helpful additional steps in furtherance of the EU’s anti-corruption policy.

We note that the UK has, for the most part, ratified the international conventions. We hope that your proposed assessment of the implications of ratifying the Council of Europe’s civil convention can be completed speedily.

We now clear the Communication from scrutiny. We look forward to hearing from you as to the results of the assessment concerning the convention and, subject to that, do not expect a reply to this letter.

14 July 2011

GOVERNMENT’S RESPONSE TO THE REPORT: THE WORKLOAD OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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 formal response to the Committee’s Report The Workload of the Court of Justice of the European Union, which was published on 6 April. The Committee considered it at its meeting of 15 June 2011.

The Committee is pleased that the Government see the Report as “a valuable contribution to the consideration of the court’s management of its workload” but we are disappointed by aspects of your response.

The evidence we received overwhelmingly pointed to an imminent crisis in the General Court, perhaps most tellingly illustrated by the Confederation of British Industry’s point that “an average turnaround time of 33.1 months for competition cases is unacceptable” (see paragraph 51 of the Report). In this regard you ignore our conclusion in relation to the General Court that it is in urgent need of structural reform (paragraph 53) and that there is nothing to be gained from allowing the EU’s judicial institution to suffer sclerosis.

We also note your statement in the final paragraph of your response that you are considering the possibility of creating a specialised tribunal for trade mark cases. However, you do not address our views on the shortcomings of specialised tribunals as a means of providing the best solution to the problems we all agree the General Court is suffering (paragraph 135).

Finally, your response does not address our prediction that driven by an unprecedented increase in EU membership plus the expansion in its jurisdiction following the adoption of the Lisbon Treaty, that the Court of Justice will start to experience another crisis of workload soon (paragraph 44).

In the interests of focusing the discussion of this Report in the forthcoming debate in the House we ask that you send the Committee a supplemental response addressing these issues.

17 June 2011

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

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

Your Explanatory Memorandum on this Green Paper was considered by the Justice and Institutions Sub-Committee on 20 July. We note that you intend to seek the views of interested parties before preparing your response to the Commission and we look forward to seeing that response in due course. We hold the Green Paper under scrutiny in the meantime.

Many of the questions posed in the Green Paper seek information on the operation of our criminal justice system which the Government are best placed to answer. We are considering the broader issues of principle which the Green Paper raises, including subsidiarity.

20 July 2011
GREEN PAPER: LESS BUREAUCRACY FOR CITIZENS THROUGH PROMOTING FREE MOVEMENT OF PUBLIC DOCUMENTS AND RECOGNITION OF THE EFFECTS OF CIVIL STATUS RECORDS (18122/10)

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

Thank you for your letter of 6 April including your response to the Commission’s Green Paper. The paper has now been considered by the European Affairs Committee and the Devolved Administrations. I attach a copy of the Government’s response.

In your letter you sought further information on 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.

The Government has undertaken a departmental trawl to establish whether there are significant issues in this area. The trawl confirmed that there is no body of evidence available to confirm the scale of the problems highlighted by the Green Paper. This has informed the Government’s response to the paper, suggesting that significant further analysis is required before determining any changes required.

The Government’s response is supportive of the objectives behind the proposals. However, it suggests that the focus of further work should be on sharing best practice, the provision of information to citizens, closer co-operation between Member States and the introduction of standard forms, where applicable, for specific registration events, such as births on an incremental basis.

5 July 2011

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

Thank you for your letter of 5 July 2011. This was considered by the Justice and Institutions Sub-Committee at its meeting of 12 October. We decided to clear this matter.

In doing so we welcome the cautious approach of the Government, particularly to legislation on automatic recognition of civil status and/or conflict of civil status laws. Like you we believe that such legislation will need to be justified by firm evidence that it would bring benefits in practice.

We do not expect a reply to this letter.

14 October 2011

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

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

Thank you for your letter of 2 June enclosing your report on the Government’s call for evidence. This was considered by the Justice and Institutions Sub-Committee on 15 June. We are grateful for sight of the report which, we note, shows clear support from UK stakeholders for the Government’s approach as set out in your response to the Commission’s Green Paper. As you know, we have considerable sympathy for that approach.

17 June 2011

**Letter from the Chairman to the Rt. Hon. Nick Herbert MP, Minister of State, Ministry of Justice**

Thank you for your Explanatory Memorandum of 29 September 2011. This was considered by the Justice and Institutions Sub-Committee at its meeting of 19 October. We decided to clear the matter.
In doing so we support the development of EU judicial training which fully respects the role of Member States and the independence of the judiciary.

We would however be grateful for further information, within the usual 10 days, on the following:

— Do you consider that the objectives set out in this Communication can be achieved without identifying the specific increase in financial resources required?

— You indicate in paragraph 16 of your Explanatory Memorandum that any financial implications fall upon the EU. Is this consistent with the acknowledgement in the Stockholm Programme that Member States will need to provide financial backing, and the Commission conclusion that all actors will need to take appropriate action, including the setting of budgets?

21 October 2011

INTEGRATED POLICY TO SAFEGUARD TAXPAYERS’ MONEY (11055/11)

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

Your Explanatory Memorandum on this Communication was considered by the Justice and Institutions Sub-Committee on 13 July. Thank you for your full account of the Commission’s review and your views on its proposals.

We note that, while you welcome the Communication as an indication of the Commission’s wish to respond to the challenge of fraud on the EU budget, your response to most of the Commission’s specific proposals is generally negative. In our view there are issues here that should be considered further.

A number of the Commission’s proposals seem at this stage intended to be useful in improving the way in which fraud is tackled. Strengthening the existing networks for judicial cooperation could improve cross-border enforcement without undermining national responsibilities for enforcing the criminal law. Reconsidering the EU convention, bearing in mind its patchy implementation, and the role of Eurojust, appear justified. Amending the existing Framework Decision on recovery and confiscation of the proceeds of crime should not be ruled out a priori but should be considered on its merits. The Committee has already welcomed the proposals to reform OLAF governance and powers, with a view to enhancing its investigative effort (as have the Government).

We are, however, more cautious in relation to the other proposals. We agree that, since a legislative proposal on evidence-gathering – through a European Investigation Order – is currently under consideration in the Council, no further action in relation to cross-border evidence is needed at this stage. We agree also that the possibility of giving OLAF reports evidential status should not be pursued for the same reason that we opposed EU measures on the admissibility of evidence proposed in the Commission’s Green Paper on evidence in criminal proceedings last year (that is, that rules on admissibility function as part of each national system of criminal justice and are adapted to the particular system). For the same reason, we doubt the value of pursuing an analysis of issues of jurisdiction.

We are more sympathetic to the Commission’s undertaking an analysis in relation to limitation periods. Limitation issues do not seem to cause difficulties in the UK but (based, admittedly, on anecdotal evidence) we believe they have the potential to defeat the ends of justice in some countries.

We gave some consideration to the idea of a European Public Prosecutor in the course of our inquiry into OLAF in 2004, but did not reach any view on the merits or otherwise of establishing such an office. We await the further analysis be undertaken by the Commission.

We retain the Communication under scrutiny.

We will consider each proposal on its merits as and when it comes forward. On reflection, do you not agree that some of the proposals would merit consideration? We look forward to hearing from you within the usual 10 days.

15 July 2011
Letter from Justine Greening MP to the Chairman

Thank you for your letter of 17 July on the Commission’s Communication on the protection of the EU’s financial interests, following its consideration by the Justice and Institutions Sub-Committee on 13 July. Your letter noted that some of the Commission’s proposals seem, at this stage, intended to be useful in improving the way fraud against the EU budget is tackled. You asked whether the Government would consider such proposals and subsequent developments on their merits.

As set out in EM 11055/11, the Government will continue to monitor closely activity relating to this dossier and seek to engage constructively. Tackling fraud against the EU budget is an important task, which we support in principle, and future proposals would certainly be considered on their merits. Nevertheless, the Government has concerns about some policy areas in which the Commission indicates its intention to introduce further reform. These were set out briefly in EM 11055/11 with the intention not to foreclose debate, but to explain factors that might inform the Government’s assessment of future activity. I would like to expand briefly on the specific areas that you raised in your letter, namely: networks for judicial cooperation, the role of Eurojust, recovery and confiscation of the proceeds of crime and limitation periods.

Any proposal to strengthen the European Judicial Network (EJN) would, of course, be considered on its merits. However, we do not feel that such a strengthening is necessary in order to address delays in relation to the execution of mutual legal assistance (MLA) requests, which is the particular problem identified by the Commission. As you are aware, the European Investigation Order is currently under negotiation and Article 11 of this Directive would impose deadlines on participating Member States for the execution of MLA requests. This should largely resolve the problem of delays and, as such, we do not consider it necessary to consider any amendments to the EJN to address this point. We continue to work through our National Correspondent and EJN Tool Correspondent to ensure that the EJN functions as effectively as possible and to support its work.

You suggest that reconsidering the role of Eurojust appears justified, in the context of tackling fraud. The Government believes that Eurojust’s added value comes from its practical assistance to Member States in setting up and providing EU funding to support joint investigation teams, arranging coordination meetings for those involved in complex cases across jurisdictions, and facilitating the execution of requests for assistance between countries. Eurojust’s mandate and powers were updated by the 2008 Council Decision, the provisions of which are only now taking effect. These provisions ensure Eurojust is well equipped to assist Member States’ prosecutors and police in successfully pursuing complex serious cross border crime, including fraud.

Eurojust is already fulfilling this role. As set out in the Eurojust Annual Report 2010, of the cases registered at Eurojust in 2010, 198 concerned fraud (14% of its total workload) with 6 cases concerning criminal offences affecting the EU’s financial interests. The fight against fraud remains one of its priority activities in its 2011 work programme, where it indicates that it intends to enhance information exchange with Europol’s analytic work files, and explore options for developing cooperation with the CARIN (the Camden Asset Recovery Inter-Agency Network) and national Asset Recovery Offices. The case for further reforms, beyond those taking effect under the 2008 Council Decision, has not been made convincingly.

In respect of recovery and confiscation, the Government would consider any detailed proposals, but maintains that existing agreements provide effective tools and powers to tackle criminal finances, including fraud, that are already available to investigators and prosecutors.

Finally, limitation periods do not in general apply to indictable offences in the UK, so a proposal to approximate them ought not to cause significant problems, provided that any approximation were not to result in prescriptive new limitation periods for such offences, which might involve costly adaptation.

Like your Committee, the Government will await further analysis from the Commission as it undertakes more detailed work on proposals to protect the financial interests of the EU, and shall take this into account in developing future policy.

2 August 2011

Letter from the Chairman to Justine Greening MP

Thank you for your letter of 2 August. This was considered by the Justice and Institutions Sub-Committee on 12 October.

We note your comments on those of the Commission’s proposals which the Committee thinks worth considering further. We remain of the view that a number of the Commission’s proposals
warrant further work. However, as any future specific proposals will come before the Committee, we now clear this Communication from scrutiny. No reply to this letter is expected.

14 October 2011

INTELLECTUAL PROPERTY: CUSTOMS ENFORCEMENT (10880/11)

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

Thank you for your Explanatory Memorandum of 20 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 13 July. The proposal was held under scrutiny.

We welcome, in principle, the Commission’s intention to introduce administrative simplification and clarification to the existing regime and we approve the proposed improvement in drafting.

We note that the Government will be producing an Impact Assessment including specific details on the relative cost impacts of the proposal. This will be useful as the Commission’s impact assessment is short of quantitative analysis. We are particularly interested in the Government’s assessment of the impacts of extending the scope of the customs enforcement regime to matters not presently covered by the existing regime, including those to which you have drawn our early attention, namely non-agricultural geographical indicators, trade names and illegal parallel trade.

We do not require your response to this letter to be made within 10 days.

14 July 2011

INTELLECTUAL PROPERTY: PROPOSED WIPO AUDIOVISUAL PERFORMANCES TREATY

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

I am writing to inform you that the General Assembly of the World Intellectual Property Organisation, to be held 26 September to 5 October, is expected to reconvene the Diplomatic Conference charged with agreeing an Audiovisual Performances Treaty.

In 1996 the WIPO Performances and Phonograms Treaty (WPPT) updated performers’ rights at international level to cover the new digital and networking technologies. It also gave performers moral rights. However, some of the rights it granted (e.g. applied only to sound performances, not audiovisual performances. A further diplomatic conference was therefore held in 2000 to negotiate a Treaty on Audiovisual Performances. The European Commission was granted a mandate to conduct negotiations in consultation with a special committee designated by the EU Council.

Provisional agreement was reached on all the articles of the proposed treaty except the one on “transfer of rights”, which enables a producer to license the exploitation of a film or TV production by consolidating the intellectual property rights of the individual contributors, including performers, so that they can be licensed on in a tidy bundle. The diplomatic conference was therefore suspended pending agreement on the outstanding article. At a meeting of WIPO’s Standing Committee on Copyright and Related Rights in June 2010 provisional agreement was reached on this remaining article.

Performing artists want the new rights the Treaty will give. Broadcasters and film-makers want the need for business certainty to be taken into account – for example, by leaving intact the current arrangements for transfer of rights in the UK. We have considered the revised text for this article and believe it to be a good compromise which protects the current arrangements in the UK. We are currently consulting stakeholders informally on this issue so that we can feed into discussions with other EU Member States.

As soon as an agreed treaty text has been published by WIPO an explanatory memorandum will, of course, be drafted and submitted to Parliamentary scrutiny. However, in the meantime I am taking this opportunity to update you on recent progress.

6 September 2011
Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 6 September. This was considered by the Justice and Institutions Sub-Committee at its meeting of 12 October.

We are very grateful for the early notification of the negotiations for this Treaty and the preliminary draft of its main terms.

We support a Treaty to provide international protection for performers’ rights and would be grateful if you would let us know, within the usual 10 day period, whether any change to EU or UK law would be required to conform to any Treaty adopted in the terms of the preliminary draft.

We should also be interested, in due course, in the outcome of your informal consultation with stakeholders.

On the assumption that this Treaty will be entered into by both the EU and its Member States we recommend that it should have provision for a declaration of competence.

14 October 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 14 October.

You asked whether any change to EU or UK law would be required in order to conform to the new Treaty.

Our present assessment is that much of the substance of the proposed Treaty would be already covered by the existing EU “acquis” and by current UK law. However, the Treaty would require a significant change in the area of moral rights, which currently falls within Member State competence. Under UK law performers do not currently enjoy moral rights in respect of audiovisual fixations of their performances, and our law would need to be adjusted accordingly.

On stakeholders, the response to our informal consultation was generally positive. Respondents commented that the new article on transfer of rights (which I explained in my letter to you of 6 September) represented a good compromise between the needs of producers and artists. They felt it would protect the current arrangements in the UK, and it was likely to be the best that could be secured to enable a treaty to be agreed.

On the declaration of competence, we will pick up the idea and see what appetite there is for it. However, it may be worth saying that the UK is only one voice in the preparation of an EU position, and the EU itself is only one voice in the process of reaching an international agreement, so there may be limits to what can realistically be achieved.

It may also be worth saying that we are as yet some way from a final version of the Treaty text, as there are some further changes of detail required following the decision of the WIPO General Assembly on 29 September to reconvene the Diplomatic Conference to agree the Treaty in June or July 2012. When we have the final text, I will of course share it with you, and let you have a more considered assessment of what it means for UK law, and for our stakeholders.

2 November 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letter of 2 November. This was considered by the Justice and Institutions Sub-Committee at its meeting of 23 November.

We are very grateful for the responses to our questions. We should be grateful to be kept updated on developments on this matter, particularly in relation to ensuring transparency as to the respective competences of the EU and Member States.

We look forward, in due course, to seeing a final text with your further analysis of its impact on UK law and for stakeholders.

24 November 2011
INTERIM EVALUATION OF THE FUNDAMENTAL RIGHTS AND CITIZENSHIP PROGRAMME 2007-2013 (9871/11)

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

Your Explanatory Memorandum on this report was considered by the Justice and Institutions Sub-Committee on 15 June. Like you, we welcome the report. We note that it gives the Programme a generally positive assessment and that, in relation to the areas identified for improvement, the Commission has proposed appropriate changes in practice. We now clear the report from scrutiny.

A substantial sum has been made available for this Programme. We consider that the greatest added value would result from focussing expenditure in the new Member States and countries aspiring to join the EU. Do you agree?

17 June 2011

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

Thank you for your letter of 17 June following submission of an Explanatory Memorandum on the European Commission’s interim evaluation of the Fundamental rights and citizenship programme. I am glad that the Lords Select Committee has cleared this document from scrutiny and, like the Government, welcomes the evaluation.

You have asked if the Government agree that the greatest added value would result from focussing expenditure in new Member States and aspiring countries. While the Government agrees that funding should be focussed where it can add the most value, and that this may well be achieved by funding projects which involve newer Member States or candidate countries, the quality and relevance of the project should be the primary factors in deciding which applications are successful. The Government is also keen to ensure that applications from the UK, are considered on the merits of the proposal and are not disadvantaged. The Government welcomes the pan-European nature of the projects as it allows for the involvement of Member States which might have already undertaken considerable work in improving the recognition of human rights and can share this experience with others. We therefore consider that there is scope to increase the involvement of newer Member States alongside older ones.

27 June 2011

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

Thank you for your letter of 27 June which was considered by the Justice and Institutions Sub-Committee on 13 July. We note your comment on the issue we raised about the focus of funding. We remain of the view we previously expressed.

No reply to this letter is expected.

14 July 2011

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

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

Thank you for your detailed Explanatory Memorandum dated 2 June 2011 which was considered by the Justice and Institutions Sub-Committee at its meeting of 29 June.

The Committee has decided to retain the matter under scrutiny.

**The Opt-in**

In relation to the opt-in decision, the Committee supports the principles behind this proposal and to that extent we advocate opting in, but we appreciate that the Government’s decision will be conditioned by the outcome of your impact assessment.

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The Proposal

Whilst we note your comment that the draft Directive recognises that in the UK victims of crime are not party to criminal proceedings (paragraph 20), should there be either a specific recital or article included in the draft which directly addresses the limited role victims of crime fulfil in criminal proceedings in the UK.

In relation to Article 10 of the proposal and the right to review decisions not to prosecute, whilst we note paragraph 8 of your Explanatory Memorandum, in Scotland no such right of review currently exists, what review procedures will be put in place to deal with this?

Beyond those issues, the Committee is grateful to you for your detailed analysis and discussion of the policy implications of each of the proposal’s 30 Articles and we would like to take this opportunity to express our support for the Government’s attempts to clarify both the Member States’ responsibilities and the aspects of the draft which your Explanatory Memorandum describes as potentially (dis)proportionate to the needs of victims of crime.

We look forward to considering this proposal as it develops and to receiving your reply within the usual 10 day deadline.

30 June 2011

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

Thank you for your letter dated 30 June, setting out your support for the principles behind the proposal and advocating opting in to this proposal.

You also suggest a recital or article addressing the role of victims in criminal proceedings in the UK should be proposed. We agree, and are considering how best to ensure the final text of the Directive reflects this. Several Articles in the Directive apply only where victims “participate” in proceedings. Most notably, Article 6 of the Directive requires Member States to provide interpretation for victims only for their “participation” in proceedings. A recital that clearly states provisions within articles are applicable in accordance with the victim’s role as stated in national law would certainly be an effective solution to ensuring the clarification is made. However it may be that as the Commission has already recognised the necessity of the caveat in specific articles it would be preferable to add further caveats to relevant articles rather than to seek an additional recital. We will take this point forward in negotiations and keep your Committee informed of developments.

The Committee asked what review procedures may be put in place to meet the obligation in Article 10. I understand that the Scottish Government consider their current procedures adequate. In Scotland, decisions on whether or not to proceed with a prosecution are the responsibility of the Crown Office and Procurator Fiscal Service, which already has in place procedures that allow victims to seek an explanation for any prosecutorial decision made and to request a review of any decision not to prosecute. We will seek clarification of the precise obligations placed on Member States by Article 10. The Scottish Government has announced its intention to introduce a Victims’ Rights Bill during the life of the current Scottish Parliament, and it is expected that the Bill will be a vehicle for any legislation required to implement the Directive.

I would also like to thank you for your letter of 30 June clearing Document 106112/11, the Communication from the Commission from scrutiny.

15 July 2011

Letter from the Rt. Hon Nick Herbert MP, Minister of State, Ministry of Justice, to the Chairman

I am writing to inform you that the UK has decided to opt in to the European Commission’s proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime.

Parliament will be informed of the Government’s decision through a Written Ministerial Statement confirming that the Directive meets the criteria set out in the Coalition Agreement with regard to EU Justice and Home Affairs measures.

The proposed Directive will have a positive impact for UK citizens, allowing them to move throughout the EU with confidence that should they fall victim to crime in any Member State, their rights will be respected when participating in criminal proceedings and they will be able to access a minimum level of support across the EU.
The UK is seen as an example of best practice in the area of victims. By opting in to this Directive we will have the opportunity to strongly influence the text and ensure that the minimum standards victims can expect throughout the EU are clear, appropriate and affordable.

I attach a copy of the initial Impact Assessment which was considered as part of the decision making process. It is important to state at the outset that full quantification of costs and benefits has not been possible at this stage, given that the draft Directive will be subject to considerable change during negotiations. The Impact Assessment sets out the potential impact of those articles which could have an impact on the UK as currently drafted, and considers the extent to which these articles are likely to be amended during negotiations.

I have written in similar terms to the Commons' European Scrutiny Committee to inform them of our decision to opt in, and I will continue to keep you informed of developments as negotiations proceed.

25 August 2011

Letter from the Chairman to the Rt. Hon Nick Herbert MP

Thank you for your letters dated 15 July and 25 August. They were both considered by the Justice and Institutions (Sub-Committee) at its meeting of 12 October 2011.

We retain this proposal under scrutiny.

THE OPT-IN

The Committee welcomes the decision to opt in to this proposal. We note your assessment that it "will have a positive impact for UK citizens" and will enable them to move throughout the EU "with confidence that should they fall victim to crime in any Member State, their rights will be respected". In addition, in relation to the on-going negotiation of this matter, we agree that opting in at the outset enables the UK to influence the text "strongly".

THE CONTENT OF THE PROPOSAL

We are grateful to you for the answers to our outstanding questions regarding the inclusion of an article or recital addressing the role of victims in the UK and on the position in Scotland conferring on victims a right to review decisions not to prosecute.

We look forward in due course to considering this proposal further as its negotiation develops.

14 October 2011

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

I am writing to provide you with an update on the proposed EU Directive establishing minimum standards on the rights, support and protection of victims of crime and to seek your Committee’s agreement to lifting the Parliamentary scrutiny reserve or to grant a waiver based upon progress so far and amendments we expect to secure during the final working group next week. A copy of the latest text has been deposited today. I appreciate that the speed of negotiations has limited the time available for detailed scrutiny of the proposal.

As you are aware, the Government opted in to this proposed Directive in August. Negotiations have proceeded with some speed, and the Presidency is planning to seek agreement for a General Approach at the next meeting of the Justice and Home Affairs Council on 14 December. The text that has been deposited is the latest version of the proposal and is due to be discussed further at an official level working group on 28-30 November. I am confident that you will agree that this is a significant improvement on the original proposal and I will update you following next week’s working group on further developments.

The UK’s main objectives in negotiations have been to ensure that the Directive is compatible with the role of victims in the UK’s common law legal systems; to clarify the obligations in the Directive; and to ensure that the obligations do not place a disproportionate burden on Member States.

To ensure that the differing role of victims in the legal systems of Member States is reflected, you have previously suggested that the text should include a recital or article addressing the particular role of victims in criminal proceedings in the UK, in which they are not a party to proceedings. In my letter on 15 July, I explained that we would explore during negotiations whether this would be best
achieved through a specific recital or article, or through further caveats to relevant articles. The articles to which this issue is particularly relevant are those relating to interpretation and translation (now Article 7), the right to be heard (Article 9), and the reimbursement of victims' expenses (Article 13), all of which we have successfully negotiated should be afforded "according to the victim's role in proceedings. We have previously corresponded regarding the impact of the right to seek a review of a decision not to prosecute.

I am confident that amendments currently under consideration to relevant articles will clarify that the rights afforded are applicable in accordance with the victim's role in the relevant justice system, and an accompanying recital (currently 10c) will clearly define what is meant by this term. These are due to be discussed at the working group next week and I will update you on the outcome of these discussions in my next letter.

Considerable progress has been made during negotiations on clarifying the obligations in the Directive and ensuring that they do not place a disproportionate burden on Member States. Significantly, the definition of 'victim' in Article 2 has now been clarified so that there is flexibility for Member States to establish procedures to define the number of family members of deceased victims to whom the Directive applies. We are satisfied that this is a proportionate and appropriate definition.

We are also pleased that the support rights for victims in Article 8 (formerly Article 7) are now clearly linked to the needs of victims in relation to their participation in criminal proceedings, and are in line with the provisions already agreed in the Directive on trafficking in human beings and the Directive on combating the sexual abuse, sexual exploitation of children and child pornography. We have secured amendments to Article 19 (formerly Article 20) relating to the protection of victims during criminal investigations, to clarify that it does not confer a requirement for all victims to be interviewed, which would be a disproportionate burden in very minor cases. Notably, Article 24 on the training of practitioners now also addresses our concerns about ensuring the independence of the judiciary and voluntary organisations.

In addition to the clarification and amendments we have sought, you will wish to be aware that the provisions in the Directive relating to the identification of vulnerable victims (Article 21, formerly Article 18) have been significantly amended during negotiations. The categories of victims who should be presumed vulnerable have been removed with the exception of children, with emphasis placed instead on individual needs assessments to determine vulnerability. The provisions in Article 22 (formerly Article 21) have also been amended to ensure that they include sufficient flexibility for Member States to implement them adequately. The Government is content that as a minimum standard for Member States the approach that has been taken is satisfactory.

I am confident that the requirements in the remaining articles in the Directive are broadly compatible with existing practice in the UK, which continues to be held up by the European Commission as an example of best practice on supporting victims. Rapid progress is being made on the outstanding issues and I will write to you again shortly to provide a further update. I hope that this will give you sufficient reassurance to allow you to lift your scrutiny reservation on this proposal.

28 November 2011

MUTUAL RECOGNITION OF PROTECTION MEASURES IN CIVIL MATTERS (10613/11)

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

Thank you for your Explanatory Memorandum dated 2 June 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 29 June.

We retain this proposal under scrutiny.

THE OPT-IN

As you are aware the Committee currently retains under scrutiny the Member State sponsored initiative for the European Protection Order (EPO). The scope and criminal legal base of the proposed EPO have caused concern to some Member States, the Government and this Committee; in particular as in the UK the majority of the types of orders the EPO is designed to complement are dealt with by the civil courts with the possible imposition of a criminal sanction for breach.
During the course of our consideration of the EPO we have suggested that the Commission, which enjoys legislative initiative for cooperation in civil matters, submit their own proposal addressing the civil stream. As we said to you in our letter on the Roadmap on victims’ rights, and our most recent letter on the EPO, we are pleased to see that the Commission has taken this course of action.

Like you, we support the principle of continuous protection as individuals protected by these types of orders move through the EU and believe that the proposal “has the potential to be of benefit to UK citizens”. We therefore recommend that the UK Government opt in.

THE PROPOSAL

Whilst we recommend opting in, we share your concerns regarding the content of the proposal and your desire to ensure that this proposal operates in conjunction with the proposed EPO. We take this opportunity to express our support for your attempts to clarify how the proposal will interact with existing EU measures on civil cooperation, for example, the Brussels IIa Regulation on judgements in matrimonial matters, the meaning of the phrase “serious reasons” in the definition of the term protective measure (Article 2(a)), and the precise nature of the mechanism by which orders will be adapted between the Member States (Article 8).

As currently drafted we are unable to understand how the safeguard in Article 10(2) concerning protective measures “intended to be recognised and/or enforced without prior service of that person” will work. Are you able to explain this provision to the Committee?

We also take this opportunity to draw your attention to one further minor point: we note that on the draft that was submitted to the Committee for consideration Article 10 has two sub-paragraphs numbered “2”.

This leaves two further issues of substance.

The first concerns the nascent adaptation procedure (Article 8) highlighted by paragraph 30 of your Explanatory Memorandum. It seems to us that in order to avoid the problems caused by the different Member States’ approaches to these types of orders this proposal is built on the mutual recognition of the certificate rather than the order itself. This interpretation is confirmed by the opening line in paragraph 5 of your Explanatory Memorandum: “details of a protection measure are to be certified on a standard form which will be automatically recognised in another Member State”. However, paragraph 5 continues with the statement that the proposal’s system “… might allow a civil order in one Member State to be treated as a criminal order in those Member States which do not have equivalent civil orders” (emphasis added). Are we right to conclude that this system of recognising protective orders from other Member States can only work if it is sufficiently flexible to allow criminal orders from other Member States to be dealt with in the UK as civil orders?

Second, although by definition the proposal deals with orders which are temporary in nature, this does not alter the fact that orders of this kind could have profound implications for the individuals involved and we are concerned that as currently drafted the proposal lacks sufficient safeguards protecting the rights of the person causing the risk. To what extent would an individual be able to challenge the imposition of a protective measure that fails to conform to the proposed safeguards in Article 10? And, in light of your ongoing review of the UK’s extradition procedures (which encompasses the European Arrest Warrant) do you envisage any negative ramifications both for the recognition of the protective measures system as a whole and/or for the individual causing the risk of the very limited grounds for refusal?

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

30 June 2011

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

Thank you for your letter of 30 June. I am grateful to the Committee for informing me that you recommend that the UK should opt into the proposal on the mutual recognition of civil protection measures and that you believe the proposal has the potential to be of benefit to UK citizens.

Whilst you recommend opting in, you are concerned that we should ensure the proposal operates in conjunction with the proposed European Protection Order (EPO) and also with existing EU measures in civil cooperation. I share this concern and the interaction of these instruments is of interest to many Member States and not just the UK and so I am confident that this will be fully explored during negotiations.
You raise a number of points about the safeguards set out in the proposed Regulation and are concerned that it lacks sufficient safeguards protecting the rights of the person causing the risk. Before I turn to your specific questions in relation to safeguards I would like to stress that I too believe that the safeguards in this proposal will need to be looked at carefully and, as I said in my Explanatory Memorandum of 2 June, it will be necessary to seek clarification of these matters during negotiations.

During a first exchange of views on the Regulation in Brussels it was apparent that safeguards were an area that would need further exploration. The current Regulation is the first iteration and I believe there will be much discussion and refinement of the safeguards as negotiations progress. My subsequent comments should be seen in the light of the fact that this is a first draft and there will be an opportunity to address many of the current problems if we were to opt into negotiations.

You ask to what extent an individual would be able to challenge the imposition of a protective measure that fails to conform to the proposed safeguards in Article 10.

The “fundamental rights safeguard” in Article 10(2) gives the person causing the risk the right to apply for review of the protection measure itself in the Member State of origin. Article 13 requires notice of the protective measure to be given to the person causing the risk, and also that he or she should be notified of the recognition of the protection measure. We would want to explore whether this could be linked to Article 10 safeguards and a connection made between this and the certification process in Article 5.

The need for swift protection of the victim needs to be carefully balanced with the rights of the person causing a risk, and safeguards will be an important part of getting this balance right.

This leads to your other question where you ask me to explain how the safeguards will work in Article 10(2) (which you have rightly pointed out should actually be Article 10(3)). I will refer to the provision as 10(3) for the avoidance of confusion.

Article 2(a) includes within scope protection measures taken ex parte. It is not clear from the drafting of Article 10(3) whether the reference to "intended to be recognised and enforced without prior service" is a reference to enforcement in the Member State of origin or the Member State of enforcement, although the reference to recognition suggests the latter. We would want to ensure that the person causing risk has knowledge of the proceedings and the order so that the right to challenge can be exercised. In England and Wales, we do not punish for contempt of court or find someone guilty under s.42A Family Law Act 1996 unless they knew of the order and so were aware of the restrictions upon their behaviour.

Aside from safeguards you also ask if you are right to conclude that this system of recognising protective orders from other Member States can only work if it is sufficiently flexible to allow criminal orders from other Member States to be dealt with in the UK as civil orders.

This instrument deals only with orders that originate in the context of “civil matters”. If the measure emanating from another Member State was made in “criminal matters” then the Directive on the European Protection Order would apply instead. That Directive permits flexibility in how we implement, so we would be able to use our system of civil measures to recognise orders made in “criminal matters” elsewhere.

I hope that I have given you reassurance that I share, and take seriously, the points you raise on safeguards. I am confident that these issues will be the source of much discussion during negotiations and I am grateful to you for raising them.

15 July 2011

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

I am writing to inform you that the UK has opted in to the proposal for a Regulation on mutual recognition of protection measures in civil matters.

Parliament will be informed of the Government’s decision through a Written Ministerial Statement confirming that the Regulation meets the criteria set out in the Coalition Agreement with regard to EU Justice and Home Affairs measures.

The draft Regulation will benefit vulnerable people in Britain who may now feel more confident to travel within the EU due to greater protection as the aim is to provide continuous protection as people move between Member States. The draft Regulation uses a quick and efficient mechanism which will avoid those needing protection having to go through time-consuming court procedures and
giving evidence on the same matters in another Member State in order to get the protection they need.

The draft Regulation covers “civil matters” and follows on from the draft Directive on the European Protection Order which covers “criminal matters” and which the UK has also opted into. The two separate instruments are intended to complement each other so that as many protection orders as possible are covered despite the differences in Member States’ systems.

I attach a copy of the initial Impact Assessment (Annex A) which was considered as part of the decision making process. It is important to state at the outset that full quantification of costs and benefits has not been possible at this stage, particularly given the fact that the draft Regulation will change during the negotiation procedure.

I have written in similar terms to the Commons European Scrutiny Committee to inform them of our opt in and I will continue to keep you informed of developments as negotiations proceed.

24 August 2011

Letter from the Chairman to the Rt. Hon Lord McNally

Thank you for your letters dated 15 July and 24 August 2011. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 12 October 2011.

We have decided to retain the proposal under scrutiny.

We note your comments that the draft we retain under scrutiny forms a “first iteration” and that the negotiation of this proposal is at a very early stage. We are pleased that you agree with the Committee that the safeguards in this proposal will need to be looked at carefully and note your reassurances in regard to Article 10(3) that the Government “want to ensure that the person causing the risk has knowledge of the proceedings and the order so that the right to challenge can be exercised”.

The Committee is grateful for the enclosed Impact Assessment and we welcome the Government’s decisions to opt in to the proposal.

We look forward to hearing from you in due course as the negotiation of this proposal develops.

14 October 2011


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

Your Explanatory Memorandum on this report of the Court of Auditors was considered by the Justice and Institutions Sub-Committee on 15 June. We thank you for your explanation of the main points of the report and now clear it from scrutiny.

We note that many of the Court of Auditors’ recommendations are concerned with improving the efficiency of OLAF’s operations and are directed to OLAF’s management. These recommendations are clearly important and, when the report is considered in the Council working group, we urge you to press the Commission and OLAF to respond positively to them.

The other recommendations relate to matters of OLAF’s governance and powers which are addressed in the Commission’s proposals for reform of OLAF published in March (doc. 7897/11). My letter to you of 25 May expressed our support for those proposals, and we trust the Court of Auditors’ opinion will be taken fully into account in the consideration of those proposals.

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

Thank you for your Explanatory Memorandum of 17 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 13 July. We decided to hold this matter under scrutiny.

It is clear from the reviews carried out by Andrew Gowers and Professor Hargreaves that the scale of the problems presented by the existing legal framework in respect of orphan works merit a legislative solution. We consider that the objectives of facilitating the digitisation of publicly available archives and making them more widely available can be better achieved at EU level. Therefore, like you, we welcome progress on this issue, and we consider that the Commission proposal complies with the principle of subsidiarity.

Of course, any legislation in this area requires balancing the costs and benefits to the institutions owning the archives, the rights holders and the general public. It appears to us at present that the Commission has achieved a reasonable balance in its proposal although we note that the Commission proposal is much narrower than the model proposed by Professor Hargreaves. We therefore look forward to the Government’s response to his suggestions. We should be grateful for further information as to whether stakeholders agree with the Commission’s choice from the options available to address this issue.

At the more detailed level of legislation we support you in seeking a resolution to the issues you have raised in your Explanatory Memorandum. We therefore look forward to information on the progress of negotiations aimed at -

— ensuring that the Directive is drafted sufficiently broadly to apply to all the different types of work held in the archives of public institutions,
— identifying more clearly the Member State of first publication of an orphan work,
— enabling undertakings such as the digital copyright exchange proposed by Professor Hargreaves to be included in the list of sources for information on orphan works,
— defining more clearly what use by a public institution of its archive should be considered to be within its public interest mission, and
— ensuring that Member States will not be limited in making wider provision for orphan works.

We would also be grateful for further information on the system the UK would propose for publicising diligent searches in respect of orphan works first published here, and the costs of doing so. Would publication provide any Government certification of such a search and if so what would be the costs implications?

We do not require your reply to the points raised in this letter to be made within 10 working days.

14 July 2011

Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 14 July following the Explanatory Memorandum filed on 17 June. I did not reply immediately as the discussions on the draft proposal were at a very early stage. In the interim, much work has been done in Member State meetings, and in discussions with stakeholders and the Commission; I am now in a position to both address your questions and provide an update.

A new proposal drawn up by the Presidency on 6 October was discussed during the Council Copyright Working Group meeting on 13 October. It was further revised on 21 October for discussion at the Working Group meeting on 27 October and certain issues were discussed further on 10 November. The Information below is based on the latest revision (which is attached) and reflects the recent discussions:
The impact assessment (IA) for the Directive, and other statements, have led many stakeholders to conclude that the aim of the Directive was to facilitate the mass digitisation of cultural and historical collections. However, the Commission has explained to Member States that the aim of the Directive is to enable cross-border cultural use of individual orphan works rather than mass digitisation. This is very disappointing for museums and archives hoping to make use of the Directive, such as the British Library and the BBC. To a degree it therefore reassures publishers and owners of potentially orphan works that any harm to them is likely to be limited. The Directive is an improvement on the current situation in which the risk of exposure to both criminal and civil proceedings for using a potentially orphan work is high. The Directive will allow individual orphan works to be used for cultural purposes without significant legal risk, while protecting rights holders.

The IA considered the possibility of using extended collective licensing schemes (ECL) to enable mass digitisation, but then concluded by proposing a scheme for the cultural use online of individual orphan works; this allowed for mutual recognition of diligent searches by Member States, provided that they were conducted according to agreed standards.

Regarding your point about the narrow focus of the proposed Directive and mass digitisation, the Commission has said that the issue of mass digitisation/mass clearance of rights will need to be addressed in other ways (such as the Memorandum of Understanding (MoU) on Out of Commerce works signed last September by authors, publishers and collective management organisations for text and image based works). This message is filtering back to stakeholders.

Turning to your question about defining more clearly a ‘public interest mission’, the draft Directive concerns ‘certain uses of orphan works undertaken by publicly accessible libraries, educational establishments, or museums, as well as by archives, film or audio heritage institutions and public service broadcasting organisation’ (Article 1 para 1). This is qualified by Article 6, para 2 which states these organisations can only use orphan works, ‘to achieve aims related to their public interest missions, notably preservation, restoration and the provision of cultural and educational access’. The revised Presidency compromise proposal adds a further qualification: ‘Member States should permit certain organisations, namely those referred to in Article 5(2)(c) of Directive 2001/29/EC and film or audio heritage institutions, which operate on a non-profit making basis, as well as public service broadcasting organizations…..’ (Recital 17).

It is interesting to note that the non-profit making qualification does not apply to public service broadcasters. Recital 17 states that, for the purposes of this Directive, public service broadcasters (PSBs) are those ‘with a public service remit as conferred, defined and organized by each Member State’.

The focus of the Draft Directive on non-commercial cultural use has become clearer with the deletion of Article 7. There was concern in the Working Group that it appeared to allow commercial use by publicly accessible libraries, educational establishments, museums, archives, film heritage institutions and public service broadcasters but this use could cause competition problems with other more obviously commercial organisations who are not so enabled.

The Government has said it will propose a domestic orphan works scheme that includes commercial use. Therefore, it is important to us that the Directive is without prejudice to such arrangements. The UK will continue to work with the Commission and other Member States to clarify issues around mass digitisation/mass clearance of rights and commercial use. The UK will attempt to find ways at EU level to facilitate mass digitisation and mass clearance of rights and to allow for commercial use.

Some Member States share the UK view, and that of your Committee, that the Directive should not stop Members States from making wider provisions. This view is reflected in the deletion of the word “existing” in of Recital 20: “This Directive should be without prejudice to […] arrangements in the Member States concerning the management of rights such as extended collective licences.” The focus here is on ECL so the UK will attempt to change the wording such that it also reflects other arrangements that Member States choose to introduce in addition to the requirements of the Directive. This wording should also be in the actual Articles and not just in the Recitals.
TYPES OF WORK IN SCOPE

Regarding your point on the scope of the proposal, the current text, specifies that for public service broadcasters only ‘cinematographic or audiovisual works and audio recordings produced by public service broadcasting organisations before the 31 December 2002’ are included in scope. For all the other categories of institution listed above the following are in scope: ‘Books, journals, newspapers, magazines and other writings’ and ‘cinematographic or audiovisual works and audio recordings’.

The Commission explained that there is no particular significance to the date in 2002 but that they wanted to ensure that there were no incentives on those who actually commission works to allow cinematographic/audiovisual works to become orphaned deliberately. As a result of Member State interventions, other matters that were out of scope originally are now being looked at, such as unpublished works (e.g. Diaries held by museums) and works where one copyright holder is known and locatable but others are not. Photographs have been excluded because the Commission felt that inclusion of this type of work left too many unanswered questions at this stage, but said that the situation will be reviewed annually.

WHETHER PUBLISHED OR BROADCAST BEFORE – MEMBER STATE OF FIRST PUBLICATION

You also asked about identifying more clearly the Member State of first publication. Because there are arguments that unpublished works should be included within the scheme, it has been suggested by some Member States that the criteria for whether a work could be included within the scope of the Directive should be determined using the concept of whether the work is publicly accessible rather than whether (or where) formally published. So if the orphan work is on display to the public in an archive, even if never published in the sense of distributing copies in quantity, it could be deemed to be within scope and available for digitisation and for publication on the archive’s website.

One of the problems related to inclusion of unpublished works is how to determine where the diligent search for possible rights holders should be undertaken. At present Article 3, paragraph 3 states that: “A diligent search shall be carried out in the Member State of first publication or broadcast”. Even without the inclusion of unpublished works this approach may be problematical for works produced by rights holders in the EU but first published outside the EU and for works first published on the internet.

We will continue to discuss these issues with the Presidency, other Member States and the Commission to try to resolve them.

DIGITAL COPYRIGHT EXCHANGE

You rightly pointed out that the UK Digital Copyright Exchange (DCE) should be included as one of the sources for information on orphan works. However, at present it is difficult to stipulate that the proposed DCE should be included as one of the mandatory sources to be searched because it does not yet exist. The UK will endeavour to ensure that the sources to be searched specified in the Directive allow for the inclusion of the DCE at a later stage.

Diligent Search

The system of diligent search for the UK’s domestic scheme, and its estimated costs, will form part of the forthcoming consultation. Details of this search would need to be provided to the authorising body so that they could decide whether reasonable efforts in good faith had been made to discover the rights holders. Another possibility is that the authorising body could conduct the diligent search itself in return for a fee from the potential user. The authorising body could publish details of works they are considering declaring as orphan works and offer rights holders the opportunity to identify works as their own. They would also need to maintain an orphan works registry of all works that had been declared orphan after a diligent search. An alternative approach would be for the authorising body to list works that, for example, a museum considers are probably orphans, on a public website, awaiting claim by the rightful copyright owners. If the works were not claimed within a certain period the authorising body could declare them orphan and available for use as such. If the DCE finds favour with industry and becomes a reality, it is likely that a search of the DCE would be an essential part of any diligent search. Indeed, a DCE could in effect become the orphan works registry.

The EU draft Directive proposes that once a diligent search has been conducted in one member state, that search should be recognised by other Member States. This would clearly facilitate cross-border use and reduce the costs of using orphan works.
I hope that you will find this information helpful; I will keep you updated as appropriate, when further progress is made.

30 November 2011

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

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

Thank you for your letter of 25 May and your recent consideration of the draft Regulations for the unitary patent and language regime. I understand that both Regulations have been retained under scrutiny. I am writing to provide an update on recent developments on this issue.

Since the Explanatory Memoranda were submitted on 5 May, both Regulations have been discussed in detail in Brussels and amendments proposed. During those discussions, we impressed upon the Hungarian Presidency the importance of ensuring that enough time was allowed for Parliamentary scrutiny of the draft Regulations. Consequently, the Presidency did not put forward the Regulations for agreement at the 30 May Competitiveness Council. Instead, a round table debate on the two implementing Regulations and on a Commission non-paper on creating a unified patent litigation system was held. Ed Davey (Minister for Employment Relations, Consumer and Postal Affairs, Department for Business Innovation and Skills) represented the UK.

The Council discussions were conducted on the basis of the amended Regulations which are contained in Council Document 10629/11 and on a non-paper concerning the creation of a unified patent litigation system (“the Court”) contained in Council Document 10630/11. I have included both Council Documents with this letter for your consideration.

UNITARY PATENT REGULATION (COUNCIL DOCUMENT 10629/11)

As I stated in the Explanatory Memorandum of 5 May (9224/11), the UK requested the insertion of a provision that the Regulation would not come into force until an agreement on the Court was in force. Our request was echoed by several other Member States and I am pleased to say that Article 22 of the unitary patent Regulation has been amended to re-instate the link between the patent and the Court so that the patent Regulation and the translations Regulation only apply once the unitary patent litigation system has been set up.

Other amendments to the draft Regulation have been made to resolve several technical issues raised by the UK and other Member States. Our major concern about the power delegated to the Commission to set fees and decide their distribution is shared by the vast majority of the Council and the relevant article (12a) has been amended. The amendment ensures that the power to set fees is held by the participating Member States.

LANGUAGES REGULATION (COUNCIL DOCUMENT 10629/11)

The debate at the 30 May Council showed that the linguistic regime for the patent was not contentious and all Member States could accept the text of the languages Regulation. Only two substantial amendments have been proposed. Firstly, to mirror that in the other Regulation, a change has been proposed to Article 7 to clearly link the coming into force of the languages Regulation with the establishment of the Court, as for the patent regulation. Secondly, the options for applicants when translating their patents during the transition period have been extended to include Spanish and Italian.

UNIFIED PATENT LITIGATION SYSTEM (COUNCIL DOCUMENT 10630/11)

The Commission presented a non-paper setting out options for a litigation system that would overcome the incompatibility with EU law identified by the Court of Justice of the European Union (ECJ) in its Opinion (1/09). The Commission considered three options: conferral of exclusive jurisdiction on patent litigation upon the ECJ; jurisdiction resting with national courts with judgements delivered for the whole territory of participating Member States as in the Community Trade Marks system; or conferral of exclusive jurisdiction upon an independent court established by the participating Member States.
The Commission's paper recommends their third option of amending the current draft international agreement to meet the concerns of the ECJ. The Commission's proposal is compatible with the Government's preferred way forward on this issue, notably as it does not extend the power of the ECJ. The proposal would create a specialised patent court by International Agreement amongst the EU Member States participating in enhanced cooperation. This court would take decisions relating to infringement and validity of the unitary patent and also for European bundle patents in force in the participating states.

At the Competitiveness Council, there was widespread support amongst the participating Member States (including the UK) for the Commission's proposal to use the current draft International Agreement as a starting point for creating a unified patent litigation. Of course, the detail will need to be resolved and we will want to ensure a legally watertight system.

**ENHANCED COOPERATION**

Spain and Italy remain opposed to the use of enhanced cooperation and they have challenged the legality of the Council Decision of 10 March before the ECJ under Article 263 TFEU. They argue that the Decision was discriminatory, as it was counter to EU law and as it did not treat Spain and Italy equally with all other Member States. This action does not mean that progress on the patent Regulations must stop as commencing proceedings under Article 263 does not suspend the contested measure pending judgement. If the action were successful, the ECJ would declare the Decision void and all actions based on the Decision would also be deemed void. It is the view of the Government that the enhanced cooperation Decision of 10 March complies with all the requirements set out in the Treaties.

I shall of course keep you updated on any progress made in this matter.

**NEXT STEPS**

Based on the Council discussions on 30 May the Presidency concluded that the two Regulations could be subject of a future agreement and they have called an extraordinary Council on 27 June with the objective of reaching General Approaches on both Regulations. In due course we expect to receive an amended draft of the international agreement on the court system based on the principles in the Commission's non-paper.

I would be most grateful if the Committee could give consideration to the latest drafts of the Regulations and developments in relation to the court system so that we may proceed to agreement on General Approaches at the 27 June Competitiveness Council. I shall of course take the necessary steps so that your Committee may clear the current documents as soon as possible and I would be delighted to answer any further questions you may have.

7 June 2011

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

Thank you for your letter of 7 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 15 June.

We decided to clear these proposals. As you know we regard the creation of an EU-wide patent as important; sufficiently so as to justify the residual risks

— of going ahead in the face of the challenge by Spain and Italy to the decision authorising enhanced co-operation, and

— of the Court of Justice finding that the new arrangement for judicial supervision is still incompatible with the Treaties.

We therefore support proceeding on the new Presidency text.

We look forward to receiving, in due course, the revised text for the international agreement on judicial supervision, which remains subject to scrutiny.

17 June 2011
Letter from Baroness Wilcox to the Chairman

Thank you for your letter of 17 June clearing these documents from scrutiny, and looking forward to further information on the judicial supervision arrangements.

I am pleased to be able to update you on some further developments as we move towards the Competitiveness Council of 27 June.

The Presidency has proposed a new recital to be inserted in the text of the unitary patent Regulation (Council Doc 9224/11) which would read:

“The jurisdiction for European patents with unitary effect should be established and governed by an instrument setting up a unified patent litigation system for European patents and European patents with unitary effect.”

In addition, the Presidency has produced a new draft agreement on the court arrangements. This draft has not yet been published. However I would like to inform you of two main changes compared with the previous draft sent to the ECJ. First, the agreement is now limited to EU member states, so neither third countries, nor the EU itself, would be party. Secondly there will be provisions setting out the liability of participating EU Member States for any failure of the proposed patent court to apply EU law. These will be similar in effect to current obligations in relation to Member States’ national courts.

The Presidency’s text will be discussed between participating states during the Polish Presidency beginning on 1 July, and we will provide a text for scrutiny as soon as one can be made available.

In terms of the economic context for the unitary patent, I would like to bring to your attention the independent review of intellectual property and growth, conducted by Professor Ian Hargreaves, which reported to the Government on 18 May this year. The review recommended that the UK “should attach the highest immediate priority to achieving a unified EU patent court and EU patent system which promises significant economic benefits to UK business”. Professor Hargreaves found that establishing a unitary patent would remove IP barriers between EU countries and could increase UK national income by over £2 billion a year by 2020. He also found that removing duplicated litigation, through the establishment of a European Patent Court, could have projected annual savings for businesses in Europe of between £100 million and £200 million.

As far as our own calculations are concerned, I am sorry that we have not yet been in a position to provide a full Impact Assessment as indicated in the original Explanatory Memorandum. We now have the information from the Hargreaves review mentioned above, which will provide part of the context. But part of the overall impact will depend on the fees regime to be set for the patent, and this has yet to be discussed. From the perspective of the different language options, we have not been able at this stage to add to the calculations set out in the Commission’s Impact Assessment.

I hope that this further information will be of assistance to the Committee in considering the judicial supervision arrangements as we move forward.

20 June 2011

Letter from the Chairman to Baroness Wilcox

Thank you for your letters dated 20 and 30 June. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 13 July.

As you know this Committee supports this latest attempt via enhanced cooperation to create an EU patent protection regime and we welcome the agreement of a General Approach to these two Regulations at the extraordinary EU Competitiveness Council held on 27 June.

We look forward to considering your Explanatory Memorandum dealing with the judicial supervision arrangements in due course. This brings our scrutiny of these two proposals to an end and we do not expect an answer to this letter.

14 July 2011
I am writing to provide you with a copy of the United Kingdom (UK) response paper in relation to the consultation it conducted between December 2010 and February 2011 on the European Commission’s (“the Commission”) legislative proposal to repeal and recast Regulation EC 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (also known as the Brussels I Regulation). A copy is enclosed with this letter.

As you are aware, the Commission published a legislative proposal to repeal and replace the current Brussels I Regulation in December last year. Following its publication, the Ministry of Justice launched a joint consultation document (on behalf of the Ministry of Justice, the Scottish Government and the Department of Justice in Northern Ireland) seeking the views of interest groups on whether it was in the national interest for the Government to opt in to the revised Regulation. Specific views were also sought on a number of issues which were initially considered likely to prove problematic, i.e. on the abolition of exequatur (specifically on the need to retain safeguards for judgment debtors and retaining public policy); the extension of the jurisdictional rules to third state defendants (how this would affect national laws in this area) and arbitration (whether a complete exclusion of arbitration from the scope of the Regulation remained the favoured option).

The consultation exercise concluded in February this year. An analysis of the responses received indicated that the majority (88%) of those who responded to the consultation agreed that it was in the national interest to opt in to the revised Regulation. These responses, together with other issues raised, were considered carefully before a final decision was made on whether to opt in to the revised Regulation or not. You will be aware that the Government concluded that it was in the UK’s interest to participate in this Regulation from the outset, a decision which was made in conjunction with the Minister for Justice (Northern Ireland) and the Cabinet Secretary for Justice in Scotland. The Permanent Representative to the United Kingdom in Brussels wrote to the Hungarian Presidency and Council giving notice of the UK’s intention to participate in the revised Brussels I Regulation on 31 March 2011.

As part of the consultation process, I will shortly be publishing the attached response paper which summarises the views received as well as advising on any conclusions drawn from them, a copy of which is attached to this letter. This document will be available on the Justice website. In summary, the results of the consultation concluded that there were three main issues where focus would be needed during the negotiation phase. The first concerned third country jurisdiction. This relates to cases where the defendant is not domiciled in the European Union (EU) but in a third country. Currently courts in the UK use their own national rules to determine where these types of case should be heard. The Commission have proposed, however, that the Regulation should set out the only grounds of jurisdiction on which courts should make such decisions. It is clear from discussion in the Working Group that some Member States favour a solution which reinforces the current exclusion of arbitration from the scope of the Regulation and would be in the interests of the EU as a whole. Current negotiations appear to indicate that the majority of Member States are not in favour of extending jurisdiction to third state defendants.

It has been made clear in the negotiations that the UK does not support the extension of EU jurisdiction in relation to defendants domiciled in third countries, nor is it persuaded that the scale and frequency of any problems with EU citizens encounter justify such an extension to the Regulation. Any extension would more appropriately be made in the context of a global agreement reached in the Hague Conference and would be in the interests of the EU as a whole. Current negotiations appear to indicate that the majority of Member States are not in favour of extending jurisdiction to third state defendants.

The second key issue for the UK concerns arbitration. The Commission have included a rule in the Regulation which will govern the relationship between arbitration and court proceedings. During the consultation phase with arbitration experts, and albeit that there was some support for the Commission’s approach in principle, the majority of experts were not persuaded that the Commission’s proposals dealt fully with the complexity of the issues at stake. It is clear from discussion in the Working Group that some Member States favour a solution which reinforces the current exclusion of arbitration from the scope of the Regulation so as to exclude the entire arbitral process. It is also clear that the alternative solution proposed by the Commission (that is an attempt to improve the interface between arbitration and court proceedings) would leave unresolved various technical issues which would need to be addressed. In light of the complexity of these issues and the
fact that a solution of this kind would inevitably entail ceding further external competence on arbitration matters to the EU, the UK has so far in the negotiations been supportive of the views of these Member States.

The third key issue concerns the abolition of exequatur. The Commission have proposed abolishing the current intermediate court procedure that requires one country’s courts to validate the judgments of another before they can be enforced. Although the Government agrees with the Commission’s reasoning on why exequatur should be abolished, it nevertheless believes that it is important that all the current protections for defendants should be retained. These protections are designed to ensure that defendants should not have foreign judgments enforced against them in circumstances where it would be unfair to do so. This approach is supported by the great majority of Member States and is likely to be approved by the JHA Council in December.

In your letter to Kenneth Clarke of 20 January, you stated that you would be interested to know whether there was a significant problem in respect of cases which did not concern choice of court agreements or arbitration. Although there is clear anecdotal evidence (albeit no hard statistics) on the problems that have occurred as a result of torpedo actions in relation to choice of court and arbitration agreements, there is no such anecdotal evidence (or indeed statistics) which prove there is a significant problem in cases which do not contain such agreements. Through our earlier consultation, we were not made aware of any specific or significant problems.

You also asked whether we could provide any assessment of the scale of the problem of the present law on provisional measures. The amendments proposed by the Commission in this area are fairly modest and merely align with the case law of the European Court of Justice. The proposal does contain a mandatory provision to ensure better coordination/liaison between courts on cases. It is our view, however, that this provision should not be mandatory but only discretionary. Again, as a result of consultation, we have not been made aware of any particular or significant problems relating to provisional measures. Indeed, it is likely that the JHA Council in December will agree that provisional, including protective measures, should be eligible for automatic enforceability by the court which has jurisdiction over the substance of the case. Where provisional, including protective measures, granted as a result of proceedings in which the defendant was not summoned to appear (ex parte measures) these would not benefit from the automatic enforceability proposed by the Regulation.

28 November 2011

ROADMAP: STRENGTHENING THE RIGHTS AND PROTECTION OF VICTIMS (8525/11)

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

Thank you for your letter dated 27 June 2011 enclosing the agreed text of the Roadmap for Strengthening the Rights and Protection of Victims. It was considered by the Justice and Institutions Sub-Committee at its meeting of 13 July.

In relation to your comment regarding measure D, as we said to you in our letter of 30 June clearing the Commission Communication on strengthening victims’ rights in the EU (10612/11), we agree that: “… any further legislation in this area should be ‘based on the identification of a material and proven problem with current arrangements and that any proposed solutions are based on robust evidence’”.

We have already cleared this matter from scrutiny and we do not expect a reply this letter.

14 July 2011

ROAD SAFETY: CROSS-BORDER ENFORCEMENT (7984/08)

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

I am writing to update your Committee with the position regarding the state of play of this proposal.

When I last wrote to your Committee on 10 March, I said that we expected to be able to continue to play a strong part in negotiating the final text of the Directive, despite not opting in to it at that point.
I am pleased to say that we have been able to do this, for example, by resisting attempts by the European Parliament to include widespread references to harmonisation of road traffic rules, by including technical changes to the data protection provisions, and by defending the standard wording relating to the UK and Ireland’s opt-in.

The final text that is expected to be adopted has retained the police cooperation legal base, as well as the overall structure accepted by the Council. Changes made to the text include stronger references to data protection, the provision for a detailed report by the Commission into the effectiveness of the Directive, and wider application of delegated acts. The ‘driver/keeper issue’, which could prevent the UK from pursuing non-resident drivers committing offences on UK soil, was not able to be addressed in the proposed final agreement.

The text will come back to COREPER and Council for a final vote once the lawyer-linguists have made any necessary corrections and amendments, which should be in the next few weeks.

We will continue to monitor the implementation of the Directive in the different Member States paying particular attention to the setup and implementation costs.

In your letter of 17 March, you asked when the Prum Decisions were expected to be implemented. The Home Office, who lead on this, have not yet been able to confirm when the vehicle registration elements of the Prum Decisions will be implemented. However, they are continuing to look at whether EU funding is available and whether work to implement these measures might be possible towards the end of the current spending review period.

9 August 2011

Letter from the Chairman to Mike Penning MP

Thank you for your letter of 9 August, which was considered by the Justice and Institutions Sub-Committee on 12 October. We are grateful for this update.

We note that you intend to monitor the implementation of the eventual Directive by the other Member States and infer that you do not intend to seek to opt in immediately on the adoption of the Directive. We repeat our request that you provide an Explanatory Memorandum if and when you contemplate opting in.

14 October 2011

THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION:
COMMISSION’S OPINION ON THE REQUEST FOR AMENDMENT (14769/11)

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

Thank you for your Explanatory Memorandum dated 28 October 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 23 November.

We have decided to retain the Commission’s opinion under scrutiny.

Unfortunately, you have produced a short descriptive Explanatory Memorandum that fails to engage with the Commission’s views. For example, in relation to expanding the General Court’s judiciary, the Commission offers two proposed methods of appointment designed to overcome the potential difficulties arising out of having more judges than Member States. Apart from a brief acknowledgement of their consideration by the Commission (paragraph 6 of the Explanatory Memorandum) you do not explain these mechanisms and you fail to offer the Committee any Government view of them. Omissions of this kind limit the extent to which the Committee can engage you in correspondence on these matters and we would welcome your views on the Commission’s suggestions.

Following the publication of our Report in April, the related exchange of correspondence setting out your formal response to it, the Report’s debate on 17 October and our correspondence in relation to the Committee’s scrutiny of the various proposals for reform of the Court of Justice of the European Union, our respective positions on the substance of these reforms is well rehearsed and need not be repeated again.

The Committee takes this opportunity to welcome the Commission’s opinion as a useful contribution to the discussion of these matters and notes that where the Commission covers the same ground as
our Report we are both in agreement; in particular in relation to reform of the General Court and in rejecting the creation of more specialised tribunals as a solution. Since our Report was published, highlighting the workload problems the General Court are experiencing, the President of the Court has requested an increase in the General Court’s judiciary, a request now supported by the Commission. Are the Government any closer to being persuaded by the arguments for this reform?

Finally, the Committee would welcome an update from the Minister setting out how the Member States’ discussion of these matters is progressing.

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

24 November 2011

STRENGTHENING VICTIMS’ RIGHTS IN THE EU (10612/11)

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

Thank you for your Explanatory Memorandum dated 13 June 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 29 June 2011.

We have decided to clear the Commission’s Communication from scrutiny. We do not expect a reply to this letter.

It is useful for the Committee to read a full explanation of the rationale underpinning the Commission’s work in this field. We agree with you that any further legislation in this area should be “based on the identification of a material and proven problem with current arrangements and that any proposed solutions are based on robust evidence”. Whilst we note that subsidiarity is not relevant to this specific item, in line with our usual processes we will consider each individual legislative proposal which emerges from this Communication against the principle of subsidiarity.

30 June 2011

TEMPORARY JUDGES OF THE EUROPEAN CIVIL SERVICE TRIBUNAL (8786/11)

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

I am writing in response to your letter of 20 May 2011 requesting an update on the course of discussions in the Council Working Group about appointing judges to the Civil Service Tribunal (CST) on an ad hoc basis to cover absences caused by illness.

As you mentioned in your letter, the President of the Court of Justice of the European Union (CJEU) has proposed appointing three temporary judges to CST to be made available for duty whenever a sitting Judge is taken ill for more than three months. He has asked the Council to draw up a list of three temporary judges to be appointed to the CST, to be chosen from former Members of the CJEU and appointed for a period of four years with the possibility of re-appointment.

I note the Committee’s support for the proposals and I am giving them serious consideration in conjunction with my Ministerial colleagues. Any budgetary implications relating to the President of the Court’s proposals would need to be consistent with the UK’s overall stance on the EU’s budget.

Should the Council agree to the President’s proposals for appointing temporary judges then we will aim to ensure that the appointments are guided by three principles: the merit of the candidate; geographical representation and fair representation of different legal systems.

Although the Council’s Working Group had an initial discussion relating to the President’s proposals for reform of the Court on 13 May, the subsequent Working Group on 27 May was cancelled. The next Working Group meeting is scheduled for 17 June, after which I will update you further. In addition I will respond to the Committee’s report looking The Workload of the Court of Justice of the European Union by 6 June.

6 June 2011
Letter from the Chairman to the Rt. Hon David Lidington MP

Thank you for your letter dated 6 June 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 15 June.

We retain this matter under scrutiny. Whilst we note your comments regarding the budgetary implications of this proposal the Committee’s view remains that if the Member States are committed to an effective Court of Justice of the European Union it ought to be possible to find sufficient funds for reform within the EU’s existing budget.

We look forward to hearing from you as to how this matter progresses.

17 June 2011

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

Thank you for your letter dated 17 June 2011 concerning the draft regulation relating to temporary judges of the European Union Civil Service Tribunal (CST).

I agree with you that it ought to be possible to find sufficient funds for reform within the Court’s existing budget and this is the position the UK is taking in discussions on reform of the Courts at the European level. Just to be clear, I am open in principle to any reforms which increase the efficiency of the CJEU.

We will be keeping Scrutiny Committees updated as discussions on this proposal and the other five proposals relating to the Statute’s progress.

Can I take this opportunity to thank you again for your interest in reform of the Court of Justice of the European Union.

4 July 2011

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

Thank you for your letter dated 4 July 2011. It was considered by the Justice and Institutions Sub-Committee at its meeting of 13 July 2011.

We have decided to retain the proposal under scrutiny. We are pleased that you remain open to any reform designed to increase the efficiency of the Court of Justice of the EU and we welcome your agreement that it ought to be possible to fund reform of the Court from within the existing EU budget.

We look forward to hearing from you as the negotiation of this proposal develops but we do not expect a reply to this letter.

14 July 2011

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 my letter of 15 March 2011 in which I informed the Committee of the possibility of a vote in Council on the proposal to increase the copyright term of protection for sound recordings and performers’ rights in sound recordings from 50 to 70 years.

You will wish to know that on 7 September the Committee of Permanent Representatives (COREPER) voted in favour of the proposal; the matter will now go to the Council (we understand that it is likely to be tabled at the General Affairs Council on 12 September) where it is expected to proceed without a further vote.


6 September 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 13 June and your Explanatory Memorandum of 21 June covering the document which you had already provided in correspondence. These were considered by the Justice and Institutions Sub-Committee at its meeting of 13 July. We decided to clear the document.

As I indicated in my letter of 13 May we welcome the inter-institutional understanding on the practical arrangements for handling delegated legislation.

The Committee also welcomed your acknowledgment that the Common Understanding should be treated as a depositable document, and the further steps you outline in your letter to facilitate scrutiny by early contact at official level and more rigorous follow up to correspondence.

We are grateful for your explanation of how delegated legislation will be handled within the Council and the European Parliament, which will inform our consideration of how we scrutinise delegated legislation.

We do not require an answer to this letter.

14 July 2011