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

This edition includes correspondence from 1 December 2013-3 June 2014

JUSTICE, INSTITUTIONS AND CONSUMER PROTECTION
(SUB-COMMITTEE E)

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Letter from the Viscount Younger of Leckie, Parliamentary Under Secretary of State for Business, Innovation and Skills to the Chairman

I am writing to you concerning the World Intellectual Property Organisation (WIPO) Treaty on visually impaired and otherwise print-disabled persons.

The European Commission has recently published a proposal for a Council decision on the signing, on behalf of the European Union, of the World Intellectual Property Organisation (WIPO) Treaty on visually impaired and otherwise print-disabled people. Details of the Treaty, which is open to signing until June 2014, are included in the Explanatory Memorandum.

I last wrote to you on 13 June 2013 to update you on the then Treaty negotiations. In your response of 4 July 2013 you asked for reassurances concerning EU competence in this matter. In addition to seeking your approval of the Government position on the Commission proposal I would also like to provide a further update on the final negotiations and to respond to the points you raised in your letter.

The UK delegation was actively involved in the negotiations, remaining within our cleared negotiating position, and I am pleased to be able to tell you that, as the Committee has already noted, the Treaty text was agreed on 26 June and formally adopted on the 27 June as the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise print-disabled.

As I outlined in my previous letter, we sought to negotiate a Treaty that:

— Provides real benefits to visually impaired people around the world;
— Facilitates cross-border exchange of accessible copies that are made under the Treaty; and
— Protects the rights of copyright owners.

The Government considers that the Treaty strikes the right balance between meeting the needs of visually impaired people and ensuring that rights holders’ interests are not damaged. As the Treaty satisfies the UK’s negotiating objectives, we were able to sign it on 28 June. The initial response to the Treaty from all stakeholders has been positive.

The final text includes a provision that will make it mandatory for all Member States to provide copyright exceptions that allow accessible copies of works to be made more easily and also allow cross-border exchange of such copies, including direct export from an organisation representing blind people in one country to individuals requiring accessible copies in another. These were key issues for such organisations, who were concerned that burdensome procedures for cross-border exchange would hamper the effectiveness of the Treaty.

The Treaty also includes clear safeguards which aim to ensure that the Treaty does not undermine the rights of authors and publishers. In particular the Treaty reaffirms Contracting Parties’ commitments to apply the ‘three-step test’, which helps to ensure that copyright exceptions are properly limited and take into account the interests of copyright owners. It also provides an option for Contracting Parties to limit their exceptions for visually impaired people to cases where accessible formats are not commercially available.

This is considered to be a historic Treaty as it is the first Treaty on copyright exceptions, and it also has a humanitarian element. The UK has long been committed to improving access to copyright works for visually impaired people both within the UK and internationally.

Following EU signature of the Treaty, I will arrange for the text to be laid before Parliament as a Command Paper with an Explanatory Memorandum in the usual way.

I would be grateful if the Committee could consider the Commission proposal at its earliest convenience.

21 January 2014
Letter from the Chairman to the Viscount Younger of Leckie

Thank you for your letter of 21 January 2014 and your Explanatory Memorandum dated 22 January 2014. These were considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 5 February. We decided to retain this matter under scrutiny.

Like you, we support the objectives of this Treaty. We note, however, that the Government is giving further consideration as to whether the citation of Article 207 TFEU as a legal basis for this proposal is justified. Please inform us whether other Member States would support you in challenging this legal basis, and whether you are contemplating any action to resolve this issue.

We are particularly interested in this matter because the addition of a common commercial policy legal basis affects the extent to which the EU can be regarded as exercising competence with regard to this Treaty, rather than the Member States. As you know from our letter of 4 July 2013, we are concerned that there should be transparency in respect of this issue. Please inform us of any steps that you propose to take to clarify the respective competences of the EU and the Member States.

We should be grateful for a reply by 19 February.

6 February 2014

Letter from the Viscount Younger of Leckie to the Chairman

Thank you for your letter of 6 February in which you raise a number of questions on the European Commission proposal for the EU to sign the Marrakesh Treaty on access to published works for persons who are blind, visually impaired, or otherwise print disabled. I am grateful to the Committee for allowing an extension of time for response, and I am now in a position to reply more fully.

You asked whether other Member States would support the UK Government in challenging the legal basis of the proposal and what action was being contemplated to resolve the issue.

The first opportunity for Member States to substantively discuss the proposal was at a Council Working Group on 28 February. UK officials had engaged with counterparts in other Member States ahead of the Working Group where the UK opposed the proposal on the grounds that Article 207 of the Treaty on the Functioning of the European Union (TFEU) is not an appropriate legal base. The UK Government is however open to solutions which would enable Member States to sign and ratify alongside the EU and in seeking to provide a way forward, we suggested a compromise based on Article 19 TFEU, which we believe is a more appropriate legal base as its object is the creation of equality of opportunity for disabled people.

Most Member States shared the UK’s view that Member States should be able to ratify the Treaty in their own names, and favoured an approach where this was done on a mixed legal basis with both EU and individual Member State ratifications. On the legal base question, there were varying degrees of support for the UK position. While most agreed that Article 207 was not appropriate, and the UK alternative approach based on Article 19 had support among a number of Member States, most were prepared to consider any compromise which would allow Member States to ratify in their own names alongside the EU. In the Government’s view, the current proposal would not allow this, and this appears to be the view of the Commission, but there is disagreement on this point among the Council.

No conclusion on the proposal was reached at the Council Working Group. The next copyright working group is scheduled for the end of April, but the Presidency has indicated that, instead of discussing the proposal again at this working group it will seek a quick resolution on the proposal and will escalate the matter through COREPER for a decision. This meeting has not yet been scheduled.

UK officials will continue to engage with the Presidency, the Commission and the Council Legal Service and with counterparts in other Member States, in advance of COREPER, to explore all possible options for agreeing a position which clearly avoids a transfer of competence. It is not clear at this stage whether there is sufficient opposition to the proposal in its current form from Member States that have a clear view on national competence in this area. When seeking a compromise, the UK Government will continue to be clear that it considers an Article 207 legal base to be inappropriate, and that any compromise proposal should be drafted to allow for separate ratification of the Treaty by the Member States.

I shall be happy to provide the Committee with a further update following the COREPER meeting or sooner should there be any significant developments.

5 March 2014
Letter from the Chairman to the Viscount Younger of Leckie

Thank you for your letter of 5 March 2014. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 19 March. We decided to retain this matter under scrutiny.

We are grateful for the explanation of the legal issues concerning this proposal. We should be grateful to be kept up to date with further developments in due course, particularly with regard to the steps taken to clarify the respective competences of the EU and the Member States in the light of the resolution of the legal issues surrounding this proposal.

20 March 2014

Letter from the Viscount Younger of Leckie to the Chairman

Thank you for your letter of 20 March. I am pleased that you found the explanation of the legal issues helpful and I am now in a position to provide the Committee with a further update on the European Commission proposal. Owing to the speed of events I am sorry that I have been unable to provide an earlier response on progress of the proposal.

As expected, the Presidency escalated the matter quickly through COREPER which met on 19 March and again on 9 April. The Decision was adopted by the Council on 14 April. The UK voted against the adoption of the decision, due to the inclusion of an Article 207 (common commercial policy) legal base, which the UK considered to be inappropriate in the context of a treaty which seeks not to promote trade, but to promote blind and visually impaired people’s access to published copyright works. The UK filed a minute statement to this effect, also highlighting that we do not consider this to be an area of exclusive EU competence, and that we consider that Member States are able to ratify the treaty in their own names.

Poland, which took a similar position to the UK, abstained from the vote and filed its own minute statement. All other Member States voted in favour of the decision, which was adopted under a qualified majority. However, many Member States expressed unease about the choice of legal base, and stated that they considered this to be an area of mixed competence, which would mean that Member States could ratify the treaty in parallel with the EU. A number of Member States, including France and Germany, filed a minute statement to this effect.

The European Commission confirmed that it considers this treaty to fall wholly within an area of exclusive EU competence, and that only the EU should sign and ratify.

A copy of the minute statements entered by the UK, other Member States, and the European Commission is in the enclosed Council document.

In advance of these meetings, UK officials engaged with counterparts in other Member States many of whom supported aspects of the UK position at the Council Working Group. Although most Member States voted in favour of the proposal, many indicated that they intend to sign and ratify the Treaty in their own right. The primary reason for Member States supporting this decision despite unease about its legal basis appeared to be a concern that to do otherwise could hold up implementation of this treaty, which all agreed was important to implement as soon as possible.

The Commission has not confirmed the timescale for the introduction of a proposal for ratification of the Treaty by the EU although it has indicated a desire to move forward quickly.

I hope you find this information helpful. Once a proposal for ratification of the Treaty has been published by the Commission I shall of course provide the Committee with an Explanatory Memorandum.

15 April 2014

Letter from the Chairman to the Viscount Younger of Leckie

Thank you for your letter of 15 April 2014. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 13 May.

The Council Decision to allow the EU to sign the Marrakesh Treaty took place in circumstances where there was still considerable disagreement about the EU's and Member States’ respective competence over it. This is highly unfortunate. It begs the question why the Decision was expedited through the Council, and risks leading to legal uncertainty and/or litigation.
Unhappily for the UK, neither of its two concerns about legal base and mixed competence, which in
our opinion have some merit, appear to have swayed the requisite number of Member States to form
a blocking minority. We note, however, that nine Member States in all tabled written statements to
the effect that they considered the Treaty to be a mixed agreement.

The Committee has been clear in the past that whatever the outcome of competence disputes
concerning EU adherence to international agreements, the underlying EU legislation should be
transparent about how the EU and the Member States have exercised their respective competences.
This objective has clearly not been met in this instance. We would, therefore, be grateful, if you could
explain:

— Why the proposal was expedited through the Council despite fundamental
disagreement about whether the Treaty was a mixed agreement;

— Why, given that nine Member States in all disagreed with the Commission’s
assessment that the EU had exclusive competence over the Treaty, none
other than the UK voted against the Decision;

— Whether we would be right to conclude that this was a failure of diplomacy
on the UK’s part; if not, we would like to know the reasons for the UK’s
isolation and whether any lessons have been learned for the future;

— Whether the exclusive EU competence which arises from the common
commercial policy legal base of the Decision prevents the Treaty from being
a mixed agreement as a matter of EU law, with the consequence that it
cannot be ratified by Member States in their own right; and

— What the likelihood is of the disagreement being either resolved or litigated
before the ECJ.

We look forward to receiving your response by 30 May 2014. In the meantime, the Decision remains
under scrutiny.

13 May 2014

Letter from the Viscount Younger of Leckie to the Chairman

Thank you for your letter of 13 May in which you raise a number of serious questions concerning the
proposal for a Council Decision authorising the EU to sign the WIPO Marrakesh Treaty.

The Government shares the Committee’s concerns that the Decision was adopted by the Council
when there remained disagreement as to whether Member States should be party to the agreement
alongside the EU. Throughout negotiation of this Treaty in WIPO the UK worked hard to ensure that
Member State competence was respected. This included ensuring that the European Commission was
given a mandate to negotiate only in relation to matters falling within the EU’s exclusive competence,
and that Member States were actively involved in the Treaty negotiations.

However, in light of a number of recent ECJ decisions on the scope of the EU’s common commercial
policy competence, the Commission is taking a broad view as to which matters fall within this area
and over which the EU has exclusive competence. The Commission’s view is that the current
agreement is one over which the EU alone can exercise competence, but- as will be clear from the
UK’s written statement- we disagree with this analysis.

Many Member States have expressed strong support for this Treaty, and a desire to see it come into
effect without undue delay. The UK is one of this group, but we have been clear that this desire
should not override the need to follow the proper process, in particular for there to be clarity on the
questions of legal basis and the extent of the EU’s competence in respect of the agreement. However,
despite these concerns, which were shared by a number of Member States, the Presidency and
Commission were keen to expedite the proposal before 27 June 2014, the date on which the Treaty
closes for signature. There was concern from a number of Member States that if the proposal were
not expedited, implementation of the Treaty could be delayed.

As you are aware, a number of Member States raised concerns about the legal base and its
consequences for ratification, and filed statements in which they set out their views that the EU does
not have exclusive competence in this area. Despite this, they did not oppose the adoption of the
Decision. This is because most Member States were satisfied that the choice of legal base did not
mean that the EU was exercising competence in respect of the whole Treaty and did not therefore
prevent Member States signing and concluding the agreement in their own right.

13 May 2014
As is clear from their statement, this is not the view of the Commission, which considers all matters covered by the Treaty to come within the exclusive competence of the EU.

The UK and Poland, on the other hand, disagreed with the choice of legal base (as set out in the respective statements), which is why the UK voted against the adoption of the Decision, and Poland abstained from voting.

The UK raised these concerns with other Member States, many of which agreed that there was a lack of clarity around the extent of EU competence in respect of the Treaty, and potential risks in adopting the Decision on the cited legal bases. However, it is clear that the majority were ultimately persuaded that these legal bases could allow Member States to ratify the Treaty alongside the EU, and were prepared to adopt the Decision despite the legal uncertainty. It is also likely that there was a reluctance to be perceived as playing a part in delaying the implementation of an important international treaty that seeks to assist visually impaired people.

Although we were not isolated in our concerns, I recognise that voting alone is not a comfortable position to be in. However, I believe that it is important that the UK maintains a clear position on the balance of competence between Member States and the EU. I take this issue very seriously and I think that this was the right action to take in these circumstances.

Following adoption of the Decision, the EU signed the Treaty on 30 April in Geneva. In line with their view that the Decision supports a mixed competency approach, Greece and France signed the Treaty at the same time. There is no indication that the Commission opposed these moves.

The Government considers that the legal bases cited in the Decision could potentially prevent Member States from signature and ratification of the Treaty in their own name, although many Member States do not appear to hold this view. The Commission has yet to reveal its intentions on moving forward. The Government is considering its options, and I shall keep you up to date with any developments.

I hope you find this information helpful and that it reassures the Committee that adoption of the Decision did not represent a failure of diplomacy on the UK’s part.

3 June 2014

ACTIONS FOR DAMAGES UNDER NATIONAL LAW FOR INFRINGEMENTS OF THE COMPETITION LAW PROVISIONS (11381/13)

Letter from Jo Swinson MP, Parliamentary Under Secretary of State, Department for Business, Innovation and Skills, to the Chairman

I am writing to provide an update on the above Directive following discussions at the Competitiveness Council on 2 December. I had previously written to explain that if the Directive was put to a vote at the meeting, I considered it would be in the UK’s interest to vote in favour. In the event, the draft was adopted at the Council meeting. Had the UK abstained, we would have created a blocking minority.

I know the legal base of the Directive was of particular interest to the Committee. Like the Committee, we thought that the joint legal base (Articles 103 and 114) was appropriate and this is what the Council has agreed to. The Directive will therefore require co-decision with the European Parliament.

The UK has been very supportive of the proposals in the Directive which will give consumers greater access to redress, further deter anti-competitive behaviour and protect the public enforcement regime operated by competition authorities in each Member State.

From our point of view what is particularly valuable is that the Directive provides protections (from undue attention by claimants) for whistle-blowers who (in return for reduced or no fines) admit their involvement in a cartel. This leniency programme has proved a key way that cartels are uncovered and their members punished. The Directive will ensure that leniency applicants and those who settle early are not put in a worse position than their co-cartelists by providing that voluntary and self-incriminating leniency statements and settlement submissions are excluded from disclosure and that they will only be liable (notwithstanding joint and several liability) for the direct harm they themselves caused (unless it is not possible for a claimant to obtain sufficient compensation from another party).
These proposals are best dealt with at a European level and there are no equivalent provisions in our draft Consumer Rights Bill. Despite concerns raised by other Member States, these proposals passed in their current form.

Not voting for the Directive at this stage would have risked losing all the good work that has been done to date and notwithstanding very wide support for the aims of the Directive potentially delayed it for some time, possibly permanently. I believe it serves our wider interest to support the Directive now and to play an important role in negotiating the Directive as it progresses.

I apologise for this scrutiny override but hope you accept that it was prompted by a view of the national interest. As the Directive proceeds through the European Parliament, I will keep the Committee informed of developments.

9 December 2013

Letter from the Chairman to Jo Swinson MP

Thank you for your letters of 29 November and 9 December. They were both considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 18 December.

We note the override of the scrutiny reserve and your reasons for it. We appreciate that this has been a fast moving proposal, but it is not clear, however, whether it would have been possible for you to provide an earlier update and thereby avoid the override.

Should this proposal become the subject of discussions with the European Parliament with a view to a first reading deal, please deposit a Supplementary Explanatory Memorandum which brings any substantive changes to the proposal to the early attention of the Committee.

We do not expect a reply to this letter.

18 December 2013

Letter from Jenny Willott MP, Minister for Employment Relations and Customer Affairs, Department for Business, Innovation and Skills, to the Chairman

My colleague, Jo Swinson, wrote to you in December 2013 providing an update on Council discussions of the above draft Directive. In your response, you requested an update, when suitable, on trilogue discussions with a supplementary Explanatory Memorandum. The trilogies have concluded, and attached [not printed] is a supplementary Explanatory Memorandum outlining any policy changes to the Directive.

In summary, I believe this Directive enhances the ability competition law, and will act as a strong deterrent for breaches of competition law. Therefore, I think for consumers to claim for damages for it is in the UK’s wider interests to support the Directive, and I am writing to ask if the Committee will lift the scrutiny reservation.

30 March 2014

Letter from the Chairman to Jenny Willott MP

Thank you for your Explanatory Memorandum of 9 May.

We consider that strengthening the framework for private enforcement of damages for breaches of competition law is a worthwhile legislative aim. We note that negotiations appear largely to have gone well for the Government, and that the proposed Directive will complement national policy on consumer rights. We are therefore content to clear it from scrutiny.

We do not expect a reply to this letter.

13 May 2014
COMBATING CERTAIN FORMS AND EXPRESSIONS OF RACISM AND XEONOPHOBIA
BY MEANS OF CRIMINAL LAW (5784/14)

Letter from the Chairman to Norman Baker MP, Minister for Crime Prevention, Home Office

Thank you for your Explanatory Memorandum dated 13 February on this report. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 12 March and we now clear the report from scrutiny.

You explain that in two respects you take issue with the Commission’s conclusions. We note that you consider that the general criminal law meets the requirement in relation to denial of genocides, etc. We agree with your rebuttal of any suggestion that not extending jurisdiction to offences of this kind by British nationals, wherever committed, is incompatible with the Framework Decision.

Although we remain disappointed that you do not intend to follow this Committee’s recommendation, in our follow-up Report on the UK’s 2014 opt-out decision, that the Government reconsider its decision not to seek to rejoin this measure, we are pleased that the Government is committed to maintaining the legislation required by it.

No reply to this letter is expected.

13 March 2014

COMMITTEE OF THE REGIONS ON THE EU JUSTICE AGENDA FOR 2020 -
STRENGTHENING TRUST, MOBILITY AND GROWTH WITHIN THE UNION (7838/14)

Letter from the Chairman to Karen Bradley MP, Minister for Modern Slavery and Organised Crime, the Home Office and Shailesh Vara MP, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for your Explanatory Memorandum of 31 March on the Commission’s Communication on the EU Justice Agenda for 2020, which was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 13 May. As you know, the Select Committee has published a Report, Strategic Guidelines for the EU’s next Justice and Home Affairs programme: steady as she goes, (HL Paper 173) which addressed many of the issues raised in the Commission’s Communication. We draw your attention in particular to its conclusions in paragraphs 151-156 of that Report, which we would expect to see reflected to the extent possible in the final strategic guidelines adopted by the European Council in June. We look forward to the Government’s response to that Report.

We note that the JHA Council is currently considering its own contribution to the strategic guidelines. We would be grateful for early sight of its conclusions on the strategic guidelines, with an explanation of the UK’s contribution to their negotiation.

Finally, in view of the fact that as part of the Commission’s consolidation policy 35% of the Justice Programme of the EU Budget 2014-20, €378 million, has been earmarked for training of legal practitioners in EU law, and of that fact that the UK did not opt into the Regulation establishing the Justice Programme, we ask you to explain the consequences for the training of UK legal practitioners of not opting into the Programme.

We would be grateful for a response to this letter by 30 May. In the meantime, the Communication remains under scrutiny.

13 May 2014

Letter from Karen Bradley MP and Shailesha Vara MP to the Chairman

Thank you for your letter of 13 May. As you note, the Government has received the Justice, Institutions and Consumer Protection Sub-Committee’s report on the next Justice and Home Affairs programme, Strategic Guidelines for the EU’s next Justice and Home Affairs programme: steady as she goes, and will reply formally in due course.

We will continue to engage fully in the negotiating process in the run up to the expected agreement of the new programme at the June European Council, and note your desire for early sight the JHA Council’s contribution in that regard. At the time of writing, no such document is yet available. However, we will provide a copy of the final JHA Council contribution, along with an explanation of the UK contribution to it, as soon as possible.

As regards the Justice Programme, Ministry of Justice is currently considering the value of a post-adoption opt in and will write to you in the coming weeks. As you note, if the UK did not opt in, then training for legal practitioners would not be available from the scheme. One of the questions for the Government would, in that event, be how to mitigate this and ensure that excellent reputation our judiciary hold internationally is maintained.

30 May 2014

COMMUNITY TRADE MARK (8065/13, 8066/13)

Letter from the Chairman to the Viscount Younger of Leckie, Parliamentary Under Secretary of State for Business, Innovation and Skills

I am writing to update you on the progress of negotiation on the European Commission’s proposals to amend the Trade Mark Directive (‘the Directive’) and Community Trade Mark Regulation (‘the Regulation’) 207/2009.

Council Working Group discussions on the proposals between Member States and the European Commission are progressing. An article-by-article analysis of the Directive, which progressed slowly and deliberately through the summer, was completed on 11 October 2013. The commencement of the first read-through of the Regulation immediately followed and we expect it to conclude on the 18 or 19 December. More working groups are planned in January and February 2014 during which we will begin discussing the compromise texts which are prepared by the Presidency.

The European Parliament is also making progress on its work on the Commission’s proposals and Rapporteur Cecilia Wikstrom delivered her position on this on 31 July 2013 with the publication of suggested amendments in two draft reports.

Having considered the reports it is our view that the majority of the proposed amendments are much closer to the Government’s position than the Commission’s text. We have supported the proposed amendments that are consistent with the UK’s position. A vote in the European Parliament is expected to take place on 17 December 2013.

Negotiations on the issues of abolition of ex-officio examination in Articles 41 of the proposed Directive and mandatory cooperation in both Article 123c of the proposed Regulation and Article 52 of the proposed Directive have revealed that the majority of Member States share our views. In particular, on Article 41, the Commission has allayed our concerns by confirming that the proposed text will allow national offices to retain their search and notification system. Provided that this principle is enshrined in an amendment to the current text, we would consider the proposed provision acceptable.

In addressing Delegated Acts, we want to ensure that processes for making decisions are clear and continue to involve Member States where appropriate. Having undertaken further work to identify what provisions of the proposed Regulation we will resist under Article 290 (TFEU), we are of the view that many of the delegations sought are of a purely technical nature and there may be some merit in dealing with them this way, dependant on securing an appropriate sunset period. However others appear to have more far reaching implications, such as the setting of fees. It is clear that other Member States oppose the widespread use of Delegated Acts and we expect to work with them to find a more balanced position.

The issue of fees is a very sensitive one as a significant reduction in the Office for Harmonisation in the Internal Market’s (OHIM) fees may weaken the position of national IP offices. It is in our interest to maintain a dual and complementary system and a balanced relationship between national marks and European trade marks. To do this, we need to ensure that OHIM’s fees are maintained at a certain level to reflect the scope of the EU wide protection given and balanced against the costs for businesses.

I was also grateful to receive the supplementary questions contained in your letter of 10 October 2013. Some of the issues flagged resonated with our own thinking, for example with the need to ensure that the new name of the right correctly defines the territory that it covers, the problems that
would arise if absolute grounds in national marks were extended EU wide and the benefits of mediation. I have provided substantive answers to those questions in the attached [not printed] Annex I.

Turning to the issues raised by stakeholders with the proposals, many of the matters raised are largely of a technical nature and refer to proposed changes to substantive and procedural trade mark law. Matters of interest to stakeholders include: the proposal to include descriptive foreign signs in the absolute grounds for refusal, wider protection for trademarks with a reputation, wider protection against bad faith, treatment of small packages and goods in transit, and provisions on classification of goods and service.

In comparison, there was little comment from stakeholders in relation to more strategic and political issues such as mandatory cooperation, redistribution of OHIM’s fees and Delegated Acts. In general, while they share some of the UK’s concerns on the Commission’s power to adopt delegated legislation to fix fees, they were more positive on the proposed mandatory cooperation framework. As expected, stakeholders unanimously oppose any move to shift future OHIM surpluses to the central EU budget.

We have used the issues highlighted by your Committee and the varied views of stakeholders to focus our own thinking, helping us to identify our key objectives during the negotiations on the proposals.

It is on that basis that after appropriate consultation with his Cabinet colleagues, the Secretary of State for Business, Innovation and Skills has instructed UK officials to attempt to build a consensus with like-minded delegations to amend the text of the Regulation and Directive to: minimise the use of delegated powers, especially in relation to non-technical matters; pursue a balanced cooperation framework with minimum mandatory adoption; keep the Office for Harmonisation in the Internal Market (OHIM) as managerially independent as we can; look for a solution for the OHIM surplus that, as far as possible, reflects that the funds are derived from trade mark and design registration fees; and limit the impact on legitimate trade stemming from measures to tackle counterfeit goods. Officials are also charged with working to ensure that the overall package delivers technical changes that work for SMEs.

We believe that these objectives will best serve the interests of UK during the ongoing discussions with the Commission, the European Parliament and other Member States.

You can be assured that I will continue to keep your Committee informed of key developments as negotiations progress.

18 December 2013

Letter from the Chairman to the Viscount Younger of Leckie

Thank you for your letter of 18 December 2013, which was considered by the Justice, Institutions and Consumer Protection Sub-Committee. We decided to retain this matter under scrutiny.

We are grateful for the very comprehensive update and reply to our earlier questions.

We support your negotiating objectives, as outlined in your letter, but have one reservation. We consider that fairness to businesses dictates that the level of fees should primarily reflect the costs of the service provided, including indirect services such as the activities of the EU Observatory on Infringements of Intellectual Property Rights, liaison with third country organisations and co-operation with national trade mark offices. Protecting the competitiveness of national trade mark offices should be only a minor consideration, particularly since they would continue to receive support through co-operation with the Agency. Solutions to the surplus of the Agency should, therefore, favour lowering of fees in order to obtain a balanced and sustainable budget.

We look forward to a further update in due course.

16 January 2014

Letter from the Chairman to the Viscount Younger of Leckie

I am responding to your letter of 16 January which was in response to my last update on EU Trade Mark Reform. The discussions are progressing and I will update you further on the specifics shortly. I am pleased that you are able to support all but one of our objectives for the negotiations. I thought it would be helpful to respond to the Committee’s comments on the matter of fees and the Office for
Harmonisation in the Internal Market’s (OHIM) surplus and I thought that the issue could be given extra clarity if handled in a discrete response.

My officials have been considering carefully the issues surrounding fees and the surplus, including the conclusions of your committee, for which we are grateful. I fully understand why you have reached these conclusions and you are absolutely right to focus on the interests of business. However, when considering fee levels and setting the policy we must take into account budgetary considerations and all the economic, administrative and financial factors. We clearly need to reflect the interests of those registering trade marks, but it is also important that we have due regard to the interests of the market, other companies, competitors and the public.

The registration of a trade mark is an operation which is almost unique in the interaction between the end user and government. The value and cost in a trade mark are not related to the level of service provided, although these should be of the highest standard, but rather in the granting of a valuable monopoly right which can last in perpetuity. Indeed the first ever trade mark registered in the UK is still on the Trade Mark Register today, 140 years later.

This exclusive right to prevent another using a particular trade mark is immensely valuable to the owner, whilst imposing costs on the rest of society: for example new businesses cannot use a mark that is too similar to an existing mark and must work to find something distinctive. With these factors in mind, it is my view that the current fee for a Community Trade Mark is already incredibly low for a monopoly right in a market of twenty eight Member States and over 500 million people. Therefore, whilst I share your concern to keep the cost of access to the system at a level that is affordable for businesses, reducing the initial registration fees further in order to reduce the current surplus could have unintended consequences.

In order for the market to operate effectively it is important that only those who intend to trade across several Member States acquire a Community Trade Mark, which is not analogous to a national trade mark. A fee that is too low could encourage more Community Trade Mark registrations in situations when a national registration is more appropriate. Such a practice would not serve the owner of the trade mark or the market.

By way of a practical example we could consider two plumbers - one operating in Lewisham and the other in Tallin. Both are trading under the same name without any conflict. The Tallin based plumber looks to register his company name as a trade mark and decides that he might as well get a Community Trade Mark since the price is not much more than the domestic mark in Latvia. The Lewisham plumber, who has a UK trade mark, would have to watch the register in OHIM to spot the likely conflict and then oppose the application, which includes having to file evidence, to avoid the risk of infringement. If he fails to do this he may have to go to the expense of changing his trading name. Therefore there is a cost complexity and burden on SMEs caused by the inappropriate use of a Community Trade Mark when there would never be any conflict in the market.

We must take care to ensure that businesses continue to take the right decision on whether they apply for national trade marks or a Community Trade Mark, based on their own businesses circumstance and plans. Any cluttering of the Community Trade Mark Register with trade marks which are only intended to be used in one or two member states could stifle innovation within the EU and have a negative impact on growth. Cluttering of the register makes it more difficult for a prospective trade mark owner to find an available trade mark that does not clash with an existing trade mark. Further, it increases the likelihood of costly conflicts with owners of other marks on the register as it becomes more difficult to have sufficient distinction between registrations.

As an illustration of the problem, in 2013 any application for a Community Trade Mark had almost a one in five chance of being challenged, an uncomfortably high instance for SMEs, which opens them up to the risk of further costs. Ultimately, the registration fees are by far the most reasonable cost of obtaining a trade mark; the legal fees or rebranding costs that may result from a challenge are what will make the process unaffordable.

However, that is not to say that there is not some scope to review the level of fees at the OHIM and your conclusion that something can be done with the regime that is business friendly is the right one. Currently the fee to renew a trade mark is higher than the fee to register a new mark. We find this difficult to justify and it is not the position with fees in the UK. Therefore our position is to negotiate to attempt to reduce the renewal fee to a level closer to, if not aligned with, the registration fee.

Further, some other fees which are more relevant to SMEs, as they relate to access to justice, remain relatively high. The fees for an application to appeal and for a revocation/invalidation could be reduced by a reasonable margin and I have instructed my officials to negotiate to explore ways in which these could be lowered. This would reduce the costs for parties most affected by the
registration of Community Trade Marks, including the proprietors of UK trade marks, many of whom are SMEs.

I believe these measures will help to move the OHIM towards a more balanced budget. This position also matches the view of a number of stakeholders. We will also explore how any surplus could be used to provide clear benefits to users.

It is clear that the operation of the Community Trade Mark system imposes some costs on national enforcement agencies and there may be scope for us to continue to invest in projects that bear down on counterfeiting and improve enforcement mechanisms. As now, other projects can be designed to improve the function of the national trade mark system, increasing legal certainty for all businesses that operate in Europe, including those based in the United Kingdom.

I hope this further information has been of use to the Committee and that you are able to support my view that this approach would be of greater benefit to all businesses and in particular SMEs.

26 April 2014

CONSEQUENCES OF DISENFRANCHISEMENT OF UNION CITIZENS EXERCISING THEIR RIGHT TO FREE MOVEMENT (5866/14, 5867/14)

Letter from the Chairman to Greg Clark MP Minister of State for Cities and the Constitution, Cabinet Office

Thank you for your Explanatory Memorandum dated 18 February 2014. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 12 March 2014.

We decided to clear these proposals from scrutiny. We note that the 15 year rule governing the disenfranchisement of UK nationals living abroad has been repeatedly debated in Parliament and been found by the European Court of Human Rights to be compatible with the European Convention on Human Rights. We agree with you that decisions regarding national electorates ought to remain a matter for national Parliaments and Governments.

We do not expect a reply to this letter.

13 March 2014

CONSULAR PROTECTION FOR CITIZENS OF THE UNION ABROAD (18821/11)

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

I am writing to update your Committee on the discussions on the proposed Council Directive on consular protection for citizens of the Union abroad. Our position has not changed from that set out in our explanatory memorandum and my letter of 30 January 2013. We maintain a general reserve against the Directive.

Discussions on the Directive have continued to take place at the relevant EU Working Group ("COCON"). Until relatively recently these made little progress with some Member States opposing both the scope and basis of the Directive, and any role for the European External Action Service (EEAS) in the provision of consular assistance.

The Greek Presidency have, however, pushed much harder to make progress. The most recent draft text was tabled at the COCON on 28 March 2014 and is attached here.

The revised text addresses a number of concerns held by ourselves and other Member States, and the Council is increasingly likely to accept a version of the text. You will recall that this dossier is decided by qualified majority voting.

On our side, you may recall that our major concerns with this Directive were around ensuring that it is Member States and not the EU Institutions which provide consular services, and avoiding any restrictions on our freedom to choose which consular services to provide and the manner in which those services are provided. We have carried out an extensive examination of the revised text, in conjunction with FCO and Cabinet Office legal advisers. While overall we continue to believe that the Directive is unnecessary we are content that it does not cross UK red lines. We have however suggested some changes to the text, mainly to ensure consistency of language with previous Council
Decisions and the language on the EEAS review agreed at the General Affairs Council in December 2013.

The draft is still subject to further discussion, but I expect the substance is likely to change little.

The next COCON will take place on 29 April and is likely to include a full read through of the Directive. There are still a number of issues with the text that need to be addressed before a vote is likely to take place - in particular on Article 12 which looks at financial procedures. But I think it likely that these could be addressed in the coming months leading to a vote on the Directive. We will continue to engage in the negotiations to ensure that our interests are protected should this happen.

I will continue to keep the Committee updated on the discussions.

14 April 2014

Letter from the Chairman to David Lidington MP

Thank you for your letter of 14 April 2014, which was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 13 May.

Whilst we were grateful for the update it provided, your letter lacked an all-important explanation of how UK red lines have been met. We therefore ask you to provide a detailed explanation of how the compromise text meets UK red lines, and also of how it meets the concerns previously expressed by this Committee, particularly in relation to the assistance to be offered in draft Articles 8 to 11, which appeared to go beyond the competence of the EU under Article 23 TFEU.

On receipt of satisfactory responses to the above, we will consider releasing the proposal from scrutiny.

We look forward to receiving your reply by 30 May.

13 May 2014

COPYRIGHT AND THE MULTI-TERRITORIAL LICENSING OF RIGHTS IN MUSICAL WORKS FOR ONLINE USES IN THE INTERNAL MARKET (12669/12)

Letter from the Chairman to the Viscount Younger of Leckie, Parliamentary Under Secretary of State for Business, Innovation and Skills

Thank you for your letter of 13 November 2013, which was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 4 December. We decided to clear this matter.

The Committee was grateful for the update in the progress of negotiations and the helpful information supplied by your officials.

We agree that the outcome of negotiations is, overall, beneficial. Whilst we are disappointed that the proposal itself does not set flexible rules for the use of undistributed funds at EU level, we appreciate that this may not have been negotiable and that changes to the proposal you outline in your letter do mitigate the risk of Collective Management Organisations gaining an unwarranted windfall.

We do not expect a reply to this letter.

5 December 2013

CORRECTION CO-EFFICIENTS (17622/13, 17625/13)

Letter from the Chairman to Nicky Morgan MP, Economic Secretary to the Treasury, HM Treasury

Thank you for your Explanatory Memorandum of 8 January. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 29 January. We decided to clear these proposals.
We support your policy of seeking substantial reductions in EU administrative spending. To this end we urge you to seek an outcome to these negotiations which entails no increase at all in the pay and pensions of EU officials for the years in question.

30 January 2014

Letter from Nicky Morgan MP to the Chairman

Thank you for your letter of 30 January which cleared from scrutiny the remuneration and pension adjustments for EU staff in 2011 and 2012 (Proposals 17622/13 and 17625/13). This followed my Explanatory Memorandum of 8 January. I am writing to update you on the negotiation of these proposals.

Negotiations concluded when compromise proposals of a 0% adjustment in 2011 and 0.8% adjustment in 2012 were put forward. These were adopted by Coreper on 26 March. Following agreement in trilogues, Council adopted this position on 14 April, where the Government voted against due to our position that the 2012 adjustment did not show a sufficient level of restraint.

I would also like to draw your attention to the 3 March 2014 European Court of Auditors (ECA) opinion on the Commission’s revised proposals of a 0.9% adjustment in both 2011 and 2012. As covered in my previous correspondence, the Commission issued these revised proposals following the 19 November 2013 judgement by the European Court of Justice on the Commission’s original proposal of a 1.7% adjustment in 2011. The ECA noted the Commission’s margin of appraisal in making the revised proposal but felt that insufficient clarity was provided as to the basis for the computation of these proposals. The ECA’s observations were taken on board by the Council in reaching the 0% adjustment in 2011 and 0.8% adjustment compromise with the Commission and European Parliament.

2 June 2014

DETENTION AND SUPERVISION OF EU CITIZENS (6943/14)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your Explanatory Memorandum dated 11 March 2014. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee. We have decided to retain the Commission’s report under scrutiny.

You will appreciate that this Commission report on the operation and implementation of these three Framework Decisions, described by the Commission as “important pieces of legislation predating the Lisbon Treaty in the area of criminal justice”, revisits many of the questions and issues that we have discussed at length in our work alongside the Home Affairs, Health and Education Sub-Committee which looked at the Protocol 36 decision. Aside from the three matters we raise below we see no value in revisiting, at this point in time, the wider questions arising out of the Commission report which touch on the Protocol 36 decision. The two Sub-Committees and the Government have made their views on that matter clear.

There are three matters arising out of your Explanatory Memorandum that we wish to discuss with you. First, there is a clear disagreement between you and the Commission over whether the three Framework Decisions constitute a coherent package of legislation. In a letter dated 8 February Lord Taylor told us that discussions ahead of the December deadline had begun. Has this precise issue arisen in the discussion so far and if so, how has it progressed?

Second, the Government have repeatedly given an undertaking to implement the European Supervision Order and you say in the Explanatory Memorandum that the Commission’s report will help inform the UK’s work in this regard. When do you expect the UK to implement this measure?

Third, we note that despite the fact that the UK has so far failed to implement two of the three Framework Decisions that form the subject matter of this report, you tell us that you are engaged in a process of encouraging those states that have yet to transmit the relevant information to the Commission to implement the Prisoner Transfer Framework Decision - the one measure of the three that the UK has implemented. How many of the 10 Member States that have failed to implement the Prisoner Transfer Framework Decision have you persuaded to implement?
Beyond these three issues we take this opportunity to note the Commission report’s findings; in particular its conclusion that the level of implementation of this legislation which was unanimously agreed by the Member States before the Lisbon Treaty came into effect is “far from satisfactory”.

We look forward to considering your response by 6 June.

8 May 2014

EU MEMBERSHIP OF GRECO (UNNUMBERED)

Letter from Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chairman

Following my last letter to you of 13 February 2013 on the matter of EU membership of GRECO, I am writing to update on you on related developments.

The most significant of these is the Commission’s indication that it proposes for the EU to apply for full membership of GRECO, operating on the basis on Article 220 of the Treaty of the functioning of the European Union. The Commission highlighted this aim at the January 2013 General Affairs and Evaluation Committee (GENVAL) meeting, the June 2013 GRECO plenary, and again in the EU anti-corruption report published in February.

The Commission, in cooperation with other EU institutions, is currently conducting an assessment of the legal and practical implications of full EU membership of GRECO. We understand that the assessment should conclude this year, and the Commission will thereafter inform Member States of the outcome. We will need to consider the EU’s application once submitted before offering a Government opinion.

I will continue to keep you updated on any developments.

20 March 2014

EUROPEAN ACCOUNT PRESERVATION ORDER (13260/11)

Letter from Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chairman

As a general approach to this proposal is due to be agreed at the next Justice and Home Affairs Council I thought you would find it helpful to hear how the text has developed. As you know, the UK will have no vote on the decision about the general approach as we decided not to opt in.

SCOPE

CROSS-BORDER RESTRICTION

The definition of the cross-border restriction proposed by the Cypriot Presidency has been refined further. A cross-border case will be one in which the bank account or accounts to be preserved are maintained in a Member State other than (a) the Member State of the court seised with the application for the Preservation Order or (b) the Member State in which the creditor is domiciled. The moment for determining whether there is a cross-border case remains the date on which the application for an Order is lodged with the court with jurisdiction to issue the Order.

FINANCIAL INSTRUMENTS

It has been agreed that financial instruments will be excluded from scope. The possibility of future inclusion will be considered when an adopted Regulation is reviewed.

OTHER EXCLUSIONS

There is also agreement to exclude rights in property arising out of a matrimonial relationship or a relationship deemed by law to have comparable effects to marriage, something about which I know your Committee has expressed interest, as well as wills and succession matters.
GEOPGRAPHICAL RESTRICTION

It has been decided that only creditors domiciled in a participating Member State will be able to use this procedure. The recitals will include text to clarify that only bank accounts maintained in a participating Member State will be subject to preservation.

IMPACT ON COMPANY RESTRUCTURING AND RESCUE

We have sought to strengthen the bankruptcy exclusion in Article 2 to ensure that companies in the process of restructuring are excluded from the process. Unfortunately this was not agreed but the bankruptcy exclusion has been redefined to ensure that no Order can apply to a debtor once any insolvency proceedings as defined in the Insolvency Regulation (1346/2000) have been opened in relation to the debtor.

IMPROVED PROTECTION FOR DEBTORS

THRESHOLD TESTS FOR OBTAINING AN ORDER

We were successful in our calls for the same threshold test to apply to Orders issued both pre-judgment and post-judgment. One of the problems with the Commission text was how easily a creditor would have been able to obtain an Order once he had a judgment on the debt. Given this change there was no longer a need for different sections in chapter 2 for separate procedures for issuing an Order depending on whether the creditor had already obtained a judgment.

The threshold test in Article 7 now states that a court should issue an Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure because there is a real risk that without such a measure the subsequent enforcement of the creditor’s claim against the debtor will be impeded or made substantially more difficult. Importantly a recital will clarify that in making an application the creditor must satisfy the court that enforcement may be impeded or made substantially more difficult because of a real risk that the debtor may have dissipated, concealed or destroyed his assets or have disposed of them under value to an unusual extent or through unusual action. The fact that the financial circumstances of the debtor are poor or deteriorating should not in itself constitute sufficient ground for the issuing of an Order. However the court may take these factors into account in the overall assessment of the existence of the risk.

Where a creditor has not yet obtained a judgment on the debt he must also satisfy the court that he is likely to succeed on the substance of his claim against the debtor. Under Article 13 where a creditor has yet to initiate proceedings on the debt, he must do so within 30 days of lodging the application for an Order or within 14 days of the date of issue of the Order, whichever is the latest date. Where the creditor fails to do so any Order that has been issued will be revoked automatically.

SECURITY AND LIABILITY

In all but exceptional cases, for all cases pre-judgment a creditor will be required to provide security for an amount sufficient to prevent abuse of the procedure and to ensure compensation for any damage suffered by the debtor as a result or the Order, to the extent that the creditor is liable. Where the creditor has already obtained a judgment the court will have more discretion about whether security should be provided.

A new provision on liability states that the creditor shall be liable for damage caused to the debtor where the creditor can be proved to be at fault. Liability will arise where there has been a failure to comply with a number of provisions in the Regulation. In addition Member States are able to maintain or introduce into their national law other grounds or types of liability or rules on burden of proof. These rules will be determined under the law of the Member State where the Order is enforced. All other aspects of liability not specifically addressed in the Article are to be governed by national law.

COMPETENCE FOR ISSUING ORDERS

The text now clarifies that only courts will be able to issue a Preservation Order.

THE USE OF AN EX PARTE PROCEDURE

The text also clarifies that the debtor shall not be notified of an application for a Preservation Order nor shall he be heard prior to the issuing of the Order.
AMOUNTS EXEMPT FROM AN ORDER

Article 32 retains the principle suggested by the Cypriot Presidency not to specify the types of exemptions that should apply. Where certain amounts are exempt from seizure under the law of the Member State of enforcement those amounts will be exempt from preservation under the Regulation. Provision has been made for systems such as ours where exclusions are made on application by the debtor.

CHALLENGES TO AN ORDER

We were unsuccessful in our attempts to allow all debtors to challenge an Order at a local court. The previous Article 36 that allowed consumers, employees or insured persons such local challenges was deleted. Instead the provision on jurisdiction in Article 6 states that where the debtor is a consumer jurisdiction to issue a Preservation Order will lie only with the courts of the Member State in which the debtor is domiciled.

Debtors will be able to apply for the revocation or modification of an Order to the court where it was issued where the conditions of the Regulation are not met, including provisions on service and translation requirements. Such remedies are also available where the preserved amount exceeds the amount of the Order, where the claim has been settled or any judgment on the debt no longer applies. An application can also be made to the court or other competent authority in the Member State of enforcement where any exemptions from seizure have not been applied properly, where the bank account is excluded from the scope of the Regulation, enforcement of the judgment was refused or suspended or if the enforcement is manifestly contrary to public policy. A debtor will also be able to apply to the issuing court for a modification or revocation of the Order on the ground that the circumstances on the basis of which the Order was issued have changed.

There had been discussion during the Cypriot Presidency that where a judgment was obtained a creditor would be required to initiate enforcement proceedings within a given period to ensure that the Order was not prolonged unnecessarily. This has not been taken forward.

PROVISION OF INFORMATION ABOUT BANK ACCOUNTS

It has been agreed that the mechanism for providing information on bank accounts under Article 17 should be restricted only to those cases where the creditor has obtained an enforceable judgment. The creditor must also substantiate why he believes an account is held in a particular Member State.

Now included in the methods by which account information can be obtained is our suggestion for information to be obtained direct from the debtor with appropriate sanctions if the debtor uses advance knowledge of the possibility of the Order to then try and dissipate assets.

DATA PROTECTION

There is now a specific provision to ensure that personal data obtained, processed or transmitted under the Regulation shall be adequate, relevant and not excessive in relation to the purpose for which it was obtained, processed or transmitted and may be used only for that purpose. In addition appropriate authorities may not store data beyond the period for which it was obtained, processed or transmitted.

PROCEDURE FOR AMENDING THE STANDARD FORMS

While the Commission had proposed originally the use of the Delegated Acts procedure it has been agreed that the Implementing Acts procedure should be used instead.

If, as anticipated, a general approach is obtained at this month's Council, the Greek Presidency will seek to obtain a first reading deal with the European Parliament before the election to that Parliament in May 2014.

The Government acknowledges that the proposed text is, in terms of the balance between the rights of creditors and debtors, a significant improvement over the Commission's proposal. However it is not yet in a position to say whether the changes are sufficient to enable the Government to recommend a post-adoption opt in. Before such a decision can be made the Government will want to consider, in conjunction with those that expressed an interest in the proposal, the text that is adopted. While an improvement in debtor protection will be one factor to consider, practitioners and banks will also want to be satisfied that the procedure is likely to be effective.
I will inform you in due course of the content of the text that is agreed between the Council and Parliament.

3 December 2013

Letter from the Chairman to Chris Grayling MP

Thank you for your letter of 3 December 2013. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 18 December. We decided to hold the matter under scrutiny.

We were grateful for the update on the progress of negotiations. It appears that significant strides have been made towards meeting earlier concerns with the original proposal.

We are concerned that the exclusion of matrimonial property may significantly detract from the benefit of the EAPO for creditors, and should be grateful for your assessment.

In relation to the new provision intended to facilitate a creditor obtaining information concerning bank accounts directly from a debtor, please supply further information of the circumstances in which you envisage such a provision being used.

We should be grateful for a further update, in due course, in the light of any trialogue negotiations aimed at a first reading deal with the European Parliament.

We should also be grateful if that update would address an issue outstanding from previous correspondence, namely whether courts would have a residual discretion not to make an EAPO, or to make one for a lesser sum, in order to avoid oppression or significant harm.

We would also appreciate your view as to how far the text as it has developed meets the concerns which led to the decision not to opt in at the negotiating stage - particularly in the light of the new provision that only creditors in a participating Member State will be able to use this procedure.

18 December 2013

EUROPEAN INVESTIGATION ORDER (18918/11)

Letter from the Chairman to Mark Harper MP, Minister of State for Immigration, Home Office

Thank you for your letter of 11 November. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 4 December. We are grateful for your further progress report and your detailed commentary on the text of the draft Directive as now agreed in principle.

We welcome the further changes in the draft Directive which have been agreed in principle and agree that these improve the text. We keep the matter under scrutiny and look forward to a further update in due course, and in any case no later than the conclusion of the trialogue, when we should like to see the agreed text.

In the meantime, we should like to have your view on the interaction between this proposal and the block opt-out under Protocol 36 on which this Committee recently published a supplementary report. Although the extent to which existing instruments will be superseded by the EIO Directive is one of the outstanding issues in the trialogue, it is likely that the Framework Decision on the European Evidence Warrant and parts of the EU Convention of 2000 on mutual assistance in criminal matters will be replaced. In practice, the European Evidence Warrant has not become operational, but the Convention is the current basis for mutual assistance in relation to evidence between the UK and most Member States. The Government did not include the Convention in its list of 35 measures which it would seek to rejoin under Protocol 36. If the EIO Directive is adopted early in 2014, is there not a real possibility that there might be a gap in the operation of mutual assistance on evidence gathering when the opt-out takes effect on 1 December 2014?

We look forward to your reply on the latter point by the end of December.

5 December 2013
**Letter from Mark Harper MP to the Chairman**

Thank you for your letter of 5 December. You requested to see the agreed text and asked how the EIO will interact with the 2014 decision and, in particular, whether there will be an operational gap between 1 December 2014 and the EIO’s full implementation by Member States.

You will have noted in my letter of 16 December 2013 to the Commons European Scrutiny Committee that it is not yet possible to give a definitive answer on the EIO’s interaction with the 2014 decision as discussions on this technical issue are still ongoing. This is primarily due to the position of Denmark and Ireland. We hope to provide a more detailed explanation in due course. In addition, an explanation of our position on any potential operational gap will be provided in response to your report of 31 October on the 2014 decision.

The agreed text with an accompanying Explanatory Memorandum has now been deposited. This agreed text remains limité. A non-limité version of the text will be provided as soon as it is available and I hope you will be in a position to clear it from scrutiny.

20 December 2013

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**Letter from the Chairman to Mark Harper MP**

Thank you for your letter of 20 December and your supplementary Explanatory Memorandum. They were considered by the Justice, Institutions and Consumer Protection Sub-Committee on 22 January.

We are pleased to note the successful conclusion of the trilogue and are grateful for your detailed account of the changes which have been made in the draft Directive compared with the text agreed by the Council in December 2011. Although we should like to see the final text when available, we have had sufficient information to enable us now to clear this matter from scrutiny.

We note that, as you indicated in your letter, the Government response to our second Report on the block opt-out under Protocol 36 refers to the question concerning the interaction of this Directive and the opt-out from the Convention on mutual assistance, and we acknowledge the explanation given there.

22 January 2014

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**Letter from James Brokenshire MP, Security Minister, Home Office, to the Chairman**

Thank you for your letter of 22 January in which you cleared the EIO text agreed in trilogue from scrutiny. Please find attached [not printed] the final, public version of the agreed EIO text.

There are no substantive changes to the text agreed in trilogue (and shared with your committee, as limité text, along with an accompanying unnumbered Explanatory Memorandum last December). This final EIO will be put forward for adoption on 14 March. Although it is our view that the agreed text is a good package for the UK, as it has not yet cleared scrutiny, we will be abstaining in any vote.

11 March 2014

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**EUROPEAN POLITICAL PARTIES: FUNDS AND FINANCE (13842/12, 17469/12)**

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

I am writing to keep you updated on the progress of the negotiations on the Commission proposals for a Regulation on the Statute and Funding of European Political parties, proposals which your Committee continues to hold under scrutiny. As you will recall, European political parties (EUPPs) are trans-national alliances between the political parties of EU member states. They are regulated by Regulation 2004/2003, as amended by 1524/2007, and are funded primarily by grants from the EU budget. It is important to emphasise that they do not present themselves for election in Member States, and that the draft Regulation preserves this distinction – these rules will not apply to domestic political parties. The purpose of the revised Regulation is primarily to establish a common “European legal personality” for these entities, establish rules for how this status may be acquired or rescinded, and to delineate how this relates to an EUPP’s eligibility for EU funding.

The negotiations are now drawing to a close. The Greek Presidency of the Council has a mandate from Council for trilogues with the European Parliament, and anticipates concluding an agreement in
the draft Regulation is still limité, and may be subject to further revision. However, given the limited time remaining before the European Parliamentary elections, and the interest the EP has shown in agreeing this dossier within this legislative session, we are unlikely to see the draft Regulation changing significantly before it returns to the Council. As you know, I am committed to full and transparent scrutiny and so am attaching [not printed] this document for your information, stressing that it is being provided to the Committee under the Government’s authority and arrangements agreed between the Government and the Committee for the sharing of EU documents carrying a limité marking. It cannot be published, nor can it be reported on in any way which would bring detail contained in the document into the public domain.

You will recall the background to this dossier, and the Governments views as outlined in our previous correspondence. I continue to be sceptical about the logic behind this proposal. While I agree that the EU does have a problem with its democratic legitimacy, I find it difficult to see how the proposed changes could effectively address that problem. The electorate of the EU are, and will in my view remain, most closely connected to national political parties and national parliaments. However, the UK has engaged with these negotiations, in order to use this opportunity to improve the current Regulation, in particular to reduce the dependency of EUPPs on EU institutions, and to ensure that what should be administrative decisions – registration, for example – are dealt with in a neutral and apolitical way. While I continue to think this regulation unnecessary I believe that the text as it stands is an improvement on the current provisions.

I share the Committee’s concern, expressed in your letter of 7th February 2013, that the independence of European political parties and foundations should not be compromised by these proposals. Throughout negotiations, the Government has attached great importance to ensuring the independence of political parties, and the right of citizens to associate freely in political organisations. In particular, the Government has worked to ensure that the registration, deregistration and governance processes for EUPPs will be free from political bias, and that these procedures should not be unnecessarily onerous.

With this in mind, the new Regulation would establish a new independent Authority, which will have the responsibility for these processes and decisions. The costs of establishing this authority will be met by the EP’s budget. We, together with other Member States, have argued that these proposals should be cost-neutral, and the Commission assures us that they are committed to this goal.

Unlike the current system, registration for funding will now be a strictly administrative procedure, dependent on the submission of the relevant documents, and the approval of the Member State where the EUPP has chosen to establish its central administration. The process of deregistration, by which an EUPP could be made ineligible for EU funding, will be subject to comprehensive safeguards. EUPPs will only be deregistered (a) at the request of a Member State for matters in relation to which they could be dissolved at domestic law, eg insolvency; or (b) if they have “seriously and manifestly” breached the values to which all EU Member States subscribe, as set out in Article 2 of the Treaty of European Union (such as democracy and the rule of law). There is a complex procedure for deregistration on the latter ground. The procedure begins by a request from the Commission, Council or European Parliament for verification that an EUPP is complying with EU values. The Authority will take a decision on this after consultation with a new “panel of independent eminent persons” (a panel appointed by the Council, EP and Commission, none of the members of which may be from any of those institutions, EU officials, hold an elected office, or be members or former members of EUPPs). If the Authority decides to deregister an EUPP on the grounds of non-compliance with EU values, the decision may be overridden by the Council and Parliament acting together and time is allowed for a Court appeal before the decision taking effect. A deregistered EUPP would no longer be eligible for EU funding. While complex, I consider this an improvement the current Regulation, where EUPPs may be denied access to EU funds upon an affirmative vote in the EP.

I have also been very alive in these negotiations to any suggestion that this regulation would interfere with our domestic law governing elections and referenda. The current draft therefore explicitly states that domestic provisions continue to govern spending in election campaigns, and forbids the use of EU funds during referenda campaigns.

The Government is keen to ensure that the rights of British – and other EU – taxpayers are protected, and to ensure that these proposals do not compromise current levels of accountability, financial propriety or transparency. I believe we have been largely successful in this regard so far. For example a freeze on the co-financing rate will avoid pressure being put on the EU budget, and the definition of “donation” has been expanded to include goods and services, as recommended in the Court of Auditors opinion of 14 February 2013, in order to ensure that EUPPs cannot circumvent transparency requirements.
In line with the UK’s democratic practice, where parties are for the most part funded without reliance on the State, the Government has also sought to reduce the reliance of EUPPs on EU funds. This is a sensitive subject, as the practice in many EU Member States is for political parties to be funded through taxation. Nevertheless, the new Regulation envisages an increase in the ceiling for private donations to EUPPs, allowing them to reduce their dependence on EU funds.

As I noted above, the negotiations have not yet concluded, and the EP may press for changes during trilogues. The UK will seek to ensure that any changes do not undermine the improvements the draft should bring, as outlined above. The Government will assess its position on the text that emerges from trilogues.

I would like to thank the Committee for their continuing interest in these proposals. I will keep the Committee updated on progress.

3 March 2014

Letter from the Chairman to David Lidington MP

Thank you for your letter of 3 March which the Justice, Institutions and Consumer Protection Sub-Committee considered on 19 March. We note the limitation regarding the text you provided.

Your update on the negotiations is very helpful. We consider that the changes which have been made in discussions in the Council improve the draft measure by further enhancing the independence of European parties while safeguarding public funds, and we welcome the changes. We note that the provision on taxation has been removed from the text.

We also understand that, since the date of your letter, a text which was informally agreed in the course of a trilogue has been approved by the Committee of Permanent Representatives and will now go forward to the Council and the European Parliament for adoption. On the assumption that the trilogue text is not significantly different from the text you described in your letter, we are content now to clear this proposal from scrutiny. We should appreciate, however, your confirmation that there have been no such changes.

We are keeping under scrutiny the accompanying proposal to amend the Financial Regulation (Doc. 17469/12), and would welcome an update on the progress of that proposal.

We look forward to a reply by 4 April 2014.

20 March 2014

EUROPEAN SMALL CLAIMS PROCEDURE (16749/13)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your Explanatory Memorandum of 4 December 2013. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 8 January 2014.

Like you, we do not consider that the proposal gives rise to any subsidiarity concerns.

We should be grateful if you would inform us, in due course, of the outcome of your consultations with interested parties, the outcome of your further consideration of the UK opt-in and any further developments there may be in the negotiation of the text. When you do so, please also particularly address the impact of extending the European Small Claims Procedure to disputes where the cross-border dimension involves third countries.

In the meantime our preliminary view is that we would not object to the UK opting in to this proposal if that course of action is favoured by the devolved administrations and interested stakeholders.

10 January 2014

Letter from Chris Grayling MP to the Chairman

I am writing to confirm that the Government has decided to opt in to this proposal and that a Written Ministerial Statement to that effect has been laid in Parliament.
In your letter of 10 January you said that you would not object to the UK opting in to this proposal if that course of action was favoured by the devolved administrations and interested stakeholders. The Government received four responses to its consultation on this proposal and all supported UK participation in this procedure. The devolved administrations also supported a UK opt in.

The issues raised in the responses to the consultation were similar to those highlighted by the Government in the Explanatory Memorandum. As yet there has been only one Council working group meeting that has considered the proposal. So far the UK has received significant support from other Member States on all the issues where we have concerns. The majority of Member States have called for the existing cross-border definition to be retained.

With regard to the threshold for a small claim, I can report that Northern Ireland would prefer a level of €6,000 rather than the €10,000 proposed by the Commission. From the discussions at the first working group I anticipate that this is nearer the level likely to be agreed by the Council.

I will keep you informed of further developments as the negotiations progress.

22 February 2014

EUROPEAN UNION ACCESSION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS (UNNUMBERED)

Letter from Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chairman

I write to update you on matters relating to the EU’s accession to the European Convention on Human Rights.

As outlined in previous correspondence, the UK lodged its observations in the Article 218(11) litigation on 15 October 2013. The Court of Justice has now listed the matter for a hearing before the full court on 5-6 May 2014 at which Counsel acting on behalf of the UK will intend. I am currently aware of 14 other Member States that have confirmed their attendance, and several more which may attend. The Court has allocated Member States 10 minutes for speeches.

For the same reasons as outlined in my letter to you of 20 December 2013, I am unfortunately unable at this stage to share with you details of the UK’s speech or any other more detailed information relating to the litigation. There will be no official written record of the hearing, although the hearing itself will be public.

The position regarding the internal rules remains the same as in my letter to you of 4 November 2013, in that we do not expect the Commission’s legislative initiative on the Internal Rules until the Court has delivered its opinion on the compatibility of the Accession Agreement with the EU Treaties. We expect clarification on their legal base at that stage.

I will keep you informed of any developments regarding these matters.

1 May 2014

FIGHT AGAINST FRAUD ON THE EU’S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW (12683/12)

Letter from the Chairman to Nicky Morgan MP, Economic Secretary, HM Treasury, to the Chairman

Thank you for your recent letter which we received on 20 November. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 4 December. We decided to keep the matter under scrutiny.

We note that the Government’s remaining concern is the provision on extra-territoriality and infer that you consider that to be the obstacle to opting in to the proposal at this stage. As you know, the Committee takes a different view, as explained in our letter of 11 September.

We look forward to an update on progress in the trilogue in due course but, subject to that, do not expect a reply to this letter.

5 December 2013
Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your Explanatory Memorandum of 17 February which was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 5 March. We decided to hold the matter under scrutiny.

We agree that the UK opt-in is engaged by this proposal and support your objective of reflecting this in the recitals of the proposal.

We would not object to the UK opting in to this proposal if this is supported by the stakeholders you are consulting. We are influenced by the fact that you support the principle of choice of forum, the UK would likely have some support from other Member States whatever position it took on the proposed declaration, and that the UK participates in the Brussels I Regulation.

We should be grateful if you would update us in due course on the outcome of your consultation and further deliberation on the proposed declaration and the progress of negotiations.

6 March 2014

Letter from Shailesh Vara MP, Parliamentary Under Secretary of State, Ministry of Justice, to the Chairman

I am writing to update the Committee on developments on the Council Decision designed to give effect across the European Union to the Hague Convention on Choice of Court Agreements.

The Government has taken the decision that the UK should opt into this proposal and notified the Council accordingly on 30 April.

We are aiming in negotiations to preserve the UK’s position as regards the applicability of the opt-in. However, in the face of disagreement from the Commission and some Member States, we have not yet been able to secure a change to the recital dealing with UK participation. Our efforts will continue.

As to the proposed exception relating to insurance, we expect a new version of the text, which we will need to study carefully, to emerge shortly. The Commission has accepted that this should make clear that the exception should not apply to contracts concerning reinsurance. Our stakeholders in the insurance industry have indicated that this would be very helpful, although the preference remains that the Convention should apply to all contracts of insurance other than those already excluded by the Convention – notably consumer contracts. However there is some opposition to removing the exception altogether. We will continue to negotiate on this point and to work with our stakeholders on how, if the exception must remain, it might be mitigated.

I had hoped to include with this letter the impact checklist promised in the Explanatory Memorandum, but it is still being finalised. We will provide it to your Committee shortly.

14 May 2014

Letter from Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chairman

Greece will take over the rotating Presidency of the Council of the European Union on 1 January 2014. I am writing to provide an overview of the Presidency’s priorities in the areas of justice on which the Ministry of Justice leads. I hope that this will help in the planning of the scrutiny of dossiers that are likely to be considered by the Justice and Home Affairs (JHA) Council during this period.

The Greek Presidency is planning to host the following JHA Councils:

— 23 – 24 January (Informal Council) in Athens, Greece
— 6 -7 March
This is Greece’s first EU Presidency for 11 years, and it has said it will prioritise measures which aim to promote economic activity and growth, including justice initiatives. Greece has also expressed willingness to work on future developments in the area of freedom, security and justice now that the period of the Stockholm programme is coming to an end, and to define strategic guidelines for legislative and operational planning.

In particular, the Presidency will work to achieve progress on the Data Protection proposals, the Insolvency Regulation, the European Account Preservation Order (EAPO), the Directive on Counterfeiting the Euro and other currencies and the Directive against fraud to the Union’s financial interests by means of criminal law.

Greece has indicated willingness to support UK proposals on the JHA 2014 opt-out decision (Protocol 36), particularly on assisting with non-Schengen measures.

Achieving progress on the proposed Regulation for the general EU data protection framework and the proposed Directive for personal data processing in the field of police and judicial cooperation will be a key priority for the Greeks. They have no objections to the proposal for a One Stop Shop model of supervisory authority for both individuals and organisations, although this matter remains the subject of detailed discussions in Council. Both the proposed Regulation and the proposed Directive remain under Parliamentary scrutiny and still require considerable work. I will keep you updated on the progress of the negotiations.

The Greek Presidency has expressed its intention to pay particular attention to the revision of the Insolvency Regulation with the aim of reaching final agreement. The Government welcomes the priority and time devoted to these proposals in previous Presidencies. It considers that the Commission proposal is balanced, targeted at key issues and timely given the current economic situation. Given the importance of good insolvency procedures to promoting recovery and growth it is important to get this negotiation right and avoid the risk of losing the coherence of the original proposals with too many changes.

On the European Account Preservation Order, the Greeks have sought to reassure Member States that “all efforts will be made to complete negotiations on the remaining issues of the regulation with a view to reaching an agreement at first reading with the European Parliament on the whole of the regulation and the recitals by before the end of the current parliamentary term”. The UK did not opt in to this proposal because of concerns about the lack of safeguards for defendants. Negotiations are continuing and we continue to work with others to improve the text to enable consideration of a post-adoption opt in. We will, of course, consult Parliament on any decision to opt-in post adoption.

The Greek Presidency will also seek the adoption of the Directive of the European Parliament and of the Council on the protection of the euro and other currencies against counterfeiting by criminal law. As you know, the Government decided not to opt in to this proposal. Although agreeing that a proportionate criminal justice response to counterfeiting requires robust national laws and effective international cooperation at the operational level, the Government’s view is that the Directive would have very little if any positive impact on UK enforcement or international operational cooperation and intelligence sharing, whilst presenting unwelcome legislative consequences for the UK.

As regards the EU’s relations with third countries in the field of judicial cooperation, Greece has sought to reassure Member States that it stands ready to continue the constructive dialogue for the benefit of European citizens.

20 December 2013

PROCEDURAL SAFEGUARDS FOR CHILDREN AND VULNERABLE PERSONS IN CRIMINAL PROCEEDINGS (17633/13)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

The Justice, Institutions and Consumer Protection Sub-Committee met yesterday, 15 January, to consider the above six documents, together with your Explanatory Memorandums (EMs) dated 9 January on the five documents containing proposals for EU measures.

I regret that the Sub-Committee was unable to make progress in its scrutiny of these documents because of inadequacies in the EMs. In view of the very tight timetable by which the Committee is
bound, in order to consider the questions of compliance of the Commission’s proposals with the principle of subsidiarity and whether to recommend that the UK opt in to any of the proposals, I have asked my officials to contact yours seeking the appearance of a Minister from your Department at the next meeting of the Sub-Committee, on 22 January, to give evidence to assist the Sub-Committee’s deliberations.

Among the matters which the Sub-Committee will wish to discuss are the following:

— The EMs which you submitted did not comply with the timetable of ten working days for submission of EMs following deposit of the documents;

— Although the Communication forms part of this package of measures and present a summary of the proposals, no signed EM covering it has been submitted at the time of writing;

— None of the EMs covering the proposals gave information as to the Government’s approach to the proposals, or of the Government’s view on the compliance or otherwise of the proposals with the principle of subsidiarity; and

— None of the EMs set out any view on the factors which you would take into account in deciding whether or not to opt in to the proposals.

We regard these failings as unacceptable and tending to show a disregard for the process of Parliamentary scrutiny. Notwithstanding the intervention of the Christmas period, it should have been clear that the very tight deadlines faced by the Committee, to consider the issues of subsidiarity and the opt-in, required urgent action to provide full EMs.

Should it not be possible for a Minister or senior official to attend the Sub-Committee’s meeting on 22 January, we shall need a full account of the Government’s views on whether the proposals are consistent with subsidiarity and your approach to the opt-in question in time for that meeting — ie. by the end of Tuesday 21 January at the latest.

I am sorry to write in these terms but I wish to convey the very strong feelings expressed by all members of the Sub-Committee yesterday at the meeting, which I attended.

16 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 16 January 2014 following up the Explanatory Memoranda (EMs) we submitted earlier about the recent proposals (set out above) from the European Commission (“the Commission”).

Let me start by apologising to the Committee for late submission and an explanation for this has been provided below. I also note your concern that the EMs were in content below the standards we would hope to meet in discharging our responsibilities for Parliamentary scrutiny. I hope that the information and the explanations I provide below goes some way towards providing the information you need.

You asked for an explanation of the delay in providing these EMs. I understand that the combination of the complexity of the exercise, occasioned by the fact that the EMs covered a number of linked proposals, coupled with the need to consult other Departments and the Devolved Administrations, and the proximity of the Christmas holiday period, led to the delay.

You asked about an Explanatory Memorandum on the Communication from the Commission which accompanied its individual proposals. Notwithstanding that this was essentially a covering note to the proposals themselves, one has now been prepared and is in the process of being deposited.

You asked about the factors which will be considered when the Government considers whether or not to opt in to these proposals. The broad terms on which they will be considered are established within the Coalition agreement. The key criteria applicable to these proposals will be the potential impact on protecting civil liberties and the integrity of the criminal justice system. We will also be considering the implications of extending ECJ jurisdiction to these areas, the associated costs and the practical implications. All of these topics require financial and policy analysis which is currently under way.

We will also look carefully at the evidence that measures of this kind are necessary and proportionate. In those respects, our initial thinking is as follows.
On the proposal for a Directive on the Presumption of Innocence, the Commission contends that it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed, and a consequent reluctance among EU judicial authorities to cooperate with each other. It suggests, therefore, that EU level action is necessary to address these variations and implies that only the EU can act.

However, as noted in the relevant EM, the Commission also observes in its Impact Assessment, which accompanies the proposal, that there is "limited statistical quantifiable evidence of insufficient mutual trust" which may raise a question about the necessity for the proposal. We are not aware of any such evidence. All Member States are already party to the ECHR, which requires that those suspected of a criminal offence should be presumed innocent until proven guilty (Art 6(2)). By the Commission’s own account, evidence of reluctance to cooperate, occasioned by differing views taken of the presumption of innocence, is difficult to come by. Accordingly, we will want to probe carefully the necessity for the European Union to act in order to ensure EU judicial authorities cooperate with each other.

On the proposed Directive on legal aid, we are similarly not aware of any evidence to suggest that the right to legal aid enshrined in the ECHR is not being observed in any Member State. Accordingly, we will interrogate further during the forthcoming technical level negotiations whether there is a robust case for a minimum standards-based regime in this respect.

On the proposed Directive on child defendants, the Commission asserts in its accompanying material that there is a need for EU-wide action to protect the rights of children involved in criminal proceedings. Whilst the protection of children is clearly a high priority for UK and other Member States, we are not aware of any evidence that current arrangements are an obstacle to mutual trust and recognition. The very detailed provisions of the proposal also raise questions about its proportionality. Again, we would plan to explore this further as negotiations progress.

We will, naturally, update the Committee as our thinking develops.

You have also asked, in particular, for an overall analysis of the impact on the UK legal system in addition to the detailed analysis (to be weighted against the other opt-in factors we have identified). Our initial view of the position is as follows:

— In relation to the proposal for a Directive on the presumption of innocence, the Government considers that the proposal reflects principles which are already part of the law of the UK (the presumption of innocence, burden and standard of proof, rights to remain silent and against self-incrimination and restrictions on trials in absentia). However, there is detail set out concerning those principles which would require changes to UK law. Some of these changes are of significance. In particular, as the EM identifies, the UK law permits in some circumstances inferences to be drawn from non-cooperation with a criminal investigation.

— On the proposed Directive on Child Defendants, whilst I consider that the UK has appropriate safeguards for child defendants and meets the general aims of the directive, the directive (as detailed in the EM) in part goes beyond the current law and practice. To that extent, clearly the proposal would involve a review of the Police and Criminal Evidence Act 1984 (PACE, in relation to England and Wales) and other legislative provisions and practice.

— In relation to the proposal for a Directive on provisional legal aid, as set out in the EM, our decision as to opt-in will be guided by the factors set out above, with a particular focus in this context on the likely financial implications of doing so. Our initial analysis is that current UK practice already delivers the main provisions required by the draft Directive. However, there are areas in which change would be required, with associated financial implications. Any additional financial burdens will need to be scrutinised closely in light of the Government’s continuing efforts to bear down on the cost of legal aid.

You asked about subsidiarity, and in particular asked me to expand on the analysis of this provided in the EMs.

The Government notes that the Commission’s underlying motivation in bringing forward these proposals as part of the Roadmap on criminal procedural rights is that minimum standards throughout the EU are required in order to support mutual trust – particularly having in mind that courts
extraditing suspects under the European Arrest Warrant will benefit from the assurance that the
defendant will receive a fair trial anywhere in Europe. That aim, if we were to accept it, clearly cannot
be achieved by Member States acting alone and must be done at EU level. To that extent they would
comply with the principle of subsidiarity.

As I hope I have made clear, that is not to say that the Government accepts that these measures are
necessary or proportionate, but those considerations are distinct from the principle of subsidiarity.

We hope that the above information will satisfy all of the points the committee has raised with us,
meaning that a ministerial appearance at the next meeting on 22 January will not be necessary. Please
let us know your views.

I hope this letter goes some way towards answering the concerns set out by the Committee.

20 January 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your letter of 20 January. This was considered by the Justice, Institutions and
Consumer Protection Sub-Committee at its meeting of 22 January 2014. The Committee focused on
the issues of subsidiarity and the exercise of the UK opt-in.

With regard to the issue of subsidiarity, it is our view from the information laid before this
Committee that this proposal does not merit a reasoned opinion challenging it on subsidiarity
grounds.

In reaching this conclusion, we note that the Commission, although acknowledging that there is
limited, statistical, quantifiable evidence of insufficient mutual trust, consulted with representatives of
the Member States; the Council of Europe; the International Association of Youth and Family Judges
and Magistrates; the UN; and medical and legal practitioners specialising in children’s cases as a basis
for arguing that this measure is necessary to increase the protection of vulnerable child suspects.
We have also taken account of your indication that you are not aware of any evidence that current
arrangements are an obstacle to mutual trust and recognition, whilst acknowledging the general
importance of the protection of children.

As for the question of the opt-in, the Explanatory Memorandum included discussion of a number of
obstacles to the smooth adoption of this proposal in the UK. Your letter noted that, in line with the
Coalition Agreement, the key criteria in determining the Government’s approach to the opt-in will be
the potential impact on protecting civil liberties and the integrity of the criminal justice system; and
that you will also be considering the impact of jurisdiction of Court of Justice and the costs of the
proposal and practical implications. In the absence of any indication as to how these general criteria
will impact on this particular proposal, we do not feel able to give an opinion on the question of the
opt-in.

We should be grateful if you would provide us with this further information by 7 February.

In the meantime we have decided to retain both the proposed Directive and the Commission’s
Recommendation under scrutiny.

23 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 23 January. I note the consideration that your Committee has given to
this proposal and I thank you for your work. Let me reiterate that the Government is fully committed
to taking account of the views of Parliament on this dossier.

I also note the conclusion of your Committee not to issue a reasoned opinion challenging the
subsidiarity grounds of the Commission proposal.

You asked for more detail on the application of these criteria concerning the opt-in, which were set
out in earlier correspondence. That is provided below:

Regarding the impact on civil liberties, it is clear that the Commission’s stated objective of the
proposal is to enhance civil liberties, namely those of children suspected or accused in criminal
proceedings. This is laid out in the Commission’s Explanatory Memorandum to the proposal. However, as my letter of 20 January stated, the Government believes that the UK already meets the
general aims of the Directive, so in that sense, there would be little impact in respect of
improvements in this regard. There would, however, need to be a number of changes to the Police
and Criminal Evidence Act 1984 (and associated “PACE” codes) to meet the precise provisions of the proposal, which we consider to provide a good level of protection of the civil liberties of suspected or accused children in the UK.

The Directive would make a number of changes to the provision made for child defendants which would have an impact on their civil rights. In particular, Article 6 makes the right of access to a lawyer mandatory; the child may not waive this right. A child who does not want a lawyer may see this as an infringement of their civil liberties. On the other hand, the assurance that any child will receive legal representation could also be viewed as rights positive, but since this already largely reflects domestic practice, we do not see that there will be any substantial impact on civil rights.

Article 7 of the proposal provides for the mandatory individual assessment of a child, whilst article 8 provides a child deprived of his liberty the right to a medical assessment. It is already current practice in a number of circumstances for the police and other criminal justice agencies to carry out such assessments. However, making these assessments more readily available could be seen as protecting civil liberties to the extent that they might better ensure the individual receives a fair trial. The corollary to this is that a child may not wish to be examined and to have the data obtained stored by the State. However, assuming such data is lawfully dealt with, we do not consider that its retention would have a particular effect on a child’s civil liberties.

The Government does not believe, therefore, that there would be a significant enhancement or further protection of domestic civil liberties as a consequence of this Directive, but nor would there be any significant diminution either. I suspect that the net changes that the Directive would bring about would not be great in this respect.

You also asked for more information on the integrity of the criminal justice system as a result of this proposal. The Government has not noted any significant impacts on the overall integrity of the justice system from this proposal. However, an analysis of this with operational officials is continuing and any issues arising from that will be considered and communicated to your Committee.

Another factor that will be considered is the impact of the European Court of Justice’s (ECJ) jurisdiction. Some impacts will be evident, such as the ability of the Court to hear infraction cases referred by the European Commission against member states that are alleged not to have fully or correctly implemented the Directive. If the UK elects to opt-in to the Directive, then we will also face potential infraction if the Commission were to allege that our implementation is insufficient. Furthermore, the Court of Justice’s jurisdiction would also mean the possibility of adverse decisions from that Court on the subject matter of this Directive. As you will be aware, if we disagree with the ECJ’s interpretation of legislation, it will be impossible for the UK to amend the law itself. Indeed, it would be very difficult to alter it at all as this would require the Commission to propose an amendment to the EU legislation itself, or a cohort of Member States to do so under the auspices of a Member State’s initiative.

Finally, you requested details on the cost and practical implications of the proposal. This is the area where the Government has the most concern. Discussions at official-level within the Ministry of Justice and with operational colleagues in the Home Office and other Departments have highlighted some issues, such as:

— Whether the scope of the instrument, as defined in Article 2, is too wide and whether minor offences should be excluded on the ground of proportionality and cost. Related to this, whether the definition of a child in Article 3 would present problems for law enforcement agencies in England, Wales, and Northern Ireland as regards 17 year-olds and 16 year-olds in Scotland.

— The costs of issuing the information prescribed in Articles 4 and 5 to the suspected child and to the holder of parental responsibility. When read alongside the obligations of Directive 2012/13/EU, this would involve reissuing a large amount of printed literature.

— Issues around access to a lawyer in Article 6. In particular, whether it may bind the UK to the Access to a Lawyer Directive as it applies to children, given that it does not currently bind the UK otherwise, pending a review of that opt-in decision.

— The impact and cost of further individual assessments and medical examinations and whether they might delay urgent proceedings (Articles 7 and 8).
The obligation to record audio-visually all interviews and whether the proportionality exemption for the same in Article 9(1) is compromised by Article 9(2).

The test for the deprivation of the child’s liberty in Article 10(1) is as the “last resort” and for the shortest possible period of time. That prescription, along with the definition of child as under 18, would require significant re-writing of PACE 1984.

Article 12’s obligations, which could require specific measures such as the construction of child cells in all Police stations.

The costs and practicalities of the training obligations in Article 19 and whether the blanket requirement is proportionate.

The data collection obligation in Article 20, particularly the financial and time costs of doing so and whether the data would serve any practical purpose.

I hope that this letter provides sufficient and useful information for you and the Committee to consider. I will, of course, continue to update Parliament on this dossier as it goes forward. I note that the Directive remains under scrutiny.

6 February 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your letter dated 6 February. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 26 February 2014.

We have decided to retain both the proposed Directive and the Commission’s Recommendation under scrutiny. Your latest letter focuses entirely on the many factors governing the imminent opt-in decision that the Government must make before the deadline expires on 18 March. We are grateful that you cover these issues with greater detail than your Explanatory Memorandum. However, ideally we would have liked to have been furnished with the requisite information enabling us to express our own opinion on the opt-in before our deadline expired on 11 February.

It is our view that many of the concerns that you express in the first half of your letter do not form a strong argument against opting in. Regarding the proposal’s impact on civil liberties you conclude that the changes that the Directive would bring about would “not be great”. As for the integrity of the UK’s criminal justice system you say that the Government have not as yet “noted any significant impacts”.

Alongside these issues is your concern regarding the application to this specific proposal of the Court of Justice’s (CJ) jurisdiction. There are two main strands to your argument; (i) the threat of infraction proceedings against the UK by the Commission for failure to implement the Directive correctly, and (ii) the chance of “adverse decisions from the court on the subject matter of this Directive”. These concerns do not, in our view, make a convincing argument against opting into this specific proposal. We believe that they may form an argument for never opting in to any legislation subject to the UK’s opt-in protocol but, up to this point in time, such a course of action has not been the Government’s chosen policy. The Home Office’s recent letter to us regarding the wider ramifications of the opt-in specifically cautioned against a blanket policy and, since the Lisbon Treaty came into effect in 2009, as you are no doubt aware, there have been numerous examples of Justice and Home Affairs legislative proposals where the Government have concluded that the benefit of the legislation outweighs the supposed risk of the CJ’s jurisdiction.

We find the “cost and practical implications of the proposal” that you list in the second half of your letter more difficult to analyse, in particular, in relation to whether or not we should suggest that the Government opt in to the negotiation of this proposal. We note that two of the issues that you list would require national legislation to accommodate the Directive’s provisions: (i) changes to the definition of a child and, (ii) the aspect of the proposal dealing with the deprivation of liberty; in particular, the requirement that a child should be deprived of its liberty only as a last resort and for the shortest possible time. You are clear that in order to accommodate this aspect of the proposal in the UK a “significant re-writing of PACE 1984” would be required.

However, in our view, none of the issues listed by you in this section of your letter seem to be fundamentally incompatible with the operation of the UK’s criminal justice system, as was the case, for example, regarding the Directive on access to a lawyer. In contrast to that proposal, we would argue that in this instance the balance regarding the opt-in appears to be between the combined
weight of your concerns highlighted in the second half of your letter against the confidence and ability of the Government to negotiate a satisfactory outcome to these concerns in the subsequent negotiations. We recognise that this is a fine line. However, in our report looking at the European Union’s Policy on Criminal Procedure (30th Report of Session 2010-12, HL Paper 288), we concluded that:

“The Government should therefore continue to look favourably, in principle, at opting in to further Roadmap legislation bearing in mind particularly the influence that the UK can bring in raising standards across the EU to the benefit of travelling UK citizens, and the risk, if we do not opt in, that the trust placed in the UK criminal justice systems by judges of other Member States will be diminished”. (Paragraph 109.)

With these aims in mind, we suggest that only if you are confident that you can address your concerns satisfactorily during the subsequent negotiations should the Government opt in to this proposal at the outset.

We look forward to considering updates on this proposal in due course.

27 February 2014

PROCEDURAL SAFEGUARDS FOR SUSPECTS AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS (17645/13)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

The Justice, Institutions and Consumer Protection Sub-Committee met yesterday, 15 January, to consider the above six documents, together with your Explanatory Memorandums (EMs) dated 9 January on the five documents containing proposals for EU measures.

I regret that the Sub-Committee was unable to make progress in its scrutiny of these documents because of inadequacies in the EMs. In view of the very tight timetable by which the Committee is bound, in order to consider the questions of compliance of the Commission’s proposals with the principle of subsidiarity and whether to recommend that the UK opt in to any of the proposals, I have asked my officials to contact yours seeking the appearance of a Minister from your Department at the next meeting of the Sub-Committee, on 22 January, to give evidence to assist the Sub-Committee’s deliberations.

Among the matters which the Sub-Committee will wish to discuss are the following:

— The EMs which you submitted did not comply with the timetable of ten working days for submission of EMs following deposit of the documents;

— Although the Communication forms part of this package of measures and present a summary of the proposals, no signed EM covering it has been submitted at the time of writing;

— None of the EMs covering the proposals gave information as to the Government’s approach to the proposals, or of the Government’s view on the compliance or otherwise of the proposals with the principle of subsidiarity; and

— None of the EMs set out any view on the factors which you would take into account in deciding whether or not to opt in to the proposals.

We regard these failings as unacceptable and tending to show a disregard for the process of Parliamentary scrutiny. Notwithstanding the intervention of the Christmas period, it should have been clear that the very tight deadlines faced by the Committee, to consider the issues of subsidiarity and the opt-in, required urgent action to provide full EMs.

Should it not be possible for a Minister or senior official to attend the Sub-Committee’s meeting on 22 January, we shall need a full account of the Government’s views on whether the proposals are consistent with subsidiarity and your approach to the opt-in question in time for that meeting – ie. by the end of Tuesday 21 January at the latest.
I am sorry to write in these terms but I wish to convey the very strong feelings expressed by all members of the Sub-Committee yesterday at the meeting, which I attended.

16 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 15 January 2014 following up the Explanatory Memoranda (EMs) we submitted earlier about the recent proposals (set out above) from the European Commission (“the Commission”).

Let me start by apologising to the Committee for late submission and an explanation for this has been provided below. I also note your concern that the EMs were in content below the standards we would hope to meet in discharging our responsibilities for Parliamentary scrutiny. I hope that the information and the explanations I provide below goes some way towards providing the information you need.

You asked for an explanation of the delay in providing these EMs. I understand that the combination of the complexity of the exercise, occasioned by the fact that the EMs covered a number of linked proposals, coupled with the need to consult other Departments and the Devolved Administrations, and the proximity of the Christmas holiday period, led to the delay.

You asked about an Explanatory Memorandum on the Communication from the Commission which accompanied its individual proposals. Notwithstanding that this was essentially a covering note to the proposals themselves, one has now been prepared and is in the process of being deposited.

You asked about the factors which will be considered when the Government considers whether or not to opt in to these proposals. The broad terms on which they will be considered are established within the Coalition agreement. The key criteria applicable to these proposals will be the potential impact on protecting civil liberties and the integrity of the criminal justice system. We will also be considering the implications of extending ECJ jurisdiction to these areas, the associated costs and the practical implications. All of these topics require financial and policy analysis which is currently under way.

We will also look carefully at the evidence that measures of this kind are necessary and proportionate. In those respects, our initial thinking is as follows.

On the proposal for a Directive on the Presumption of Innocence, the Commission contends that it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed, and a consequent reluctance among EU judicial authorities to co-operate with each other. It suggests, therefore, that EU level action is necessary to address these variations and implies that only the EU can act.

However, as noted in the relevant EM, the Commission also observes in its Impact Assessment, which accompanies the proposal, that there is "limited statistical quantifiable evidence of insufficient mutual trust" which may raise a question about the necessity for the proposal. We are not aware of any such evidence. All Member States are already party to the ECHR, which requires that those suspected of a criminal offence should be presumed innocent until proven guilty (Art 6(2)). By the Commission’s own account, evidence of reluctance to co-operate, occasioned by differing views taken of the presumption of innocence, is difficult to come by. Accordingly, we will want to probe carefully the necessity for the European Union to act in order to ensure EU judicial authorities co-operate with each other.

On the proposed Directive on legal aid, we are similarly not aware of any evidence to suggest that the right to legal aid enshrined in the ECHR is not being observed in any Member State. Accordingly, we will interrogate further during the forthcoming technical level negotiations whether there is a robust case for a minimum standards-based regime in this respect.

On the proposed Directive on child defendants, the Commission asserts in its accompanying material that there is a need for EU-wide action to protect the rights of children involved in criminal proceedings. Whilst the protection of children is clearly a high priority for UK and other Member States, we are not aware of any evidence that current arrangements are an obstacle to mutual trust and recognition. The very detailed provisions of the proposal also raise questions about its proportionality. Again, we would plan to explore this further as negotiations progress.

We will, naturally, update the Committee as our thinking develops.
You have also asked, in particular, for an overall analysis of the impact on the UK legal system in addition to the detailed analysis (to be weighted against the other opt-in factors we have identified).

Our initial view of the position is as follows:

— In relation to the proposal for a Directive on the presumption of innocence, the Government considers that the proposal reflects principles which are already part of the law of the UK (the presumption of innocence, burden and standard of proof, rights to remain silent and against self-incrimination and restrictions on trials in absentia). However, there is detail set out concerning those principles which would require changes to UK law. Some of these changes are of significance. In particular, as the EM identifies, the UK law permits in some circumstances inferences to be drawn from non-cooperation with a criminal investigation.

— On the proposed Directive on Child Defendants, whilst I consider that the UK has appropriate safeguards for child defendants and meets the general aims of the directive, the directive (as detailed in the EM) in part goes beyond the current law and practice. To that extent, clearly the proposal would involve a review of the Police and Criminal Evidence Act 1984 (PACE, in relation to England and Wales) and other legislative provisions and practice.

— In relation to the proposal for a Directive on provisional legal aid, as set out in the EM, our decision as to opt-in will be guided by the factors set out above, with a particular focus in this context on the likely financial implications of doing so. Our initial analysis is that current UK practice already delivers the main provisions required by the draft Directive. However, there are areas in which change would be required, with associated financial implications. Any additional financial burdens will need to be scrutinised closely in light of the Government’s continuing efforts to bear down on the cost of legal aid.

You asked about subsidiarity, and in particular asked me to expand on the analysis of this provided in the EMs.

The Government notes that the Commission’s underlying motivation in bringing forward these proposals as part of the Roadmap on criminal procedural rights is that minimum standards throughout the EU are required in order to support mutual trust – particularly having in mind that courts extraditing suspects under the European Arrest Warrant will benefit from the assurance that the defendant will receive a fair trial anywhere in Europe. That aim, if we were to accept it, clearly cannot be achieved by Member States acting alone and must be done at EU level. To that extent they would comply with the principle of subsidiarity.

As I hope I have made clear, that is not to say that the Government accepts that these measures are necessary or proportionate, but those considerations are distinct from the principle of subsidiarity.

We hope that the above information will satisfy all of the points the committee has raised with us, meaning that a ministerial appearance at the next meeting on 22 January will not be necessary. Please let us know your views.

I hope this letter goes some way towards answering the concerns set out by the Committee.

20 January 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your letter of 20 January. The Justice, Institutions and Consumer Protection Sub-Committee considered it yesterday together with your Explanatory Memorandums (EMs) on the five Commission proposals.

We acknowledge your apology and explanation for the late submission of the EMs. While we note the difficulty of timing which may be caused where you have to consult other Departments, we take the view that all departments must work to ensure that the well-established timetable for the submission of EMs is met, particularly where, as in this case, you are aware that the scrutiny committees will themselves be up against strict time limits.

Moreover, your explanation does not account for the additional delay in submitting the EM on the overarching Communication. While that document does not contain substantive proposals, it is a
significant document explaining the package as a whole and the Committee expected to have it for consideration with the rest of the EMs.

I should like to emphasise the importance we attach [not printed] to the agreed timetables for scrutiny which have been in place since the 1970s. If the Government consider that the timetables cause difficulties, we should be prepared to discuss whether any change in procedure may be necessary.

As to the proposals themselves, we have decided to scrutinise them in the three parts suggested by the division among your EMs and I am writing separately in relation to each element. We do not, therefore, expect a reply to this letter.

23 January 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your Explanatory Memorandum of 22 January 2014. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 29 January.

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

30 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 23 January. I note the consideration that your Committee has given to this proposal and I thank you for your work. Let me reiterate that the Government is fully committed to taking account of the views of Parliament on this dossier.

I also note the conclusion of your Committee not to issue a reasoned opinion challenging the subsidiarity grounds of the Commission proposal.

You asked for more detail on the application of these criteria concerning the opt-in, which were set out in earlier correspondence. That is provided below:

Regarding the impact on civil liberties, it is clear that the Commission’s stated objective of the proposal is to enhance civil liberties, namely those of children suspected or accused in criminal proceedings. This is laid out in the Commission’s Explanatory Memorandum to the proposal. However, as my letter of 20 January stated, the Government believes that the UK already meets the general aims of the Directive, so in that sense, there would be little impact in respect of improvements in this regard. There would, however, need to be a number of changes to the Police and Criminal Evidence Act 1984 (and associated “PACE” codes) to meet the precise provisions of the proposal, which we consider to provide a good level of protection of the civil liberties of suspected or accused children in the UK.

The Directive would make a number of changes to the provision made for child defendants which would have an impact on their civil rights. In particular, Article 6 makes the right of access to a lawyer mandatory; the child may not waive this right. A child who does not want a lawyer may see this as an infringement of their civil liberties. On the other hand, the assurance that any child will receive legal representation could also be viewed as rights positive, but since this already largely reflects domestic practice, we do not see that there will be any substantial impact on civil rights.

Article 7 of the proposal provides for the mandatory individual assessment of a child, whilst article 8 provides a child deprived of his liberty the right to a medical assessment. It is already current practice in a number of circumstances for the police and other criminal justice agencies to carry out such assessments. However, making these assessments more readily available could be seen as protecting civil liberties to the extent that they might better ensure the individual receives a fair trial. The corollary to this is that a child may not wish to be examined and to have the data obtained stored by the State. However, assuming such data is lawfully dealt with, we do not consider that its retention would have a particular effect on a child’s civil liberties.

The Government does not believe, therefore, that there would be a significant enhancement or further protection of domestic civil liberties as a consequence of this Directive, but nor would there be any significant diminution either. I suspect that the net changes that the Directive would bring about would not be great in this respect.

You also asked for more information on the integrity of the criminal justice system as a result of this proposal. The Government has not noted any significant impacts on the overall integrity of the justice
system from this proposal. However, an analysis of this with operational officials is continuing and any
issues arising from that will be considered and communicated to your Committee.

Another factor that will be considered is the impact of the European Court of Justice’s (ECJ)
jurisdiction. Some impacts will be evident, such as the ability of the Court to hear infraction cases
referred by the European Commission against member states that are alleged not to have fully or
correctly implemented the Directive. If the UK elects to opt-in to the Directive, then we will also face
potential infraction if the Commission were to allege that our implementation is insufficient.
Furthermore, the Court of Justice’s jurisdiction would also mean the possibility of adverse decisions
from that Court on the subject matter of this Directive. As you will be aware, if we disagree with the
ECJ’s interpretation of legislation, it will be impossible for the UK to amend the law itself. Indeed, it
would be very difficult to alter it at all as this would require the Commission to propose an
amendment to the EU legislation itself, or a cohort of Member States to do so under the auspices of a
Member State’s initiative.

Finally, you requested details on the cost and practical implications of the proposal. This is the area
where the Government has the most concern. Discussions at official-level within the Ministry of
Justice and with operational colleagues in the Home Office and other Departments have highlighted
some issues, such as:

— Whether the scope of the instrument, as defined in Article 2, is too wide and
whether minor offences should be excluded on the ground of
proportionality and cost. Related to this, whether the definition of a child in
Article 3 would present problems for law enforcement agencies in England,
Wales, and Northern Ireland as regards 17 year-olds and 16 year-olds in
Scotland.

— The costs of issuing the information prescribed in Articles 4 and 5 to the
suspected child and to the holder of parental responsibility. When read
alongside the obligations of Directive 2012/13/EU, this would involve
reissuing a large amount of printed literature.

— Issues around access to a lawyer in Article 6. In particular, whether it may
bind the UK to the Access to a Lawyer Directive as it applies to children,
given that it does not currently bind the UK otherwise, pending a review of
that opt-in decision.

— The impact and cost of further individual assessments and medical
examinations and whether they might delay urgent proceedings (Articles 7
and 8).

— The obligation to record audio-visually all interviews and whether the
proportionality exemption for the same in Article 9(1) is compromised by
Article 9(2).

— The test for the deprivation of the child’s liberty in Article 10(1) is as the
“last resort” and for the shortest possible period of time. That prescription,
along with the definition of child as under 18, would require significant re-
writing of PACE 1984.

— Article 12’s obligations, which could require specific measures such as the
construction of child cells in all Police stations.

— The costs and practicalities of the training obligations in Article 19 and
whether the blanket requirement is proportionate.

The data collection obligation in Article 20, particularly the financial and time costs of doing so and
whether the data would serve any practical purpose.

I hope that this letter provides sufficient and useful information for you and the Committee to
consider. I will, of course, continue to update Parliament on this dossier as it goes forward. I note that
the Directive remains under scrutiny.

6 February 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your letter dated 6 February. It was considered by the Justice, Institutions and
Consumer Protection Sub-Committee at its meeting of 26 February 2014.
We have decided to retain both the proposed Directive and the Commission’s Recommendation under scrutiny. Your latest letter focuses entirely on the many factors governing the imminent opt-in decision that the Government must make before the deadline expires on 18 March. We are grateful that you cover these issues with greater detail than your Explanatory Memorandum. However, ideally we would have liked to have been furnished with the requisite information enabling us to express our own opinion on the opt-in before our deadline expired on 11 February.

It is our view that many of the concerns that you express in the first half of your letter do not form a strong argument against opting in. Regarding the proposal’s impact on civil liberties you conclude that the changes that the Directive would bring about would “not be great”. As for the integrity of the UK’s criminal justice system you say that the Government have not as yet “noted any significant impacts”.

Alongside these issues is your concern regarding the application to this specific proposal of the Court of Justice’s (CJ) jurisdiction. There are two main strands to your argument; (i) the threat of infraction proceedings against the UK by the Commission for failure to implement the Directive correctly, and (ii) the chance of “adverse decisions from the court on the subject matter of this Directive”. These concerns do not, in our view, make a convincing argument against opting into this specific proposal. We recognise that they may form an argument for never opting in to any legislation subject to the UK’s opt-in protocol but, up to this point in time, such a course of action has not been the Government’s chosen policy. The Home Office’s recent letter to us regarding the wider ramifications of the opt-in specifically cautioned against a blanket policy and, since the Lisbon Treaty came into effect in 2009, as you are no doubt aware, there have been numerous examples of Justice and Home Affairs legislative proposals where the Government have concluded that the benefit of the legislation outweighs the supposed risk of the CJ’s jurisdiction.

We find the “cost and practical implications of the proposal” that you list in the second half of your letter more difficult to analyse, in particular, in relation to whether or not we should suggest that the Government opt in to the negotiation of this proposal. We note that two of the issues that you list would require national legislation to accommodate the Directive’s provisions: (i) changes to the definition of a child and, (ii) the aspect of the proposal dealing with the deprivation of liberty; in particular, the requirement that a child should be deprived of its liberty only as a last resort and for the shortest possible time. You are clear that in order to accommodate this aspect of the proposal in the UK a “significant re-writing of PACE 1984” would be required.

However, in our view, none of the issues listed by you in this section of your letter seem to be fundamentally incompatible with the operation of the UK’s criminal justice system, as was the case, for example, regarding the Directive on access to a lawyer. In contrast to that proposal, we would argue that in this instance the balance regarding the opt-in appears to be between the combined weight of your concerns highlighted in the second half of your letter against the confidence and ability of the Government to negotiate a satisfactory outcome to these concerns in the subsequent negotiations. We recognise that this is a fine line. However, in our report looking at the European Union’s Policy on Criminal Procedure (30th Report of Session 2010-12, HL Paper 288), we concluded that:

“The Government should therefore continue to look favourably, in principle, at opting in to further Roadmap legislation bearing in mind particularly the influence that the UK can bring in raising standards across the EU to the benefit of travelling UK citizens, and the risk, if we do not opt in, that the trust placed in the UK criminal justice systems by judges of other Member States will be diminished”. (Paragraph 109.)

With these aims in mind, we suggest that only if you are confident that you can address your concerns satisfactorily during the subsequent negotiations should the Government opt in to this proposal at the outset.

We look forward to considering updates on this proposal in due course.

27 February 2014
Promoting the Free Movement of Citizens and Businesses by Simplifying the Acceptance of Certain Public Documents in the European Union (9037/13)

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

We submitted the above document with an Explanatory Memorandum on 3 June 2013. You wrote on 11 July 2013 to inform me that your Committee had decided to retain the above issue under scrutiny and asked for clarification of a number of points. The Committee was particularly interested in having our analysis of the costs and benefits of implementing the proposal, and requested an update on negotiations.

The proposal remains under active discussion in Working Group meetings in Brussels, in particular the scope of the documents to be covered by it has not yet been agreed. As such I am not yet able to resubmit this proposal for Scrutiny. However, I am pleased to be able to provide an update on the negotiations as requested.

An assessment of the potential burdens on UK authorities has been difficult given that the scope of the proposal has not yet been finalised. At this stage, we calculate that the potential benefits to citizens and businesses from the abolition of legalisation would be around £2million per annum, with further potential savings on translation costs if multi-lingual forms are introduced and if the requirements for certified translations are abolished. However, in common with many other Member States, we oppose this part of the proposal due to concerns over the reliability of uncertified translations. We have identified annual costs of between £37,000 and £250,000, depending on the quantity, to verify documents in cases of reasonable doubt, as well as one-off costs of around £250,000 for HMG to set up systems to issue common format documents. We will revise these estimates when details of the documents to be covered and the verification system are confirmed. We will also resist any amendments which would entail additional costs to Member States.

With regard to progress on the negotiations, the ordinary legislative procedure applies so there will be co-decision with the European Parliament and voting will be on the basis of a qualified majority. The European Parliament voted through amendments on 4 February which considerably enlarged the list of the documents to be covered and which would be unacceptable to us. A first redraft in March from the Presidency, which reduced that list, is being discussed in the Civil Law Working Group. We have actively participated in these discussions. Our aim is to:

— Minimise the financial and administrative impact of implementation for national governments;
— Ensure that Member States can insist on originals of documents in certain circumstances such as passport, identity and visa areas; and
— To guard against the possibility of ‘mission creep’ whereby EU common format documents could ultimately replace national documents.

To reinforce our views we met the Commission on 10th April for a bilateral meeting and are satisfied that our concerns have been noted and understood. We have support from other Member States for our interventions to:

— Delete land registry, intellectual property, criminal conviction and education documents from the scope;
— Clarify that “use” of documents does not mean “acceptance”;
— Reduce the scope of documents which will have multilingual forms created; and
— To extend the timeframe for implementation.

Suggestions from the UK to provide an impact assessment and to include details of the verification mechanism have been incorporated into draft texts as well as several of our minor suggestions on wording, but the wide-ranging scope of the proposal means a final draft will be some months away. The Committee has also expressed an interest in our thinking on the legal base. Provided that the scope of the documents affected by the Regulation does not change significantly, our legal advisers are content with the Commission view that these provisions have a dual predominant purpose relating to both the free movement of citizens and the impact on the internal market. It is necessary to adopt the dual legal base because Article 114(1), relating to the establishment and functioning of the internal
market, cannot be used for provisions relating to the free movement of persons, so Article 21(2) which concerns the rights of Union citizens to move and reside freely within the territory of the Member States also has to be adopted. Legal advisers also agree that the proposal does not fall to be considered under Article 81 which deals with judicial cooperation in civil matters.

We are content that the proposal has a clear cross-border dimension. However we will continue to consider the issue of proportionality in respect of the various civil status documents covered. There are not any specific documents which officials consider to be too sensitive for the simplification envisaged by this proposal, but we continue, with widespread support in the Working Group, to work on retaining the right to demand original documents as a precaution against fraud.

23 April 2014

PROTECTION OF THE EURO AND OTHER CURRENCIES AGAINST COUNTERFEITING BY CRIMINAL LAW (6152/13)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter of 22 November 2013. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 18 December. We decided to retain this matter under scrutiny.

We are grateful for the update and would like a further one, in due course, which covers the outcome of the trilogue discussions for a first reading deal. In providing this, please also let us have your assessment of the factors affecting the exercise of the UK opt-in at the stage of adoption of the measure, in the light of the text of the proposal as it has developed.

18 December 2013

Letter from the Chris Grayling MP to the Chairman

I write in response to your letter of 18 December 2013 asking for a further update on the outcome of the trilogue negotiations on the proposed Directive on the protection of the Euro and other currencies against counterfeiting by criminal law. As indicated by your letter your committee currently retain this proposal under scrutiny.

Following the General Approach agreement that I referred to in my letter of 22 November, the draft Directive was considered by the European Parliament’s Civil Liberties, Justice and Home Affairs (LIBE) Committee. Their report was published on 10 January and this was followed by two further Council working group meetings and formal trilogue discussions. A first reading deal has now been agreed by the negotiating parties and following any legal-linguist revisions it will be adopted at a future Council meeting.

The agreed text of the draft Directive confirms the position in the General Approach that the instrument should not include minimum sentences, which were included in the European Commission’s original proposal. The UK joined many other Member States in arguing successfully during the negotiations that this provision should be removed; it is incompatible with the principles of proportionately and subsidiarity and would remove the ability of judges to determine an appropriate criminal sanction having regard to all the circumstances of a particular case, a fundamental feature of sentencing practice across the UK.

The agreed text instead relies on minimum maximum sanction provision, leaving the determination of sentences in individual cases to judges. The first reading agreement also reflects the General Approach in respect of the absence of the obligation on Member States to accede or remain parties to the Geneva Convention on Counterfeiting, which the majority of Member States viewed as beyond the scope of the legal base relied on by the Commission.

Although the minimum sentences provision has been removed, there remain some areas of significant concern. The principle of these is that Article 8(1), dealing with jurisdiction, is agreed in its original form. The Government remains convinced that this provision requiring the UK to assume jurisdiction for counterfeiting overseas by UK nationals is unnecessary and disproportionate and no evidence has been presented to us to suggest that extraterritorial jurisdiction linked solely by the nationality of the offender will have a significant impact on tackling counterfeiting. As regards the UK, there is no evidence to suggest involvement by nationals in counterfeiting overseas is more than very exceptional.
In addition, a new European Parliament proposal accepted as part of the first reading agreement, at Article 10a, creates an obligation on Member States to transmit data to the European Commission biannually on the number of prosecutions and convictions for the counterfeiting offences referred to in the Directive. This would place an unnecessary and disproportionate data collection burden on Member States for a benefit that is not immediately apparent. Consultation with operational experts here in the UK indicates that this proposal would, at best, duplicate existing practices. We do not therefore believe this provision would provide any benefit for enforcement of laws against counterfeiting of currency.

As the Committee is aware, the Government chose not to opt in to the proposed Directive at the outset of negotiations. Though some of our concerns with the Commission’s proposal, such as the requirement for minimum sentences, have been addressed during negotiations, as set out above, others remain and we have some additional concerns with amendments added during trilogue negotiations with the European Parliament. Therefore, the Government does not consider it appropriate for the UK to exercise our right to opt in to the Directive post-adoption. We do not believe that opting in to the instrument would provide any significant benefits for the UK in tackling counterfeiting. UK expert operational opinion remains of the view that non-participation in this instrument will not damage the UK’s operational effectiveness domestically or have any adverse impact on international cooperation and intelligence sharing. In the circumstances, I ask that you now clear this dossier from scrutiny.

16 March 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your letter 16 March 2014. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 26 March. We decided to clear this proposal from scrutiny.

We note that the Government does not intend to opt-in to this measure once it has been adopted and the reasons for this decision.

27 March 2014

PROTECTION OF THE EU’S FINANCIAL INTERESTS – FIGHT AGAINST FRAUD 2012
ANNUAL REPORT (12772/13)

Letter from Nicky Morgan MP, Economic Secretary to the Treasury, HM Treasury, to the Chairman

Thank you for your letter of 21 November on the Commission’s Fight against Fraud 2012 annual report.

You asked for an update on the UK’s progress towards creating an Anti-Fraud Coordination Service (“AFCOS”). The recent Regulation (EU, EURATOM) No.883/2013 requires Member States to designate an AFCOS to facilitate effective cooperation with the EU Anti-Fraud Office (“OLAF”). Rather than creating a new AFCOS, some Member States, including the UK, have opted to nominate a relevant contact point to liaise with OLAF.

The Government notes the challenges raised by Commissioner Leppard of the City of London police and is aware of the importance of complying with this obligation. The Home Office continues to work towards identifying a suitable contact point and the Government will notify the Commission and update this Committee once this work has been completed.

Your letter also sought clarification of how the Government will handle those cases of fraud against the EU budget that are only uncovered through external investigation. One of the main mechanisms through which this type of fraud is handled is via the UK’s National Crime Agency (“NCA”) which provides a number of UK-wide liaison services, fulfilling EU requirements and wider international commitments. This includes providing Europol and Interpol bureau services and being home to the UK Financial Intelligence Unit. It does this through the Europol National Unit (ENU), which is based in the UK International Crime Bureau of the NCA and is supported by the UK National Unit based in The Hague. The ENU provides a channel for all UK law enforcement engagement with Europol. Europol is also a partner of the ENU. The agencies and services currently represented in the UK Liaison Bureau at Europol include: NCA, the Metropolitan Police Service (Serious Crimes and Counter Terrorism units), HMRC, Home Office Immigration Enforcement and Police Scotland.
The Government believes that the NCA’s work with these agencies and services will offer an effective means of detecting and following up instances of fraud that require external investigation. This is just one example of improvement action at national level which we believe will increase the effectiveness of the UK’s response to fraud, and, in turn, strengthen cooperation with our European and international partners to fight cross-border fraud. Combined with the improvements to OLAF processes, we believe that the Commission’s rationale for the supranational European Public Prosecutor’s Office is further weakened.

5 December 2013

Letter from the Chairman to Nicky Morgan MP

Thank you for your letter dated 5 December. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 18 December 2013. We are grateful for your more detailed answer to our questions, and note your reassurances regarding the architecture of the UK’s institutional response to these types of crimes. We have decided to retain this matter under scrutiny pending the successful outcome of the Government’s work to nominate a contact point in the UK for OLAF. In that regard we note Lord Newby’s undertaking during the course of the debate on 11 December of the Committee’s report into fraud on the EU’s finances that he intends to draw the Home Office’s attention to the “strength of feeling in the House that this decision should be taken quickly”.

We look forward to considering your update in that regard in due course.

18 December 2013

Letter from Nicky Morgan MP to the Chairman

Thank you for your letter of 18 December 2013 on the Commission’s 2012 report on the Fight against Fraud.

Your letter confirmed that the Committee would continue to hold this report under scrutiny pending the Government’s nomination of a UK Anti-Fraud Coordination Service (AFCOS) contact point.

As requested during the Lords committee debate of 11 December 2013, Lord Newby wrote to the Home Office on 19 December 2013 to stress the importance of this obligation and the Committee’s particular interest in this ongoing issue. I am pleased to inform you that the Minister for Modern Slavery and Organised Crime, Karen Bradley, wrote to Lord Newby on 28 April 2014 notifying him that the City of London Police have been nominated as the UK’s AFCOS contact point. Treasury officials were informed of this decision shortly thereafter and have now communicated this information to the EU Anti-Fraud Office (OLAF).

This Government takes fraud against the EU budget extremely seriously and I look forward to further enhanced cooperation between the UK and OLAF on EU fraud. I hope that this information is sufficient for the Committee to now clear the Commission’s Fight Against Fraud 2012 report from scrutiny.

14 May 2014

PROTECTION OF UNDISCLOSED KNOW-HOW AND BUSINESS INFORMATION (TRADE SECRETS) AGAINST THEIR UNLAWFUL ACQUISITION, USE AND DISCLOSURE (17392/12)

Letter from the Chairman to Viscount Younger of Leckie, Parliamentary Under-Secretary of State for Business, Innovation and Skills

Thank you for your Explanatory Memorandum of 17 December 2013. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 15 January 2014. We decided to retain the matter under scrutiny.

We agree that no subsidiarity concerns arise in respect of this proposal.

Please keep us informed, in due course, of developments in the negotiation of this proposal and the outcome of your consultations with interested parties. In doing so, we would be grateful if you would
address the suggestion that the proposal leaves gaps which should be filled, such as provision for obtaining evidence of misuse and damage.

16 January 2014

Letter from the Viscount Younger of Leckie to the Chairman

I am writing to update you about recent developments to the proposed Directive on the protection of trade secrets, and to answer the points raised by the Committee in your report of 12 February 2014. The Presidency wishes to agree a general approach at Competitiveness Council on 26-27 May. I hope therefore that the Committee will be able to clear this proposal or agree to a scrutiny waiver in advance of that date.

DEVELOPMENTS ON THE DOSSIER

Negotiations in the Council Working Party have been proceeding at a rapid pace, as the Presidency has set itself the aim of agreeing a general approach at the Competitiveness Council on 26-27 May. There is broad support from Member States for the Directive. The Working Party has been considering a compromise text and the Presidency now feels that, following the most recent meeting on 10 April, technical work has come to an end. This meeting considered a Presidency compromise text (document 8461/14), which I have attached [not printed] to this letter. The Presidency is expected to produce a final compromise proposal shortly for discussion in Coreper in advance of Competitiveness Council. I will share this with the Committee once it is available.

The key issues for the UK were limitation periods and measures to preserve confidentiality. The limitation period originally proposed was between 1 and 2 years. The new text sets a maximum period of 5 years, which is 1 year less than the period permitted in England and Wales and Northern Ireland, and the same as that in Scotland. The UK continues to argue that we should be able to maintain a period of up to 6 years, but I believe that 5 years represents a significant improvement on the original proposal.

Measures to preserve confidentiality are of the utmost importance. If a trade secret holder thinks that confidential information might be leaked as a result of court action, this would be a disincentive to seeking legal redress. Such measures are available in UK jurisdictions, but not in many other Member States. The UK has therefore supported the inclusion of such measures in the Directive. They remain part of the compromise text.

An issue that arose during our consultations with other Government Departments was the possible impact of the Directive in times of national emergency, particularly where military supply lines are concerned. In these very rare circumstances, it might be necessary for the Government to acquire, use or disclose a trade secret. I am pleased to inform you that the UK has secured in the compromise proposal text that states that such acquisition, use or disclosure is lawful.

NATIONAL STAKEHOLDER RESPONSES

In your report, you asked me to report back on the response of national stakeholders to the draft Directive. Given the speed with which the Presidency has been driving this dossier, it has not been possible to conduct a formal consultation process. My officials have informally consulted key representative bodies to gain their views on this proposal. Broadly, industry is supportive as it sees the Directive as a means of delivering a minimum standard of protection and available remedies across the EU. Issues that have been raised in the discussions include the shortness of the limitation period, the impact on employer/employee relations, the absence of provisions to secure evidence, the importance of retaining measures to protect confidentiality in litigation, and more technical points relating to the drafting of the text.

IMPLEMENTING LEGISLATION

You also requested that I list the Articles in the Commission’s proposal that would require implementing legislation and explain what form such legislation would take. The table annexed [not printed] to this letter provides this information.

I hope that this letter answers any concerns that you may have on this proposal and that you are now able to clear this or agree to a scrutiny waiver.

30 April 2014

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Letter from the Viscount Younger of Leckie to the Chairman

I am writing to inform you that at the Competitiveness Council on 26 May the Government took the decision to override parliamentary scrutiny to support the general approach on a proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

I wrote to you on 30 April 2014 to provide you with an update of developments on this dossier and inform you of the Presidency’s intention to seek agreement to a general approach at the next meeting of the Competitiveness Council. Unfortunately, the timings of prorogation and recess meant that you were unable to consider my letter in time for this meeting. I therefore decided that on this occasion it would be necessary to override parliamentary scrutiny. I can assure you that this was not a decision that I took lightly.

This proposal is supported by UK businesses. For many of them, trade secrets are an important means of protecting their innovative ideas. The UK has worked closely with the Presidency and other Member States to improve the Commission’s text and I believe this strikes an appropriate balance between protecting the interests of businesses and safeguarding the rights of citizens. In my earlier letter, I explained how the proposal had developed to resolve the concerns that the UK had raised. We were still seeking a change to enable us to continue to apply our existing limitation periods of six years, and I am pleased to say that this change was made to the final Presidency text. I have attached [not printed] a copy of the text to this letter.

Particularly important to UK businesses are measures to protect confidentiality in court proceedings. The fear of disclosure can deter trade secret holders from seeking legal redress if they believe that their trade secrets have been taken unlawfully. I considered that UK support for the measures proposed would be critical to maintaining their inclusion in the Directive as we approach the next stage of negotiations with the European Parliament.

At the Competitiveness Council, a number of Member States attempted to re-open points of detail, including the confidentiality provisions. It was necessary for the UK to support the Presidency and a group of other Member States, to ensure that the Presidency text was agreed unchanged. I believe it was also important to take this step to maintain the Government’s relations with key business stakeholders. The outcome of the meeting was agreement to the text, and the Presidency was invited to begin negotiations with the European Parliament, which has yet to start work on the proposal.

I regret that prorogation and recess dates have made it impossible for you to consider my earlier letter. However, I believe that the final text represented a good balance, which will improve the protection of trade secrets within the EU, for the benefit of UK businesses, including sectors such as aerospace, the automotive industry and life sciences.

I hope that you will accept my explanation.

3 June 2014

RAILWAY ROLLING STOCK (11140/13)

Letter from the Chairman to the Baroness Kramer, Minister of State, Department for Transport

Thank you for your letter of 27 November which was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 4 December.

We are grateful for the update and have decided to clear this matter.

5 December 2013

REFORMING EUROJUST (12566/13)

Letter from James Brokenshire MP, Security Minister, Home Office, to the Chairman

I am writing to confirm the Government’s position on the abovementioned draft EU Regulations following the expiry of the three month opt in period.

Following my letter to you of 21 October, and debates held in both Houses, the Government has not opted in to the draft Regulation on Eurojust within the first three months. We will, however, conduct
a thorough review of the final agreed text to inform active consideration of opting in post adoption, in consultation with Parliament.

As you know, the Government values UK membership of Eurojust as currently established where Eurojust’s role is about providing support and co-ordination to investigations and prosecutions in cases of cross border crime. That is why we are seeking to rejoin those arrangements as part of the 2014 opt out decision.

The Government has substantial concerns about the new proposal, however, notably in relation to the proposed extension to the mandatory powers of the Eurojust National Members and in the interaction between Eurojust and the parallel proposal to establish a European Prosecutor’s Office (EPPO). Indeed, we do not believe the new Eurojust proposal is even necessary this time, not least given the ongoing peer evaluation. As you know, the Coalition Agreement confirms we will not participate in any EPPO.

I wish to stress that we remain committed to the current Eurojust arrangements and we will actively seek to protect those arrangements as part of these negotiations.

I appreciate that your Committee, whilst recognising the Government’s concerns, took the alternative view on the Eurojust opt in decision. I can, however, assure you that we will remain a full and active participant in both the Eurojust and EPPO negotiations. We will provide regular updates to your Committee as both negotiations play out.

I will also respond separately to your letter of 21 November.

2 December 2013

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 21 November.

RELATIONSHIP BETWEEN THE NEW EUROJUST REGULATION AND THE PROPOSAL TO ESTABLISH A EUROPEAN PUBLIC PROSECUTOR’S OFFICE (EPPO)

As you know, one of the principal reasons that the Government did not opt in to the new Eurojust Regulation within the first three months was over concerns about the inter-relationship foreseen by the Commission between the Eurojust proposal and the parallel proposal for an EPPO (in which, as you also know, we will not participate).

Your letter suggested that the subsidiarity yellow card issued by national Parliaments might have reduced the need to take a cautious approach in respect of the Eurojust pre-adoption opt in decision. Whilst I would share your view on the desired outcome following the yellow card, the latest development is that the Commission has undertaken and published its review following the yellow card and concluded that they intend to maintain the proposal. The implications for the negotiations of the Commission’s response are still to play out fully, but I believe it was right to take a cautious approach to this and not opt in at the start of negotiations on Eurojust in order to protect our position.

Moreover, I am sure both Scrutiny Committees will wish to take a view on the Commission’s response to the yellow card and the Government will provide an Explanatory Memorandum on the Commission’s review shortly. Our initial view is that the Commission have taken a legalistic approach to responding to the yellow card by mounting what appears to be a legal defence of the proposal. We are concerned that in doing so they have not actively demonstrated full consideration of the concerns raised by national Parliaments.

STATE OF PLAY ON NEGOTIATING PROCESS

As you will have seen from the Written Ministerial Statement at the time, the Commission’s decision to propose the establishment of an EPPO and reform Eurojust received support in principle from a large proportion of Member States at the October Justice and Home Affairs Council, but, on the EPPO, there was less agreement on issues of substance, including: scope; structure; competence; powers; jurisdiction and governance. At Working Group level there has been more time focussed on the EPPO file than the Eurojust file, with five and a half days so far spent on the former, and another one and a half days scheduled for later this month, but only three days so far spent on the latter.

On the Eurojust file, some other Member States have shared our view that the timing of the proposal is too soon given that the peer evaluation of the current legislation is still ongoing. The Commission’s
rationale for publishing the Eurojust proposal does appear to have more to do with the requirement in the Treaties for an EPPO to be established “from Eurojust”, and the need to make changes to Eurojust consequent on the Commission’s approach to the EPPO, rather than any clear need to reform Eurojust at this time. At the time of writing we do not yet know the timetable the incoming Greek Presidency intends to set, but we can expect the focus to be similarly weighted towards the EPPO file. The EPPO is also due to be discussed over lunch at Justice Day of the upcoming December Justice and Home Affairs Council and we will keep you informed of developments.

You also asked for a view on the impact of the upcoming change of Commission and the European Parliament elections. As with all negotiations these events will lead to some interruption to formal negotiations between the Institutions, but we would expect work to continue in the Council whilst the new European Parliament Committees and Commission are appointed. The effect on negotiations over the longer term, particularly in respect of the Eurojust file where the ordinary legislative procedure applies, will likely depend on the degree of change in the composition of the newly elected European Parliament.

DEVOLVED ADMINISTRATIONS

Thank you for informing me that the Committee have written to the Lord Advocate and the Northern Ireland Minister for Justice about their views on the opt in decision. I can re-iterate that the Justice Ministers of both Devolved Administrations were consulted as part of our decision-making process on the Eurojust opt in decision and conversations took place at official level. No objections to our proposed course of action were raised and indeed the concerns we have about the proposals were informed by those consultations.

POWERS OF NATIONAL MEMBERS AND EUROJUST’S CURRENT OPERATING FRAMEWORK

You also asked about the removal in the draft Eurojust Regulation of Member States’ discretion over whether or not to allocate certain powers to their National Members. There are early signs that we have some support from some other Member States on this point. Equally, however, other delegations have expressed the contrary view and said that they would prefer the mandatory powers of National Members to be as full as possible, including going further than the Commission proposal envisages and providing for powers to initiate investigations, as provided for in the Treaty. The exact numbers on either side of this debate are not yet clear. The issue remains under negotiation and we will work with like minded Member States to seek to achieve our objective of maintaining the current discretion (whilst not objecting to others granting their National Member further powers under national law where they wish to do so).

Under the current arrangements, the role of the UK’s National Desk at Eurojust is about providing support and co-ordination to cases involving competent authorities in any of the UK’s jurisdictions. For example, this can involve hosting co-ordination meetings or providing expertise to other Member States about criminal justice system arrangements within the UK in cross-border cases. Since the UK has exercised its discretion under Article 9(e) of the current Council Decision not to apply certain powers, such as the power to order investigative measures, to the UK National Member, conflicts with domestic arrangements and powers in the jurisdictions within the UK do not arise. That is precisely why we are seeking for this discretion to be maintained in any new legislation.

In terms of comparison with the powers of other National Members, there is a spectrum. Some Member States, such as Germany, have adopted a similar approach to the UK and have used the available discretion not to apply certain powers. Other Member States, such as Sweden, have granted their National Member further powers, such as to initiate investigations, using national law. In seeking to maintain the current discretion we would not oppose other Member States being able to grant further powers to their National Members under national law if they wished to do so. We are seeking flexibility for Member States to decide what is most suitable for their domestic systems. However, the Commission’s proposal seeks to establish some level of uniformity in this area by requiring all National Members to be given powers to order “investigative measures” and issue and execute Mutual Legal Assistance and mutual recognition requests.

PROTOCOL 36: COHERENCE

We do not expect any new Eurojust Regulation to be adopted before the Protocol 36 decision takes effect. But in any event, we do not accept that the UK’s position in relation to the new Eurojust Regulation is relevant to the question of ‘coherence’ as foreseen by Protocol 36. The term ‘coherence’, as used in Article 10(5) of Protocol 36, is a reference to the coherence of the package of
pre-Lisbon police and criminal justice measures that the UK seeks to re-join after the UK opt out. This is entirely separate to whether the UK opts in to (or chooses not to opt out of) a post-Lisbon JHA measure, such as the new Europol Regulation, which is dealt with under Protocols 19 or 21.

Our opt-in under Protocol 21, which applies in this case, makes provision for the UK to be ejected from the amended measure only if the application of that measure becomes inoperable in light of the new measure. There is no provision for the UK to be ejected from other related measures. So if the UK decided to not opt in to the new Eurojust Regulation post adoption, there would be no mechanism available to eject the UK from other measures such as the European Arrest Warrant and Joint Investigation Teams on the grounds of inoperability.

5 December 2013

Letter from the Chairman to James Brokenshire MP

Thank you for your letters dated 2 and 5 December respectively. They were both considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 18 December 2013.

We have decided to retain this proposed Regulation under scrutiny.

We note that one of the key messages that emerges from your answers to our questions is that the ongoing negotiation of this proposal has so far been overshadowed by the proposed Regulation introducing the European Public Prosecutor’s Office (EPPO) and that progress on this dossier in the Council has been slow. We also see that you expect this pattern to continue under the forthcoming Greek Presidency. We look forward to considering your updates on the progress of these negotiations once they begin in earnest.

Outside of the ongoing negotiation of this proposal there are a number of points that we wish to raise with you arising out of your letter.

The first concerns your response to our question about how Eurojust deals with the different criminal jurisdictions in the UK which only addresses the UK aspect of our question. Your reply focuses entirely on the internal UK perspective, and you point out that because the UK has invoked the discretion within the current legislation governing Eurojust not to apply certain powers to its national member “conflicts with domestic arrangements and powers in the jurisdictions within the UK do not arise” (emphasis added). Our question also sought to assess how the UK national member deals with the different UK’s jurisdictions when called on to provide “expertise to other Member States about criminal justice system arrangements within the UK in cross-border cases”? For example, but not limited to, the execution of a European Arrest Warrant, or a request for Mutual Legal Assistance.

The second issue regards the differing powers currently enjoyed by the individual national Members of Eurojust. You describe the range of powers enjoyed by the individual national members of Eurojust as a “spectrum”. You offer the examples of Germany which mimics the UK’s approach to this question and Sweden that goes beyond the legislation and confers additional powers on its national representative. You will recall that this Committee has acknowledged the validity of your concerns in this regard, but we feel unable to gauge the validity of the Commission’s alternative view that underlies their desire to seek uniformity in this area. Of course, you have been quite clear that you do not support this aspect of the new proposal, but are you aware of any problems for cross-border criminal investigations or operations caused by the lack of uniformity in the powers enjoyed by Eurojust’s national members?

We now turn to your reply to our question in relation to the ramifications of the Government’s decision not to opt in to this proposal and its potential impact on the coherence of the measures subject to the Protocol 36 decision.

We acknowledge that the substantive issue which underpinned our question may have been rendered moot by your description of the slow progress this proposal is making through the Council plus your expectation that it will not be adopted before the Protocol 36 Decision takes effect next year. However, we do not accept your view that the Government’s approach to the new Eurojust Regulation is not relevant to the question of coherence. The evidence taken during the Protocol 36 inquiry, which was cited in the Committee’s letter of 21 November, was to the contrary and clearly highlighted the central role Eurojust plays in relation to key Justice and Home Affairs (JHA) legislation. This includes, amongst others, the Framework Decision governing European Arrest Warrants. In addition, we are well aware that the question of coherence in the context of Protocol 36 decision is “entirely separate” to the opt-in question under the UK’s standard Title V opt-in arrangements.

Our final point concerns your comments in the final paragraph of your letter regarding the UK’s opt-in and the belief expressed at the beginning of the letter that, given the Commission’s reaction to the
yellow-card against the EPPO, the Government were right to be “cautious” in its approach to this proposed Regulation “in order to protect our position”.

In the final paragraph of your letter you highlight the fact that the UK’s opt-in Protocol makes provision for ejecting the UK from EU measures rendered inoperable by the adoption of new legislation. This is, of course, correct. However, it is precisely this eventuality that has concerned us since we first considered this matter in September. We argued, given the UK’s position as an anti-EPPO state wishing to remain in Eurojust that, on balance, the UK’s best interests lay in opting in; in particular, given our desire to see the UK’s continued membership of Eurojust. We also take this opportunity to point out that the issuing of a yellow-card against the EPPO by 14 national parliaments means that, as predicted in our opt-in report, the UK has not found itself to be alone in this position. We have repeatedly acknowledged the validity of the Government’s concerns regarding this proposal, but we continue to fear that should a text emerge from these negotiations that the UK feels unable to opt in to post-adoption, the UK will have to leave an EU agency that plays a central role in the field of JHA cooperation. We believe that the Government have not paid sufficient and equal attention to this alternative risk to the UK’s position.

We look forward to considering your response by 20 January.

18 December 2013

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

In November, the Justice, Institutions and Consumer Protection Sub-Committee which I chair, discussed the debate in the House on 4 November of its report urging the Government to opt in to the negotiations of the proposed Regulation reforming Eurojust.

We are, of course, very disappointed with the outcome of the debate, given the overwhelming support for the motion from the floor of the House.

The purpose of this letter is to explore with the Government the Minister’s response to the central argument in the report that the Government should opt in to the negotiations of the proposed Regulation reforming Eurojust at the outset. Whilst our report acknowledged the validity of the Government’s concerns with this proposal, we urged the Government to opt in to the negotiations because, in our view, it represented the most effective way for the UK to continue its important membership of Eurojust whilst securing a text that best served the UK’s interests.

In reply to the central argument in the report that the Government should opt in, Lord Taylor of Holbeach, Parliamentary Under-Secretary of State in the Home Office, said:

“I hope I can also allay some of the concerns expressed in the ... report that we might ‘miss out’ on these negotiations ... I assure noble Lords that where we do not opt in at the start of negotiations we will nevertheless be actively involved. Not only will we be present in the negotiating room at all levels, we will be able to intervene as and when we wish”.

At the heart of the Minister’s argument is the belief that opting out of proposed EU legislation at the outset of negotiations leaves the UK essentially in the same position as opting in. Indeed, this view was confirmed later in the debate when Lord Taylor said:

“We are not down the corridor to be occasionally brought in to be involved in these negotiations. We are at the table negotiating on behalf of our interests ...”

The Minister’s view suggests that the decision whether or not to opt in has only marginal effect on the UK’s position and influence during the proposal’s subsequent negotiation. In our experience, this is not the case. Furthermore, if as the Minister suggests, the decision has minimal impact on the UK’s position, we are inclined to wonder why the Government and Parliamentary Committees take any time to consider the opt-in question at all once a relevant legislative proposal has been published.

In light of the Minister’s view, can you give the Committee specific examples of those instances since the Lisbon Treaty came into effect that informed the Government’s stance?

There is, of course, also the wider European context to consider. We know from the coalition agreement that the Government consider all Justice and Home Affairs opt-in decisions on a case-by-case basis but our knowledge of how each decision is greeted by the other EU Member States is less clear. With this in mind, how do the other Member States react when the UK decides not to opt in? Would the other Member States react differently if we never opted in to proposals at the outset of their negotiation? Are there lessons to be learned from the UK’s experience of ECOFIN when it discusses matters concerning the Eurozone?
Finally, in relation to the wider EU perspective, there is also the knock-on-effect of the UK Government’s decision on the European Parliament. In this regard we are reminded of Baroness Ludford MEP’s evidence to our inquiry into the EU’s criminal justice policy, in which she said:

“It is true that UK officials seem to play an active role in discussions in the Council even when the UK has announced its intention to wait till the end of negotiations before deciding to opt in to a decision. But this situationarguably disables UK MEPs during the proceedings of the Parliament from arguing for provisions that might suit the UK” (emphasis added).

What is your view?

18 December 2013

Letter from David Lidington MP to the Chairman

Thank you for your letter of 18 December regarding the recent debate on the proposed Regulation reforming Eurojust and the Government’s Justice and Home Affairs opt-in policy.

The Home Office leads on policy regarding Eurojust and leads jointly with the Ministry of Justice on policy regarding the Justice and Home Affairs opt-in. I have therefore forwarded your letter to James Brokenshire MP, Security Minister, asking him to respond to your questions.

7 January 2014

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 18 December.

ROLE OF UK NATIONAL MEMBER AT EUROJUST

You asked for further information about how the UK National Member at Eurojust deals with the different jurisdictions in the UK when working with other Member States on cross-border cases. As you know, the UK has used the discretion available in Article 9(e) of the current Council Decision to not apply the powers potentially available in Articles 9(c) and (d) to our National Member. This means that the UK National Member has the "ordinary powers" available in Article 9(b) to "receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition". But they do not have the discretionary powers such as to "order investigative measures" or issue and execute mutual legal assistance and mutual recognition requests.

As such, the UK’s National Member role on an incoming European Arrest Warrant, for example, would be to facilitate its execution but not directly to execute it. Facilitation can take a number of forms. For example, if competing European Arrest Warrants from two or more Member States are received by authorities in Scotland, Northern Ireland or England and Wales, the UK National Member may assist those authorities by facilitating discussions between Member States as to which EAW should take precedence.

Another example would be that issues can be raised in extradition proceedings that may affect the ability of courts across the UK to execute European Arrest Warrants incoming from a particular Member State (e.g. arguments concerning the Member State’s prison conditions). In such cases the National Member can assist in coordinating multiple requests for the same evidence, which may originate from courts across the UK jurisdictions. She will organise and facilitate meetings between UK extradition prosecutors and the Member State authorities concerned, so that UK court processes can be explained, evidence requested, and case strategy agreed upon.

So far as Mutual Legal Assistance (MLA) is concerned, the UK National Member was selected for her experience in cross-border prosecutions and investigations and judicial co-operation across the UK’s jurisdictions. Often additional information is required by UK central authorities to enable MLA requests to be executed as completely as possible. In complex, sensitive or urgent cases (where measures such as search and seizure are requested) it can be difficult or undesirable to resolve issues by correspondence. The UK National Member is able to help facilitate speedy execution in these cases by, for example, explaining to counterparts in other Member States the UK’s MLA legislation and practice or why additional information is required by the responsible UK central authority.

The UK National Member works closely and collaboratively - and importantly on behalf of - law enforcement and prosecution authorities from across the UK, as well as the three UK central authorities for MLA. Under current arrangements UK authorities are able to call upon the expertise
of the UK National Member (and her team) in judicial co-operation and cross-border working to assist them in their cases. This approach enables the UK National Member to add the value of support and co-ordination to cross border cases without undermining the role of law enforcement or prosecutors or cutting across their expertise or otherwise creating conflict with arrangements in any of the UK’s jurisdictions were she to hold the additional mandatory powers envisaged by the Commission’s proposal. The UK’s Assistant National Member at Eurojust has also been appointed from the Crown Office and Procurator Fiscal Service to further support the links with the Scottish system.

You further asked whether we were aware of any problems for cross border cases caused by the lack of uniformity in the powers of National Members. We are not aware of any evidence that suggests this is the case. The absence of any Impact Assessment from the Commission for their Eurojust proposal is perhaps also informative in this regard.

**PROTOCOL 36: COHERENCE**

We share the same view about the legal separation of the decisions under Protocol 36 and Protocol 21. As you indicate in your letter, in terms of sequencing we do not expect the new Eurojust Regulation to be adopted before the Protocol 36 decision takes effect on 1 December 2014. Such a scenario is highly unlikely, not least given the European Parliament elections this year and the parallel negotiations on the European Public Prosecutor’s Office (EPPO). We therefore expect to rejoin the package of measures under the 2014 decision before any post adoption opt in decision on the Eurojust measure is made. We will make the post-adoption opt in decision in the national interest based on a thorough review of the final text and following further consultations with Parliament.

**PRE-ADOPTION OPT-IN DECISION**

You elaborated further on the Committee’s concerns around the risk of ejection from the current Eurojust arrangements if the new Eurojust text were to be adopted in a form that remained unacceptable.

Although 14 national Parliaments issued Reasoned Opinions against the EPPO, those views are not necessarily shared by the Governments in the relevant Member States. For example those Member States did not in the Council challenge the Commission response to the Reasoned Opinion which concluded that the proposal should be maintained. I therefore remain of the view that we took the right approach to the pre-adoption opt-in decision. Whilst recognising that the Committee takes a different view, I do not believe that the risk of ejection from the current arrangements over-rote the risks of being bound by an instrument that has the potential to substantially interfere with our domestic arrangements. Ultimately, we will need to decide, post-adoption, whether the final text is acceptable. As you know, we are not alone in this position since Ireland has not opted in at the start of negotiations either, and of course Denmark cannot participate in post-Lisbon measures.

We will update you as negotiations continue.

20 January 2014

**Letter from the Chairman to David Lidington MP**

Thank you for your letter dated 7 January. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 15 January. As Chairman of the House of Lords European Union Select Committee I was also in attendance.

As you know, Baroness Corston’s letter to you dated 18 December arose out of the events surrounding the debate on 4 November of the Committee’s report on the opt-in relating to the proposed Regulation reforming Eurojust. Our questions related to the wider impact of UK opt-in decisions on the Government’s negotiating position and status in the Council and not on the specific instance of the Eurojust Regulation. In light of the Foreign and Commonwealth Office’s overarching responsibility for EU related matters the members of the Justice, Institutions and Consumer Protection Sub-Committee took the view that you, as Minister for Europe, were best placed to address these important questions.

We are therefore disappointed by your decision to pass the letter to the Home Office and the Ministry of Justice. The UK’s opt-in raises issues that cover many Government departments and given that the Foreign and Commonwealth Office takes overall responsibility for the UK’s relationship with the EU including negotiations in the Council we continue to believe that you were the best placed Government Minister to answer the questions.
We look forward to considering your response by 4 February.

21 January 2014

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 18 December to the Minister for Europe. As your letter is principally concerned with the Justice and Home Affairs opt-in, it has been passed to me for a reply.

It is very difficult to draw clear conclusions about the effect of the UK’s initial opt-in decisions on subsequent EU negotiations. This is in part because it is not possible to analyse the counterfactual e.g. what would have happened if we had opted in rather than not. As well as this, many of the most significant measures on which we have taken this approach are still under negotiation. However, whilst I am not able at this stage to provide you with many specific examples, I can tell you that anecdotal evidence suggests that as long as the UK negotiation is pursued energetically and skillfully, it is in many cases possible to achieve UK negotiating objectives without having opted in at the outset. We saw that we were able to achieve a good outcome on the Human Trafficking Directive despite having not opted in at the outset.

As Lord Taylor pointed out in the debate on 4 November, the UK is able to take a seat at the negotiating table and our voice is heard - we are able to engage with the Commission and other Member States to make our arguments. And, whilst we do not have a vote, we have found that we are listened to, not least because, though in many cases other Member States may have preferred to have seen us opt in at the outset, they often wish to see us taking part in the final instrument, and are therefore often willing to assist us in achieving the kinds of textual changes that might make this more likely. However, this is not to say there is never any point in the UK ever opting in at the outset. It is clearly helpful to be able to use our voting power to push through proposals we support. What we are saying is, whilst the negotiation might sometimes be marginally smoother if we opt in at the outset, it is not the case that we will automatically lose out were we not to opt in.

With this in mind, I can tell you that in many cases individual opt-in decisions come down to an assessment of whether any marginal loss of negotiating capability associated with the loss of our voting power is outweighed by the risk of the UK ultimately being bound by particular elements of a proposal that are contrary to our policy interests. A judgement is taken not only on the risks a particular provision poses but also on its negotiability - always bearing in mind that if the UK opts in at the outset it cannot later reverse this decision. In some cases we will take the view that particular provisions, if incorporated in a final instrument, would be so damaging to our policy interests that we wish to avoid committing ourselves to the measure until the outcome of negotiations is known and as such the balance will weigh in favour of adopting a cautious approach of not opting in at the outset - as we have seen with Eurojust.

You ask how other Member States react to our opt-in decisions. It is difficult to generalise but in many cases there is a willingness to help us achieve the kind of changes we would need to consider participation post-adoption. If the UK were only to opt in post-adoption, I imagine that this would create less friction in circumstances where our initial non-opt in is currently unexpected or unwelcome. However, as I have noted, in some cases I think it is in the UK’s interests to opt in at the outset, so I would not at this stage wish to see the Government commit to such a course.

You also ask what the impact on European Parliament negotiations is where we do not opt in at the outset. I appreciate that in such cases it is less likely that UK MEPs will be given Rapporteurships, but they are still able to sit on the prominent Committees and make their views known, and, of course, vote on the proposal. Such considerations are taken into account when taking opt-in decisions.

Finally, I can assure you that we value greatly the important role Parliament plays in scrutinising such decisions. I’m sure you will accept that some of these judgements are quite finely balanced and inevitably sometimes the Government and the Parliamentary Committees will come down on different sides of the argument - as was the case with the new Eurojust proposal. Nevertheless, we appreciate the work you do in ensuring these often complex issues are properly analysed and that the Government is held to account.

22 January 2014

Letter from David Lidington MP to the Chairman

Thank you for your letter of 21 January regarding the proposed Regulation for reforming Eurojust and the wider issue of the impact of our Justice and Home Affairs opt-in policy.
On considering the issues raised in Baroness Corston’s letter, I thought it more appropriate for a Home Office or Ministry of Justice Minister to respond as they lead jointly on the UK’s JHA opt-in policy, which is often engaged across a range of different dossiers some of which fall to the responsibility of other Government departments including my own.

James Brokenshire, Security Minister, has replied (a copy of that response is included). His response gives an overview of the impact of the UK’s JHA opt-in decisions on subsequent EU negotiations, as far as an assessment is possible. As Mr Brokenshire makes clear, opt-in decisions are taken on a case-by-case basis and with consideration to the risks of the UK being bound by a measure that runs contrary to UK policy as well as the negotiability of securing a good outcome.

I hope that the assessment provided by Mr Brokenshire provides answers to the questions posed by both Baroness Corston and yourself.

3 February 2014

Letter from the Chairman to James Brokenshire MP

Thank you for your letter dated 20 January 2014. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 5 February.

We have decided to retain this proposed Regulation under scrutiny. We are grateful to you for your description of the UK national member’s role and the detailed explanation as to how the UK member assists Eurojust when dealing with the UK’s different criminal jurisdictions. We note your reply to our question regarding the lack of uniformity of national members’ powers and look forward to revisiting this issue once the Commission completes its review of the current legislation governing the agency.

We look forward to receiving updates in due course on these negotiations.

6 February 2014

Letter from the Chairman to David Lidington MP

Thank you for your letter dated 3 February. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 5 February. We note your stated reasons for passing our questions to the Home Office and the Ministry of Justice, but remain of the view that the Foreign and Commonwealth Office, with its overarching responsibility for EU related matters, was best placed to address our questions.

In light of your letter we have written to James Brokenshire MP, the Security Minister, to thank him for his detailed analysis of the many factors that guide the Government’s assessment of individual opt-in decisions. We have also raised further questions with him regarding the impact of UK opt-in decisions on the subsequent negotiations.

We do not expect an answer to this letter.

6 February 2014

Letter from the Chairman to James Brokenshire MP

Thank you for your letter dated 22 January 2014. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 5 February.

We are grateful for your detailed analysis of the many factors that guide the Government’s assessment of individual opt-in decisions. As you know, our letter dated 18 December was addressed to David Lidington MP in his capacity as Minister for Europe and we wrote to him in December expressing our disappointment with his decision to pass our questions to the Home Office and the Ministry of Justice. We also considered his reply at the meeting of 5 February. We remain of the view that the Foreign and Commonwealth Office with its overarching responsibility for EU related matters is best placed to address our questions. However, in light of the Minister for Europe’s letter we shall continue our correspondence with you.

As you know, our original letter dated 18 December sought to explore the impact that UK opt in decisions have on the UK’s influence and position in the subsequent negotiations in the Council. We asked for specific examples that informed the views expressed by Lord Taylor of Holbeach during the debate of the Committee’s report addressing the proposed Eurojust Regulation.

We note that your letter states that you are unable to supply the Committee with “many specific examples”, but you suggest that anecdotal evidence supports your view that it is possible to achieve
the UK’s objectives when the subsequent negotiations are pursed “energetically and skilfully”. You cite the negotiation of the Human Trafficking Directive in support of the UK’s ability to achieve its negotiation aims, but we do not regard this as a good example since one of the Government’s stated reasons for not opting into that proposal at the outset was that the UK already conformed with its provisions as brought forward by the Commission.

In our view, the more interesting examples arise in the context of those more difficult occasions when the UK is broadly supportive of the wider aims of prospective legislation as brought forward by the Commission, but aspects of the detail are incompatible with the prevailing UK policy. This appears to be the case with the Eurojust proposal and the Directive on access to a lawyer. Regarding the Directive on access to a lawyer, which was agreed in October, we are given to understand that the Ministry of Justice is currently undertaking a post-adoption review. In our view, it offers a clear opportunity to measure the success of your stated approach to the opt-in. How is the Ministry of Justice’s review of the proposal progressing? Did the UK successfully negotiate a text that satisfactorily addressed the Government’s key concerns? Did the other Member States accommodate the UK’s position? Will the Government be opting in?

We look forward to receiving your reply by 21 February.

6 February 2014

REMUNERATION OF OFFICIALS (15820/13, 15885/13, 15890/13)

Letter from the Chairman to Nicky Morgan MP, Economic Secretary to the Treasury, HM Treasury

Thank you for your Explanatory Memorandum of 21 November 2013. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 11 December. We decided to clear these proposals from scrutiny.

In doing so, we note that you indicated that subsidiarity does not apply because the EU Budget is a matter of exclusive Community competence. As we indicated in our letter of 22 May 2013 to the then Financial Secretary, we remain unconvinced that these are matters of exclusive EU competence. We do not, however, consider that they give rise to any subsidiarity concerns.

12 December 2013

RIGHT TO PROVISIONAL LEGAL AID AND EU LAW (17635/13)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

The Justice, Institutions and Consumer Protection Sub-Committee met yesterday, 15 January, to consider the above six documents, together with your Explanatory Memorandums (EMs) dated 9 January on the five documents containing proposals for EU measures.

I regret that the Sub-Committee was unable to make progress in its scrutiny of these documents because of inadequacies in the EMs. In view of the very tight timetable by which the Committee is bound, in order to consider the questions of compliance of the Commission’s proposals with the principle of subsidiarity and whether to recommend that the UK opt in to any of the proposals, I have asked my officials to contact yours seeking the appearance of a Minister from your Department at the next meeting of the Sub-Committee, on 22 January, to give evidence to assist the Sub-Committee’s deliberations.

Among the matters which the Sub-Committee will wish to discuss are the following:

— The EMs which you submitted did not comply with the timetable of ten working days for submission of EMs following deposit of the documents;
— Although the Communication forms part of this package of measures and present a summary of the proposals, no signed EM covering it has been submitted at the time of writing;
— None of the EMs covering the proposals gave information as to the Government’s approach to the proposals, or of the Government’s view on
the compliance or otherwise of the proposals with the principle of subsidiarity; and

None of the EMs set out any view on the factors which you would take into account in deciding whether or not to opt in to the proposals.

We regard these failings as unacceptable and tending to show a disregard for the process of Parliamentary scrutiny. Notwithstanding the intervention of the Christmas period, it should have been clear that the very tight deadlines faced by the Committee, to consider the issues of subsidiarity and the opt-in, required urgent action to provide full EMs.

Should it not be possible for a Minister or senior official to attend the Sub-Committee’s meeting on 22 January, we shall need a full account of the Government’s views on whether the proposals are consistent with subsidiarity and your approach to the opt-in question in time for that meeting – i.e. by the end of Tuesday 21 January at the latest.

I am sorry to write in these terms but I wish to convey the very strong feelings expressed by all members of the Sub-Committee yesterday at the meeting, which I attended.

16 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 15 January 2014 following up the Explanatory Memoranda (EMs) we submitted earlier about the recent proposals (set out above) from the European Commission (“the Commission”).

Let me start by apologising to the Committee for late submission and an explanation for this has been provided below. I also note your concern that the EMs were in content below the standards we would hope to meet in discharging our responsibilities for Parliamentary scrutiny. I hope that the information and the explanations I provide below goes some way towards providing the information you need.

You asked for an explanation of the delay in providing these EMs. I understand that the combination of the complexity of the exercise, occasioned by the fact that the EMs covered a number of linked proposals, coupled with the need to consult other Departments and the Devolved Administrations, and the proximity of the Christmas holiday period, led to the delay.

You asked about an Explanatory Memorandum on the Communication from the Commission which accompanied its individual proposals. Notwithstanding that this was essentially a covering note to the proposals themselves, one has now been prepared and is in the process of being deposited.

You asked about the factors which will be considered when the Government considers whether or not to opt in to these proposals. The broad terms on which they will be considered are established within the Coalition agreement. The key criteria applicable to these proposals will be the potential impact on protecting civil liberties and the integrity of the criminal justice system. We will also be considering the implications of extending ECJ jurisdiction to these areas, the associated costs and the practical implications. All of these topics require financial and policy analysis which is currently under way.

We will also look carefully at the evidence that measures of this kind are necessary and proportionate. In those respects, our initial thinking is as follows.

On the proposal for a Directive on the Presumption of Innocence, the Commission contends that it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed, and a consequent reluctance among EU judicial authorities to co-operate with each other. It suggests, therefore, that EU level action is necessary to address these variations and implies that only the EU can act.

However, as noted in the relevant EM, the Commission also observes in its Impact Assessment, which accompanies the proposal, that there is "limited statistical quantifiable evidence of insufficient mutual trust" which may raise a question about the necessity for the proposal. We are not aware of any such evidence. All Member States are already party to the ECHR, which requires that those suspected of a criminal offence should be presumed innocent until proven guilty (Art 6(2)). By the Commission’s own account, evidence of reluctance to co-operate, occasioned by differing views taken of the presumption of innocence, is difficult to come by. Accordingly, we will want to probe carefully the necessity for the European Union to act in order to ensure EU judicial authorities co-operate with each other.
On the proposed Directive on legal aid, we are similarly not aware of any evidence to suggest that the right to legal aid enshrined in the ECHR is not being observed in any Member State. Accordingly, we will interrogate further during the forthcoming technical level negotiations whether there is a robust case for a minimum standards-based regime in this respect.

On the proposed Directive on child defendants, the Commission asserts in its accompanying material that there is a need for EU-wide action to protect the rights of children involved in criminal proceedings. Whilst the protection of children is clearly a high priority for UK and other Member States, we are not aware of any evidence that current arrangements are an obstacle to mutual trust and recognition. The very detailed provisions of the proposal also raise questions about its proportionality. Again, we would plan to explore this further as negotiations progress.

We will, naturally, update the Committee as our thinking develops.

You have also asked, in particular, for an overall analysis of the impact on the UK legal system in addition to the detailed analysis (to be weighted against the other opt-in factors we have identified). Our initial view of the position is as follows:

— In relation to the proposal for a Directive on the presumption of innocence, the Government considers that the proposal reflects principles which are already part of the law of the UK (the presumption of innocence, burden and standard of proof, rights to remain silent and against self-incrimination and restrictions on trials in absentia). However, there is detail set out concerning those principles which would require changes to UK law. Some of these changes are of significance. In particular, as the EM identifies, the UK law permits in some circumstances inferences to be drawn from non-cooperation with a criminal investigation.

— On the proposed Directive on Child Defendants, whilst I consider that the UK has appropriate safeguards for child defendants and meets the general aims of the directive, the directive (as detailed in the EM) in part goes beyond the current law and practice. To that extent, clearly the proposal would involve a review of the Police and Criminal Evidence Act 1984 (PACE, in relation to England and Wales) and other legislative provisions and practice.

— In relation to the proposal for a Directive on provisional legal aid, as set out in the EM, our decision as to opt-in will be guided by the factors set out above, with a particular focus in this context on the likely financial implications of doing so. Our initial analysis is that current UK practice already delivers the main provisions required by the draft Directive. However, there are areas in which change would be required, with associated financial implications. Any additional financial burdens will need to be scrutinised closely in light of the Government's continuing efforts to bear down on the cost of legal aid.

You asked about subsidiarity, and in particular asked me to expand on the analysis of this provided in the EMs.

The Government notes that the Commission’s underlying motivation in bringing forward these proposals as part of the Roadmap on criminal procedural rights is that minimum standards throughout the EU are required in order to support mutual trust – particularly having in mind that courts extraditing suspects under the European Arrest Warrant will benefit from the assurance that the defendant will receive a fair trial anywhere in Europe. That aim, if we were to accept it, clearly cannot be achieved by Member States acting alone and must be done at EU level. To that extent they would comply with the principle of subsidiarity.

As I hope I have made clear, that is not to say that the Government accepts that these measures are necessary or proportionate, but those considerations are distinct from the principle of subsidiarity.

We hope that the above information will satisfy all of the points the committee has raised with us, meaning that a ministerial appearance at the next meeting on 22 January will not be necessary. Please let us know your views.

I hope this letter goes some way towards answering the concerns set out by the Committee.

20 January 2014
Letter from the Chairman to Chris Grayling MP

Thank you for your Explanatory Memorandum of 9 January 2014 and your letter of 20 January. They were considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meetings of 15 and 22 of January.

Based on the information available, it is difficult for the Committee to assess whether the draft Directive would have a significant impact on the legal aid scheme in the UK and therefore whether the UK should opt in. We note your initial assessment that it would not. We would like, however, more information on whether the recently-introduced changes to legal aid funding and the proposed cuts to the legal aid budget are relevant to the draft Directive.

We would also be grateful for further information on why Article 5(2) of the draft Directive appears incompatible with the UK legal aid system. In the UK at present, requested persons have the right to legal aid and benefit from the services of duty solicitors as appropriate. Does the UK provide legal aid to individuals when issuing an EAW?

On the information laid before this Committee, it is our view that this proposal does not merit a reasoned opinion challenging it on subsidiarity grounds.

We are disappointed to see how little importance the Government appear to give the Commission's Recommendation. The EM merely describes its contents and states that it is not legally binding. We would like your assessment on whether the UK already complies with the provisions in the Recommendation or whether the Government has any intention of complying with them. Given that the draft Directive requires Member States to ensure that legal aid is available to requested persons on the Member State issuing an EAW, it seems reasonable to expect Member States to use comparable criteria to assess whether an individual qualifies for legal aid. The alternative may lead to an individual qualifying for legal aid in the Member State executing an EAW but not in the Member State issuing the Warrant.

We retain both documents under scrutiny and look forward to your reply by 6 February.

23 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 23 January 2014 following the Committee’s consideration of the draft Directive on legal aid.

I can confirm that neither the recent changes to legal aid nor the proposed changes to criminal legal aid are directly relevant to the legal aid Directive as currently drafted. The UK can be rightly proud of its tradition of ensuring an individual’s right to a fair trial by, amongst other things, the provision of legal advice to those who cannot afford it. The efforts currently underway to ensure a more efficient and cost effective legal aid scheme will not diminish such a right.

In respect of your question on Article 5(2) of the draft Directive, it would appear from Article 10 of Directive 2013/48/EU, on the right of access to a lawyer in criminal proceedings and in EAW proceedings, that the expected role of the lawyer in the issuing state is a secondary one. It is to provide information and advice to the lawyer in the executing state where, of course, the relevant EAW proceedings will be taking place. The UK is fully compliant with Article 5(1). Of course, you are right that a person in who is the subject of an EAW from another Member State has access to legal aid in the UK. There is, however, currently no provision in domestic law for legal aid to be granted to any person in another EU Member State who is the subject of an EAW issued by the UK and amendments to the relevant secondary legislation would be needed to bring this into force.

As our Explanatory Memorandum mentioned, and you acknowledge, the Recommendation that the Commission published alongside the proposed Directive is not legally binding. The Government has noted its content and our analysis suggests that we are already largely compliant, however we do not intend to pursue implementation further at this stage. The legal aid regime of individual Member States is a matter for individual Member States to determine and some differences in approach will simply reflect the fact that the legal systems themselves are different and help and support is offered in different ways. Even if the UK were to move to adopt the terms of the Recommendation, since it is non-binding, there would be no reciprocity until and unless other Member States did likewise so the situation you mention in your letter would not be resolved by UK adopting the Recommendation.

I hope that this has answered your outstanding questions and I note that you have retained both this documents under scrutiny.

6 February 2014
Letter from the Chairman to Chris Grayling MP

Thank you for your letter dated 6 February. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 26 February 2014.

We note your confirmation that the recent changes to the legal aid scheme are not directly relevant to the proposed Directive as currently drafted. We also note what you say about the UK not being compliant with Article 5(2) of the Directive and that changes would be necessary to domestic legislation to bring it into force.

We understand that you are currently estimating the possible financial costs for the UK to be compliant with this Article. We should be grateful to receive a copy of this estimate when it is available.

The proposed Directive is closely linked with Directive 2013/48/EU on the right to access to a lawyer, to which the UK has not opted in at present. It may be the case, therefore, that opting in to the proposed Directive may lead to the UK having to comply with certain aspects of that Directive, even if we are not participating in it. Based on this, it seems sensible to await the outcome of negotiations and consider whether to opt in post adoption after the final text has been agreed and can be assessed together with the Directive on access to a lawyer.

We have decided to keep both proposals under scrutiny and would welcome an update following initial discussions of the proposals in the Council working group. We would also be grateful for any information you can provide on the position that other Member States are adopting on this proposal.

We look forward to hearing from you in due course.

27 February 2014

STATUTE FOR A EUROPEAN FOUNDATION (FE) (6580/12)

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

I promised to update you and the Committee on progress in negotiations on the European Commission’s proposed Statute for a European Foundation (“FE”). As a measure under Article 352 TFEU, the FE proposal requires the unanimous agreement of Council, and would require an Act of Parliament under section 8 European Union Act 2011 before we could accept it.

The tax elements of the FE proposal were widely considered to go beyond the existing non-discrimination principles set out in EU law with which the UK Government complies. The inclusion of tax elements meant that negotiations on the FE had stalled, with little prospect of further progress whilst tax remained on the table. Last month, the Permanent Representatives Committee agreed almost unanimously to remove all references to tax from the FE proposal.

The inclusion of tax was one of our main objections to the FE proposal, and we welcome the removal of all of the tax provisions. However, we continue to doubt whether the proposed Regulation is necessary or proportionate. Tax law barriers or restrictions for foreign foundations and their donors were cited as one of the justifications for action at a European which the FE proposal will not now address. Other European legal structures have failed to live up to their promise. The European Cooperative Society (SCE) has been available since 2006 and yet fewer than 50 have been set up.

We remain concerned that the additional costs involved in regulating FEs are difficult to justify at a time when UK regulators are facing reduced resources. The National Audit Office, in its recent report on the regulatory effectiveness of the Charity Commission for England and Wales\(^2\) recommended that the Cabinet Office help the Commission focus on its core regulatory functions by removing or reducing those activities that add little regulatory value.

9 January 2014

Letter from the Chairman to Nick Hurd MP

Thank you for your letter of 9 January. This was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 22 January.

\(^2\) National Audit Office, “The regulatory effectiveness of the Charity Commission”, HC 813 Session 2013-14, 4 December 2013
We are grateful for your account of the state of play in the negotiations on this proposal and welcome the decision to remove the tax provisions. We keep the proposal under scrutiny and look forward to a further update in due course. Subject to that, we do not expect a reply to this letter.

22 January 2014

STRENGTHENING THE RULE OF LAW IN EU MEMBER STATES (7632/14)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your Explanatory Memorandum dated 31 March 2014. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 13 May.

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

The subject matter of the Communication deals with profound constitutional and legal questions that go to the heart of each individual Member State’s political and legal system. In support of the Framework the Commission argues that risks to the operation of the principle of the rule of law in the Member States can pose a threat to the mutual trust between the Member States’ legal systems that forms the foundation to most EU cooperation. Specific examples cited include the operation of the Brussels I Regulation on the recognition and enforcement of judgments in civil matters and the operation of the European Arrest Warrant. In addition the Communication quotes President Barroso’s argument that some form of mechanism is needed for policing the Member States adherence to the principles enshrined in Article 2 TEU that functions below the “nuclear option” of Article 7 TEU.

In your Explanatory Memorandum you are clear that you remain unconvinced of the need for this Framework arguing instead that existing systems are in place to deal with such matters and that the Member State should retain the principal responsibility for securing domestic adherence to the rule of law.

Whilst we can see merit in President Barroso’s argument that some form of mechanism for policing the Member States adherence to the principles enshrined in Article 2 TEU that functions below the “nuclear option” of Article 7 TEU is needed we do not welcome this Commission Communication nor see it as the correct solution. We know that challenges to the rule of law exist and have existed, but we would question the Communication’s content and the basis under which it has been brought forward.

Taking the latter issue first; as we have already stated, this Communication addresses profound constitutional and legal questions which have an impact on EU cooperation but also go to the core of each individual Member State’s legal system. The current measures that are designed to regulate Member State behaviour in this field are Treaty based (in particular, Article 7 TEU which polices Article 2; and Articles 258 and 259 TFEU which deals with infringement proceedings). In our view, this basis merely underlines the significance of these matters. They have been subject to discussion by the Member States as part of the Treaty negotiation process and as such, any additional mechanism designed to address these matters should involve the Member States in its creation.

In contrast, this Commission Communication is a non-legislative document that has been produced by the Commission without recourse to the EU’s legislative institutions or procedures. We would expect at the very least that the creation of a mechanism designed to police the Member States behaviour in this regard which operates below Article 7 would pass through the EU’s legislative procedures and institutions. It would therefore be brought forward as a legal act of the Union as defined by the Treaties. This would have the advantage of involving the Member States in its discussion and creation. This Communication, by its very nature, does none of these things.

Our concerns with the content of the Framework flow from our objection to the process by which it has been brought forward; namely, the lack of Member State involvement in the process. In this context we share your concern expressed in paragraph 20 of your Explanatory Memorandum about the “purely Commission-led nature of the framework” and endorse your view that recommendations in this field would carry greater weight if endorsed by the Member States.

Aside from our concerns expressed above we have a number of questions for the Government which are left unanswered by your Explanatory Memorandum. The Communication and your Explanatory Memorandum make reference to a number of events that acted as a catalyst for this Communication including a call by the Justice and Home Affairs (JHA) Council in June 2013 which called on the
Commission to take forward a debate on a “collaborative and systemic method to tackle rule of law issues”. Did the UK support the JHA Council’s call and did this debate occur?

We have noted your statements that you are unconvinced by the need for a new EU rule of law framework and that existing measures are in place that cover EU common rules. How do you respond to the following two statements: (i) that challenges to the operation of the rule of law can pose a threat to the mutual trust that forms the foundation of so much EU cooperation. And, (ii) President Barroso’s view that a method to police these issues operating below the “nuclear option” of Article 7 is needed. If you see merit in either President Barroso’s argument or the JHA Council’s call, what alternative system would the Government advocate to achieve these aims?

We look forward to considering your response by 1 June 2014.

13 May 2014

Letter from Shailesh Vara MP, Parliamentary Under Secretary of State, Ministry of Justice, to the Chairman

Thank you for your letter of 13 May. I share many of the concerns you have expressed. The UK has worked hard to influence the Commission and other Member States to address these.

The Government remains of the view that the appropriate way to address concerns over rule of law is through dialogue among Member States. We remain committed to ensuring that the clear roles set out in the Treaties for the Council and the European Council should not be undermined by any new framework.

The Committee rightly observes that the Commission’s communication was not subject to recourse to the EU’s legislative institutions. However, the Government’s view is that a non-legislative statement on the role of the Commission in these circumstances is to be preferred to any proposal for binding legislation.

A non-binding communication affords greater flexibility for Member States to respond to a potential systemic threat to the rule of law appropriately, and UK officials have worked hard to avoid legislative proposals which may create unnecessary obligations on Member States and would give considerable greater cause for concern. Those efforts have met with some success, notwithstanding the widespread support among other Member States for action in the area of rule of law.

We are clear that this communication cannot displace the role of the Council under paragraph 1 of Article 7 of the Treaty on European Union (TEU). That provision makes clear that, before making any determination that there is a clear risk of a serious breach of one of the values set out in Article 2 of the TEU, the Council – not the Commission – must hear the Member State in question and may address recommendations to it.

You raised various specific questions in your letter.

First, the discussion at the JHA Council in June 2013. The UK position, advanced at the meeting, was that rule of law work at EU level falling below Article 7 should operate on the basis of an informal exchange of views, and that the Commission did not have power in relation to Member States’ constitutions. The Commission subsequently raised the question at a Commission-sponsored conference in Brussels under the title of Assises de la Justice in November last year, although I am advised that the conference reached no specific conclusions on the matter.

Secondly, you seek my comments on two statements. As to the first, I naturally accept that challenges to the rule of law can pose a threat to mutual trust. It does not follow, however, that there is a need for a Commission-led mechanism to address any such challenges.

As to the second – President Barroso’s view that a method to police these issues operating below the “nuclear option” of Article 7 is required – our view is that adequate mechanisms already exist in the Council of Europe and the UN, in addition to Article 7. Beyond that, and in answer to your question as to what alternative system the Government might advocate, I state again that the Government’s view is that these are primarily matters for the Member States and the correct method to address any such issues within the EU is through dialogue among them. We will continue to work with others to ensure that any EU framework on the rule of law neither impinges on the rights afforded in the Treaties to Member States, nor extends the legal competence of the EU.

29 May 2014
STRATEGY ON EUROPEAN E-JUSTICE 2014-2018 (UNNUMBERED)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter dated 19 December 2013. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee at its meeting of 22 January 2014.

We note that the Strategy’s scope and its funding procedures have both remained as originally proposed and we welcome the progress that has been made under the Strategy since the Commission Communication was brought forward. We are grateful to you for this update and look forward to being kept informed of any future developments in this field. We do not expect a response to this letter.

22 January 2014

STRENGTHENING OF CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS

(17621/13)

Letter from the Chairman to Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

The Justice, Institutions and Consumer Protection Sub-Committee met yesterday, 15 January, to consider the above six documents, together with your Explanatory Memorandums (EMs) dated 9 January on the five documents containing proposals for EU measures.

I regret that the Sub-Committee was unable to make progress in its scrutiny of these documents because of inadequacies in the EMs. In view of the very tight timetable by which the Committee is bound, in order to consider the questions of compliance of the Commission’s proposals with the principle of subsidiarity and whether to recommend that the UK opt in to any of the proposals, I have asked my officials to contact yours seeking the appearance of a Minister from your Department at the next meeting of the Sub-Committee, on 22 January, to give evidence to assist the Sub-Committee’s deliberations.

Among the matters which the Sub-Committee will wish to discuss are the following:

— The EMs which you submitted did not comply with the timetable of ten working days for submission of EMs following deposit of the documents;

— Although the Communication forms part of this package of measures and present a summary of the proposals, no signed EM covering it has been submitted at the time of writing;

— None of the EMs covering the proposals gave information as to the Government’s approach to the proposals, or of the Government’s view on the compliance or otherwise of the proposals with the principle of subsidiarity; and

— None of the EMs set out any view on the factors which you would take into account in deciding whether or not to opt in to the proposals.

We regard these failings as unacceptable and tending to show a disregard for the process of Parliamentary scrutiny. Notwithstanding the intervention of the Christmas period, it should have been clear that the very tight deadlines faced by the Committee, to consider the issues of subsidiarity and the opt-in, required urgent action to provide full EMs.

Should it not be possible for a Minister or senior official to attend the Sub-Committee’s meeting on 22 January, we shall need a full account of the Government’s views on whether the proposals are consistent with subsidiarity and your approach to the opt-in question in time for that meeting — ie. by the end of Tuesday 21 January at the latest.

I am sorry to write in these terms but I wish to convey the very strong feelings expressed by all members of the Sub-Committee yesterday at the meeting, which I attended.

16 January 2014
Letter from Chris Grayling MP to the Chairman

You asked for an explanation of the delay in providing these EMs. I understand that the combination of the complexity of the exercise, occasioned by the fact that the EMs covered a number of linked proposals, coupled with the need to consult other Departments and the Devolved Administrations, and the proximity of the Christmas holiday period, led to the delay.

You asked about an Explanatory Memorandum on the Communication from the Commission which accompanied its individual proposals. Notwithstanding that this was essentially a covering note to the proposals themselves, one has now been prepared and is in the process of being deposited.

You asked about the factors which will be considered when the Government considers whether or not to opt in to these proposals. The broad terms on which they will be considered are established within the Coalition agreement. The key criteria applicable to these proposals will be the potential impact on protecting civil liberties and the integrity of the criminal justice system. We will also be considering the implications of extending ECJ jurisdiction to these areas, the associated costs and the practical implications. All of these topics require financial and policy analysis which is currently under way.

We will also look carefully at the evidence that measures of this kind are necessary and proportionate. In those respects, our initial thinking is as follows.

On the proposal for a Directive on the Presumption of Innocence, the Commission contends that it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed, and a consequent reluctance among EU judicial authorities to co-operate with each other. It suggests, therefore, that EU level action is necessary to address these variations and implies that only the EU can act.

However, as noted in the relevant EM, the Commission also observes in its Impact Assessment, which accompanies the proposal, that there is "limited statistical quantifiable evidence of insufficient mutual trust" which may raise a question about the necessity for the proposal. We are not aware of any such evidence. All Member States are already party to the ECHR, which requires that those suspected of a criminal offence should be presumed innocent until proven guilty (Art 6(2)). By the Commission’s own account, evidence of reluctance to co-operate, occasioned by differing views taken of the presumption of innocence, is difficult to come by. Accordingly, we will want to probe carefully the necessity for the European Union to act in order to ensure EU judicial authorities co-operate with each other.

On the proposed Directive on legal aid, we are similarly not aware of any evidence to suggest that the right to legal aid enshrined in the ECHR is not being observed in any Member State. Accordingly, we will interrogate further during the forthcoming technical level negotiations whether there is a robust case for a minimum standards-based regime in this respect.

On the proposed Directive on child defendants, the Commission asserts in its accompanying material that there is a need for EU-wide action to protect the rights of children involved in criminal proceedings. Whilst the protection of children is clearly a high priority for UK and other Member States, we are not aware of any evidence that current arrangements are an obstacle to mutual trust and recognition. The very detailed provisions of the proposal also raise questions about its proportionality. Again, we would plan to explore this further as negotiations progress.

We will, naturally, update the Committee as our thinking develops.

You have also asked, in particular, for an overall analysis of the impact on the UK legal system in addition to the detailed analysis (to be weighted against the other opt-in factors we have identified). Our initial view of the position is as follows:

— In relation to the proposal for a Directive on the presumption of innocence, the Government considers that the proposal reflects principles which are already part of the law of the UK (the presumption of innocence, burden and standard of proof, rights to remain silent and against self-incrimination and restrictions on trials in absentia). However, there is detail set out concerning those principles which would require changes to UK law. Some of these changes are of significance. In particular, as the EM identifies, the UK law permits in some circumstances inferences to be drawn from non-cooperation with a criminal investigation.

— On the proposed Directive on Child Defendants, whilst I consider that the UK has appropriate safeguards for child defendants and meets the general aims of the directive, the directive (as detailed in the EM) in part goes
You asked about subsidiarity, and in particular asked me to expand on the analysis of this provided in the EMs.

The Government notes that the Commission’s underlying motivation in bringing forward these proposals as part of the Roadmap on criminal procedural rights is that minimum standards throughout the EU are required in order to support mutual trust – particularly having in mind that courts extraditing suspects under the European Arrest Warrant will benefit from the assurance that the defendant will receive a fair trial anywhere in Europe. That aim, if we were to accept it, clearly cannot be achieved by Member States acting alone and must be done at EU level. To that extent they would comply with the principle of subsidiarity.

As I hope I have made clear, that is not to say that the Government accepts that these measures are necessary or proportionate, but those considerations are distinct from the principle of subsidiarity.

We hope that the above information will satisfy all of the points the committee has raised with us, meaning that a ministerial appearance at the next meeting on 22 January will not be necessary. Please let us know your views.

I hope this letter goes some way towards answering the concerns set out by the Committee.

20 January 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your Explanatory Memorandum (EM) on this proposal. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 15 and 22 January. We also took into account the comments on this proposal in your letter of 20 January, and a letter from the Justice Committee of the Scottish Parliament concerning it.

We have corresponded separately on general issues concerning the EMs on this and the related proposals in the Commission’s package on procedural rights.

At this stage, our scrutiny of this proposal is confined to the pressing issues of subsidiarity and the opt-in but, before taking a view on those issues, we should like some further information on the proposal.

The principle of the presumption of innocence and the rights which flow from it, and the right to be present at trial are, as you note, fundamental principles of criminal justice in all the UK jurisdictions. In the EM, you mention that exceptions apply in UK law in certain circumstances, concerning the reversal of the burden of proof, inferences to be drawn from a defendant’s actions or silence, trials in absentia. We would welcome an explanation of the current law in England on when a reversal of the normal burden of proof may operate, and when inferences may be drawn from the silence or other actions of the defendant. What is your assessment as to the extent to which the law in the UK would require amendment to conform to the proposal?

You also mention areas of possible concern on whether the proposal goes further than required by Article 6(2) ECHR and on the interpretation of the provision on remedies. We would welcome your detailed views on these issues.

We note from your letter of 20 January that you doubt the necessity of this proposal. It seems to us that this amounts to a doubt as to the compatibility of the proposal with the principle of subsidiarity. The Commission’s explanatory memorandum argues that EU legislation is necessary to avoid the breaches of the presumption of innocence in other Member States found by the European Court of
Human Rights and noted by stakeholders, and thereby to promote mutual trust between the judicial systems of the Member States. What is your response to the Commission’s argument?

The Committee is still considering whether it should recommend the submission of a Reasoned Opinion finding a breach of the principle of subsidiarity and, as you know, we are under severe pressure of time in this regard. We therefore ask for a reply to this letter by the close on Tuesday 28 January at the latest.

23 January 2014

Letter from Chris Grayling MP to the Chairman

Thank you for your letter of 23 January 2014 about the above proposal, following up your Committee’s consideration of it and the Explanatory Memorandum and letter I earlier submitted to the Committee. You asked some very detailed questions and I shall try to provide the fullest reply I can in the time available to meet your deadline here.

You asked for an explanation of the current law in England on when a reversal of the normal burden of proof may operate and when inferences may be drawn from the silence or other actions of the accused. The letter also asks for an assessment as to the extent to which this law would require amendment were the proposal for a Directive to apply in the UK. This analysis is ongoing and so the following can contain only initial views of the Government and can only be based on the current text. It covers England and Wales only.

**BURDEN AND STANDARD OF PROOF**

In England and Wales, a party who bears the burden of proof in criminal proceedings must, in order to establish a fact in issue, discharge that burden to the required standard of proof. In general, the prosecution bears the burden of proof to establish all of the elements of an offence. The prosecution must discharge that burden by establishing those elements beyond reasonable doubt. However, in certain circumstances, the burden of proof can be on the accused. Where this occurs, he or she must discharge that burden by proving the facts in issue on the balance of probabilities, *Carr-Briant [1943]* KB 607.

The accused bears the burden of proof in the following circumstances. He or she bears the burden of proving the defence of insanity, *M’Naghten’s Case* (1843) 10 Cl&F 200. There is also legislation which expressly places the burden of proof on the accused. For example, section 2 of the Homicide Act 1957 provides that it is for the defence to prove the partial defence to murder of diminished responsibility. A burden of proof on the accused may also be implied by legislation. For example, if the legislation creating the offence creates exceptions to that offence, that legislation may be interpreted as placing the burden on the accused to prove the exception.

The UK courts scrutinise potential reverse onus provisions against article 6(2) ECHR in consequence of the Human Rights Act 1998. While those courts have upheld some such provisions, they have also found that others should be read as creating an evidential burden only. This means that rather than having to prove the matter on the balance of probabilities, the accused is required only to adduce sufficient evidence that the court decides to leave the matter to the jury. The prosecution is then left to disprove the accused’s contention beyond reasonable doubt. For example, in the case of *Lambert [2002]* 2 AC 545 the House of Lords read as an evidential burden a provision which placed the burden on the accused to prove, as a defence to cocaine possession, that he had no knowledge of the contents of the bag carrying the cocaine.

The Government’s initial view is that article 5(1) and (3) of the proposal for a Directive, as currently drafted, reflect the general principle in England and Wales that the burden of proving beyond reasonable doubt the essential elements of the offence lies with the prosecution. Article 5(2) would however require an assessment of reverse onus provisions in the UK to ensure that they meet the test in that paragraph of being of sufficient importance to justify being an exception. This in itself would possibly be a significant exercise and would appear to set out a different test to the one established by the UK courts on the basis of Strasbourg case law (discussed further below).

**RIGHT NOT TO INCrimINATE OneySELF AND NOT TO COOPERATE AND THE RIGHT TO REMAIN SILENT**

In England and Wales, the accused is generally not obliged to incriminate him or herself or cooperate with a criminal investigation or trial. In particular, a suspect is under no general duty to assist the police with inquiries, *Rice v Connolly [1966]* 2 QB 414. Nor is the accused compellable as a witness in the proceedings, the Criminal Evidence Act 1898, s 1(1). The accused also has a right to silence and,
in general, no inferences can be drawn from the exercise by a suspect or accused person of the right to silence.

However, there are exceptions in England and Wales to the privilege against self-incrimination. For example, the keeper of a motor vehicle is required to give information about the identity of the driver where the driver of the vehicle is alleged to have committed certain road traffic offences, Road Traffic Act 1988, s 172(2)(a). There are also circumstances under which the law of England and Wales permits inferences to be drawn from silence or non-cooperation of a suspect or the accused. These are outlined as follows.

Under the law of England and Wales, it is possible for such inferences as appear proper to be drawn from uncooperative conduct of the accused. In particular, if a suspect refuses consent to the taking of an intimate sample without good cause the court or jury, in determining whether that person is guilty of an offence, may draw such inferences from the refusal as appear proper, Police and Criminal Evidence Act 1984, s 62. The EM also mentioned as another example the provision which allows inferences to be drawn from a refusal to consent to a search for drugs, Police and Criminal Evidence Act 1984, s 55.

Inferences can also be drawn from an accused’s silence under sections 34 to 38 of the Criminal Justice and Public Order Act 1994. These provisions permit in certain circumstances a court or jury, in determining whether the accused is guilty of an offence, to draw such inferences as appear proper. Those circumstances include a failure by the accused to mention certain facts when questioned or charged which are later relied on in his or her defence (section 34), a failure to give evidence at trial or a refusal, without good cause, to answer questions at trial (section 35), a failure or refusal at arrest by the accused to account for objects, substances, marks or presence at a particular place (sections 36 and 37). There are tight controls on the circumstances in which inferences can be drawn, Argent [1997] 2 CrAppR 27 (in which Lord Bingham set out the conditions to be satisfied before an inference can be drawn). The accused cannot be convicted solely on the basis of an inference drawn in such circumstances, section 38(3).

Articles 6 and 7 of the proposal for a Directive, as currently drafted, would appear to require changes to the law of England and Wales. In particular, the right against self-incrimination in article 6(1) is presented as an absolute right. This would, if it remained, appear to require amendments to provisions which require cooperation, in particular, the provisions in the Road Traffic Act 1988 mentioned above. In addition, the law on drawing inferences from silence and non-cooperation would appear to require amendment. This is because articles 6 and 7 of the proposal provide that an exercise by the suspect or accused person of the rights there may not be used against that person in those proceedings, articles 6(3) and 7(3). These provisions are a blanket prohibition on the drawing of inferences in such circumstances. Accordingly, as drafted the proposal would require significant changes to, at least, the provisions mentioned in the Criminal Justice and Public Order Act 1994 and the Police and Criminal Evidence Act 1984.

Whether the proposal goes further than article 6(2) ECHR

Your letter asked for detailed views on whether the proposed Directive goes further than required by article 6(2) ECHR. It should be noted that parts of the proposal relate to aspects of article 6 ECHR other than article 6(2). In particular, the right to be present at one’s trial – to which articles 8 and 9 of the proposal are relevant – is not part of the presumption of innocence in ECHR law terms. The right not to incriminate oneself and the right to silence are related to article 6(2) ECHR though separate to it. The analysis below assesses the aspects of the proposal aimed directly at article 6(2) and the rights against self-incrimination and to silence.

To begin with, the Government is satisfied that the current position in England and Wales is compatible with article 6 ECHR. Accordingly, any requirement in the proposal to change that law would go beyond the minimum requirements of article 6(2). Specific points are as follows.

— Reverse onus provisions can be compatible with the ECHR. This is the clear view of the Strasbourg court and courts in England and Wales. See Robinson v United Kingdom (App. No. 20858/92) (burden placed on accused to establish partial defence of diminished responsibility upheld) and Bates v United Kingdom [1996] EHRLR 312 (no violation in burden on accused to prove that dog not a member of specified breed). The UK courts have extensively explored the circumstances in which a reverse onus provision is acceptable, for example, Lambert (cited above) and Sheldrake v DPP [2004] UKHL 37. In doing so, the UK courts have applied a test based on the reasonableness and proportionality of reverse onus provision, but have
emphasised the need to examine all facts and circumstances in a particular case, \textit{Sheldrake} [21] (Lord Bingham). The “sufficient importance” test in article 5(2) of the proposal would appear to be a different test. On this basis, it would go further than the requirements of article 6(2) ECHR.

— Article 6(1) of the proposed Directive would prohibit any provision which requires a suspect or accused person to cooperate in criminal proceedings. This is presented as an absolute right in the current text of the proposal. However, this goes further than Strasbourg case law which acknowledges that in some circumstances a duty to cooperate with the police is not a violation of article 6 ECHR. In particular, the Grand Chamber of the Strasbourg court has held that section 172(2)(a) of the Road Traffic Act 1988 (discussed above) is not a violation of article 6 ECHR. See \textit{O’Halloran and Francis v UK} (2008) 46 EHRR 21.

— As discussed above, articles 6 and 7 of the current draft of the current proposal would prevent any inferences being drawn from non-cooperation and silence. The Strasbourg case law is clear that the rights to non-cooperation and silence are not absolute. Adverse inferences can be drawn against the accused compatibly with article 6 ECHR. The court will consider all the circumstances of the case, the weight attached to the inferences by the finder of fact and the degree of compulsion facing the accused. See \textit{Murray v UK} (1996) 22 EHRR 29 (no violation of article 6 when the finder of fact drew inferences from the accused’s silence at interview and at trial) and \textit{Condon v UK} (2001) 31 EHRR 1 (an inappropriate direction to the jury about drawing inferences led to a violation of article 6). Articles 6 and 7 of the proposal would therefore go beyond the minimum necessary to meet the ECHR on this point. In its Impact Assessment, the Commission acknowledges that this is the intention of the proposal, p 46.

REMEDIES

Your letter also asked for views on the interpretation of the provision on remedies in article 10 of the current text. That article provides a requirement that suspects or accused persons have an effective remedy concerning breaches of the proposal for a Directive. The remedy should have the effect of placing suspects or accused persons in the position they would have found themselves had the breach not occurred. The Government will need to discuss with other Member States in negotiation the purpose behind the provision. It may be that the proposal envisages that the default position in the event of a breach is the quashing of a conviction and retrial. If this is the intention, then this may require changes to the law on appeal. In particular, the test for the quashing of a Crown Court conviction in the Court of Appeal is if the conviction is unsafe, Criminal Appeal Act 1968, s 2. Though procedural defects may result in convictions being unsafe, this is not invariably the case where the proceedings as a whole are fair. The Government considers that the Strasbourg court similarly looks at the overall fairness of a case.

NECESSITY AND SUBSIDIARITY

Your letter also asked for my comments on the Commission’s arguments about the need for this proposal and about its compatibility with the subsidiarity principle. You noted the comments on this in our Explanatory Memorandum and my earlier letter. From the evidence we have so far seen the Government is indeed dubious about the necessity of this proposal. The Commission’s own Explanatory Memorandum seems to rely on a selection of case law from the European Court of Human Rights and comments from certain stakeholders to support its case of need and itself acknowledges that there is “limited statistical quantifiable evidence of insufficient mutual trust”. It later notes that “…the level of safeguards in Member States’ legislation is, in a general way, acceptable and there does not seem to be any systemic problem in this area”. This evidential base is not wholly convincing so raises a question about the robustness of the case for need.

Our own experience also casts some doubt on the necessity of the proposal. Of course all Member States are already party to the ECHR which includes a presumption of innocence (Art6). If a difference among Member States’ application of the presumption of innocence and the right to be present at criminal proceedings were creating a reluctance to co-operate with the UK authorities, we would expect to see some evidence of this in our contacts at Eurojust and, more particularly, to be observable in a refusal to act upon European Arrest Warrants issued by the UK authorities (or vice
versa). We have so far found no such observable experience so we remain to be convinced of the necessity of the proposal.

As far as the application of the subsidiarity principle is concerned these doubts about necessity may, as you say, cast some doubt on the proposal’s adherence with that principle. In order to establish that the subsidiarity principle in Article 5(3) of the TFEU is satisfied, it must be established that the objectives of the proposed action cannot be achieved by Member States (this limb is sometimes referred to as the “necessity test”) and that the objectives are better achieved at the EU level. However, arguably if there is an established need of whatever magnitude which suggests a common minimum standard is needed amongst Member States then that would suggest EU action was compliant with the principle. The Commission’s argument seems to suggest that whilst it acknowledges the need for a minimum standard is possibly small and difficult to quantify it maintains it is real and that action to address it can only be taken forward at an EU level and that this therefore satisfies the subsidiarity principle. The Government remains to be convinced that the need for the proposal is made out and, as the earlier evidence we submitted to the Committee suggested, we would plan to interrogate this further in any forthcoming negotiations.

There is also, of course, a question of proportionality to consider, as I also mentioned previously, as the Treaty basis of the proposal (Article 83 (2)) is also framed so that the proposal should be made “to the extent necessary”. Again, we would plan to interrogate this further in any forthcoming negotiations.

I hope this reply answers fully all your questions and look forward to seeing your Committee’s fuller views on this proposal in due course.

28 January 2014

Letter from the Chairman to Chris Grayling MP

Thank you for your letter of 28 January. It was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 29 January, together with your Explanatory Memorandum (EM) on this proposal and the comments on this proposal in your letter of 20 January.

Our consideration of this proposal has so far been limited to the issue of its compliance, or otherwise, with the principle of subsidiarity. Like you, and the Justice Committee of the Scottish Parliament, we are not convinced that the necessity of action by the EU in relation to the subject matter of the draft Directive has been made out. We do not, however, propose to recommend that the House submits a Reasoned Opinion under Protocol 2.

We will give further consideration shortly to other aspects of scrutiny of this proposal in the light of the detailed comments in your letter of 28 January. In the meantime, we are keeping the matter under scrutiny and do not expect a reply to this letter.

I previously had cause to write concerning the inadequacies and lateness of the Explanatory Memorandums on this and the related proposals. We welcome the provision, in your letter of 28 January, of the analysis necessary to enable the Committee to begin its work of examining the proposal in depth, but the arrival of that letter less than an hour before the meeting of the Sub-Committee did not restore the confidence of Members that the expected level of service has been resumed. I trust we will now be able to rely on the timely provision of information which may be sought by the Committee.

30 January 2014

Letter from the Chairman to Chris Grayling MP

I write further to my letter of 30 January in the light of further consideration of this proposal by the Justice, Institutions and Consumer Protection Sub-Committee on 12 February. We thank you for the analysis, in your letter of 28 January, of the position in England and Wales with regard to the most significant provisions in the proposal.

It seems to us that, in broad terms, the proposal is consistent with the law in our jurisdictions and on this basis, we welcome it. We note, however, the respects in which compliance with the draft Directive, as drafted, would require changes in the law at least in England and Wales. You mention, in particular, the exceptions which apply in certain circumstances concerning reversal of the burden of proof; the right not to incriminate oneself; and inferences drawn from a defendant’s actions or silence. We note also that our law is, in these respects, consistent with the ECHR. We are of the view that
suitable amendments should be sought in the proposal to ensure that, in these areas, the exceptions under our law can be maintained.

You also mention areas where you wish to clarify elements of the proposal – its scope, whether the proposal goes further than required by Article 6 ECHR, and the provision on remedies. We doubt that the scope of the proposal would cause difficulties or that the draft Directive intends to set standards different from those guaranteed by the ECHR, but agree that it would be right to have further clarification. As to the provision on remedies, we look forward to the results of your discussion of its interpretation in the course of negotiation.

In all the circumstances, and taking account of the areas where the proposal is inconsistent with the law of England and Wales, we recommend that you should not opt in to the proposal at this stage, but negotiate with a view to amending it in order to preserve the exceptions in our law to the rights which the draft Directive would guarantee.

We keep the matter under scrutiny and would welcome an update following initial discussion of the proposal in the Council working group. At the same time, we would like an account of how other Member States view the proposal and any points of difficulty which may arise from other national laws. We are also interested in whether the position in the laws of Scotland and Northern Ireland differ significantly from that in England and Wales.

We do not expect an immediate reply to this letter.

12 February 2014

TOWARDS A EUROPEAN HORIZONTAL FRAMEWORK FOR COLLECTIVE REDRESS
(11499/13), COMMON PRINCIPLES FOR INJUNCTIVE AND COMPENSATORY
COLLECTIVE REDRESS MECHANISMS IN THE MEMBER STATES CONCERNING
VIOLATIONS OF RIGHTS GRANTED UNDER UNION LAW (C(2013) 3539/3)

Letter from the Chairman to Jo Swinson MP, Parliamentary Under Secretary of State,
Department for Business, Innovation and Skills

Thank you for your letter of 9 November which was considered by the Justice, Institutions and Consumer Protection Sub-Committee on 4 December. We are grateful for your detailed responses to our questions. We decided to keep this matter under scrutiny.

It seems that the Commission’s suggested principles would not cause difficulties of any significance for the legal systems of the UK. In relation to the principle favouring an opt-in approach to collective actions, we note your view that the Recommendation has sufficient flexibility to accommodate differences of approach where different circumstances require that. We previously acknowledged the advantages of procedures for collective redress in appropriate cases, and that the principles set out in the draft Recommendation were sensible. In the light of your reply, we consider that the proposal that Member States’ should respect the principles in their procedures is one we can endorse.

We continue to doubt whether the broad scope for collective redress procedures suggested by the Commission is appropriate. We note your comments on some of the key sectors and that implementation of the Recommendation is to be the subject of discussions next spring. We propose to consider further the issue of scope, in particular. We look forward to an account of those discussions, including the views of other Member States and the conclusions, in due course. Subject to that, no reply to this letter is expected.

5 December 2013