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 May to November 2008.

LAW AND INSTITUTIONS (SUB-COMMITTEE E)

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Letter from the Chairman to Baroness Shriti Vadera, Minister for Business, Enterprise and Regulatory Reform

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E at its meeting on 22 October. We decided to keep the matter under scrutiny.

We think it should be helpful to the aviation industry and those who provide the finance for aircraft that the international regime established by the Convention should apply in the EU. The Memorandum suggests that you are broadly favourable to EC accession to the Convention and the aircraft Protocol. Would we be right in thinking that, subject to resolution of the points about declarations, you will support the proposal? Does the UK intend to opt in to this draft Decision?

We note that the draft Decision provides for EC accession to the extent of its competences. Are you satisfied that the draft declaration of competence properly delineates the relevant areas of EC competence?

You mention two particular matters which have yet to be resolved: who is to make the declarations under Article XXX of the Protocol, and ratification by the Community and the Member States. We should be interested to have your view on the strength of the arguments in favour of the declarations being made by the Community or the Member States, and on how the issue of ratification should be resolved.

27 October 2008

CIVIL JUSTICE: COMMON FRAME OF REFERENCE FOR CONTRACT LAW

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

Thank you for your letter of 16 October 20071 in which you asked if I would write to the Committee with details of how the Common Frame of Reference (CFR) would be dealt with in the Council of Ministers and the Government’s position on any further developments on the CFR. Following the

1 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 239
meeting of Justice and Home Affairs Ministers on 18 April, I am now able to report on these and other developments.

**Publication of the Draft Common Frame of Reference (DCFR)**

As the Committee will know, in 2005 the European Commission engaged a wide range of academics to develop a CFR. In December 2007, these academics published their interim draft of the CFR – the DCFR. It is envisaged that the final edition will be published early next year. Although they have not given a precise timescale, the Commission has said that it will now start work on refining this DCFR which is likely to lead to a Commission proposal, possibly in the form of a White Paper, either later this year or the next. In order to reach a view on the DCFR and prepare for a future Commission proposal, my Department has engaged Professor Simon Whittaker of the University of Oxford, who specialises in contract law. During the summer, Professor Whittaker will be analysing the DCFR. Given that a future Commission proposal will be based on the DCFR, it is important that we form as detailed a view as possible on this academic work and Professor Whittaker has been asked to assess of its potential impact both for English contract law and EU legislation in this area.

**Developments in the European Council**

As the Committee is aware, the Commission, in their second Annual Progress Report, sought reactions from both the Council and the European Parliament on how to take forward work on the CFR. In 2007, both the German and Portuguese Presidencies attempted to achieve a Council view on 'fundamental aspects' of a future CFR. These attempts failed as several Member States, including the UK, thought that it was inappropriate for the Council to attempt to form a view on a future political CFR before considering the work of the academics which was then yet to be published.

In January 2008, the Slovenian Presidency made a further attempt to set out the future 'high level' direction of work on the CFR and prepared a draft Council position in the form of a paper which was discussed at two Council Working Groups on 21 February and on 2 April. The paper, which outlined preferred options for defining fundamental aspects of the CFR, covered purpose, content, scope and legal effect. Of these, the most critical element for the UK was legal effect, with the Government strongly expressing the view that the CFR should not have any binding legal effect.

On purpose, content and scope, the Government favoured a wide-ranging CFR as this was more likely to achieve the coherence, consistency and quality of European legislation desired in contract law. In addition, the Government's preference was for a CFR that was not restricted to consumer law or business law but that would apply generally to all contract law. On scope, the Government was content with a scope that related to all relevant matters of contractual relations. Although one Member State was concerned that this would allow too much tort law into the CFR in relation to pre-contractual obligations, the Government took a more pragmatic view. The Government also took a similarly pragmatic view on how the CFR should be structured (content); for example, there should not be too much consideration given to the precise distinctions between definitions, principles and model rules.

After two meetings of the Working Group, during which the UK secured a number of amendments to the Presidency's original text, agreement was reached on a draft Council Position on a future CFR. This was finally agreed by Justice and Home Affairs Ministers when they met on 18 April. A copy of the final text is attached.

**European Parliament**

In the European Parliament, a Parliamentary Project Team, consisting of MEPs from the JURI and Consumer Protection Committees, has been established to monitor work on the CFR. It is expected that the team will produce formal conclusions in due course.

**Forthcoming Developments on the CFR**

Following agreement on the Council position on the CFR, it is likely that the next major event on this project will be the annual conference which will be held in Paris on 23 October jointly by the Commission and the French Presidency. This is expected to be an important and wide-ranging event and we hope by then to have Professor Whittaker's analysis of the DCFR in order to help the Government prepare for it. I will write to the Committee again following the Conference.

15 May 2008
Letter from the Chairman to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for your letter of 15 May which was considered by Sub-Committee E at its meeting on 18 June.

The Committee is grateful for your account of developments since last autumn and for your offer to write further following this autumn’s conference. We note the agreement in the Council as to the purpose, scope and legal status of the CFR, and the rejection by the working group of the use of the CFR to harmonise contract law. We welcome the latter. As to the former, your letter raises some questions on which we would be grateful for your further information and views.

First, we note that the United Kingdom favours a "wide-ranging CFR", applying "generally to all contract law". Is the scope now envisaged for the CFR consistent with the moves during the United Kingdom Presidency in 2005 to concentrate the CFR on the area of consumer law, where there is a relevant acquis?

Second, we note that, although the DCFR has not yet been analysed and Professor Whittaker has been engaged to undertake this task, a wide-ranging CFR has been been agreed in principle. In these circumstances, is the Government confident that a final form of CFR can be agreed that will offer a useful source of inspiration across the whole contractual field, and on what basis?

Third, is there a risk that, once the CFR is available for use "on a voluntary basis" across the whole range of community legislation, it will in practice be used by European lawmakers regardless of its compatibility with the general common law approach, in particular the common law emphasis on the desirability of certainty and predictability in relation to business contexts. How is such a risk to be guarded against?

We look forward to hearing from you on these points. Professor Whittaker’s assessment will no doubt also throw further light on some of them, and we would be pleased if you would let us have a copy when it is available.

27 June 2007

Letter from Bridget Prentice MP to the Chairman

Thank you for your letter of 27 June in which you ask three questions relating to the proposed Common Frame of Reference (CFR).

First, you ask whether the Council’s decision to opt for a comprehensive CFR covering general contract law is consistent with the moves during the United Kingdom Presidency in 2005 to concentrate the CFR on the area of consumer law. I do not think that there is any inconsistency. The re-prioritisation of the work on the CFR following the Mansion House conference in 2005 was intended to bring forward those parts of the work on the CFR that were most directly relevant to the Commission’s review of the consumer acquis. It did not signal that the work-on the wider aspects of contract law was to be abandoned.

Secondly, you ask whether, even though the CFR proposed by the academics has not been analysed in detail by the Government, the Government is confident that a final CFR can be agreed that will offer a useful source of inspiration across the whole contractual field. At this stage, when the Commission has not even produced a draft CFR for discussion, it is difficult to predict how useful the final CFR will be. Nonetheless, the Government hopes that the CFR will be useful to lawmakers and is engaging constructively in the process to try to achieve this end.

Thirdly, you ask whether there is a risk that, once the CFR is available for use, European lawmakers will use it regardless of its compatibility with the general common law approach. I would emphasise that the CFR is intended to be an aid to lawmakers not a legislative instrument. If a legislative proposal emerges that is not in the UK’s interests the Government will negotiate to protect those interests. This applies whether the proposal is derived from the CFR or not. For the present, I would rather focus on the opportunity that the creation of the CFR offers to increase our mutual understanding of the different legal systems within Europe and to improve the consistency and coherence of European legislation in the area of contract law.

You also asked if I would provide the Committee with a copy of Professor Whittaker’s analysis of the academic CFR when it is available. I will be happy to do this.

I hope the above information is useful in answering the points you have raised. I will of course continue to keep the Committees informed of further developments and will, in any event, write again after the conference to be hosted by the French Presidency in October.

16 July 2008
Letter from the Chairman to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E at its meeting on 15 October. We retain the proposal under scrutiny.

We endorse your support for this Network which provides a useful role both for the authorities of the Member States and citizens engaged in litigation with cross-border elements.

We agree that most of the elements in the proposal should improve the operation of the Network. However, we share your view that the draft contains some detailed provisions about how Member States should organise their participation which need not (and should not) be determined at EU level - in particular that it is inappropriately prescriptive in the context of the UK and Gibraltar in providing that there should be only one main contact point and that the contact point should be full-time.

The draft is also constitutionally inappropriate in one further important respect. It would provide in a new sub-paragraph to paragraph 2 that "If the contact point designated …. is not a judge, the Member State concerned shall designate a judge to assist it in its liaison task with the local authorities. This judge shall be a full member of the Network". Judicial deployment is a matter for the Heads of the respective United Kingdom judiciaries, both in principle and by statute (see e.g. in the case of England, Constitutional Reform Act s.7(2)(c)). The Government cannot commit the Head of any judiciary to make a judge available for any particular task, whether judicial or (as is here the case) non-judicial. Further we think attention may need to be given to the identity of the person best suited to perform the role and we are not sure, in the UK context, this would be a judge.

We note your agreement to contact points being responsible for supplying information about the law of another Member State "provided that they do not have to give legal advice". This may prove a fine line to draw, and the provision that such information should not be binding is clearly of importance. It is also conceivable that there could be problems about costs incurred if information supplied proved inaccurate.

We take it that, given a sufficient degree of assurance that the above points can be resolved, the Government will opt in to the proposal. Is that your intention?

Finally we should be grateful for an explanation as to how the Network is financed, including the relative contributions of national and EC budgets.

16 October 2008

Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

Thank you for your letter of 16 October to Bridget Prentice.

Since the Explanatory Memorandum was submitted there has been rapid progress on the negotiation of this proposal. The Presidency has recently issued a new text, which I enclose, and hopes that a general approach can be agreed at the JHA Council on 2728 November. If possible, the Presidency would also like to reach a first reading deal with the European Parliament by the end of the year.

As you will see, all of the main concerns we had with the Commission’s proposal have been resolved in the Presidency’s text. I can confirm that the UK has opted in to this proposal. The deadline for notification of our opt in was the end of September. I will explain the main substantive changes to the Commission’s proposal in the recent Presidency text and in doing so will answer the questions you asked in your letter. For ease of reference I shall refer to the changes as they affect the Article numbers of the text of the 2001 Council Decision, cross-referencing these with the Article numbers in the Commission’s proposal in brackets.

COMPOSITION AND ORGANISATION OF THE CONTACT POINTS

The Presidency has deleted the proposed new second sub-paragraph to Article 2(2) (Article 1(b)(i) of the Commission proposal) thereby removing the provisions which obliged Member States to provide one main contact point who would work full-time on Network business. Instead, Member States will now be obliged in a proposed Article 2(2a) (Article 1(b)(a)) to “guarantee the contact points sufficient and appropriate facilities in terms of staff, resources and modern means of communication”. A recital will also be included which will clarify that it is for Member States to assess what is sufficient and appropriate. Where a Member State has more than one contact point, under a proposed change to
Article 2(5)(c) (Article 1(1)(d)) it will be required to notify the Commission of the specific responsibilities of each. The Government can accept these changes.

**Liaison with the Judiciary**

I understand your concerns about the designation of a judge to undertake liaison functions. The Presidency has proposed an amendment to the new sub-paragraph of Article 2(2) (Article 1(1)(b)(ii)) which now places the obligation on each contact point to establish effective liaison with the judiciary, but leaves Member States to decide whether they want to designate a judge for that purpose. Under a proposed change to Article 5(2) (Article 1(3)(b)(i-0) and 1(3)(b)(ii)a) the contact points will need to ensure that the local judicial authorities receive information about Community and international instruments and will also be responsible for ensuring coordination between the members of the Network at the national level, including through the provision of sufficient resources to allow regular meetings between them, Article 6(2) (Article 1(4)). The Government can support these amendments and, now that the appointment of a liaison judge is not obligatory, the Government believes this new text resolves the outstanding concerns on this point.

**Membership of Professional Associations of Lawyers**

In response to concerns from all Member States, the Presidency has clarified that membership of the professional associations of lawyers should not extend to the provision of information on specific cases. This has resulted in the deletion of the proposed changes to Article 5(1) (Article 1(3)(a)(i)) and the insertion of a new Article 5(2a) (Article 1(3)(a)(ii)) which also clarifies the role of the professional associations in the Network by saying that they should work together with the contact points to facilitate judicial co-operation, the practical application of Community instruments and international conventions, and the development of the Network's website.

The new text also makes clear that while Member States shall determine the professional associations that can be members of the Network, they will need to obtain the agreement of these associations. This has been reflected in proposed amendments to Article 2(3) with an additional proposed paragraph 4a (Article 1(1)(c) and (c)(a)). The Government has supported these changes.

It remains to be seen whether this new text will satisfy all Member States. Some have already suggested that the professional associations should be granted associate membership.

Although this matter has still to be resolved it is clear that the Network will have some relationship with the professional associations of lawyers. The Government believes that there is added value in having the participation of these associations, in particular to allow them to share views on the working of current instruments. It will continue to support a provision, which allows this to happen, however that relationship is defined.

**Provision of Information on National Law**

The provisions relating to providing information on national law, the proposed amendments to Articles 3(2)(b) and 5(2)(a) (Article 1(2)(b) and 1(3)(b)(i)), have not changed substantively in the Presidency text, although the reference to supplying information that is applicable "to the dispute or situation" has been deleted from the latter. I note that you have said it might be difficult to draw a line between supplying information on the law of another Member State which does not extend to legal advice. These provisions give legal effect to something which the Network has been doing for some time. In practice, such requests tend to ask for copies of specific legislation or they ask which legislation would be relevant to a particular matter. The contact points are not asked to give a view on how that legislation should be applied to a specific case. If such a request was made our contact points would make it clear that they cannot provide such advice.

**Provision of Information to the Public**

All Member States have expressed concerns about the provisions on providing information to the public. The Commission's text was unclear about the obligations that would be placed on the contact points. The main concerns have been the resource implications if the public had direct access to the contact points and the need, once again, to avoid requests for legal advice. The Government agrees that it is important to provide information to the public on Community law but believes that the main source of information should continue to be the Network's website and that there should not be duplication of work with those national authorities, such as HM Courts Service in England and Wales, that already provide information to the public.
The Presidency has sought to clarify the provisions in the latest text. It is proposed under Article 5(2)(c)(a) (Article 1(3)(b)(ii)) that the contact points and, under Article 13a Article 1(11)), that the Network should "contribute towards providing the public with general information on judicial cooperation". The latter also obliges the contact points to promote the Network’s website. It has been suggested that this could be achieved by including a link to the site on national Ministry of Justice websites. We already do that.

**OTHER MAIN CHANGES TO THE TEXT**

In Article 8 (Article 1(5)) the deadline for contact points to respond to requests has been extended from 10 to 15 days. We could have accepted the original target but it was clear that some other Member States could not, so the Presidency has suggested this change as a compromise. Article 11a (Article 1(7)) has been redrafted to ensure that third countries can be invited to attend relevant meetings where international instruments concluded by the European Community, not just the Lugano Convention as in the original text, are discussed. Article 12a (Article 1(8)) has clarified that the information provided by the Network to the European Consumer Centres Network should also be on general matters rather than on specific cases. A change to Article 18(4) (Article 1(12a)) has also been added to delete the word "progressively" from the requirement on Member States to establish the information sheets on the Network’s website. Now that the website has been established "progressively" is superfluous. The Government can accept all these changes.

**FUNDING OF THE NETWORK**

You also asked for an explanation of how the Network is financed, including the relative contributions of national and EC budgets. I can confirm that the Commission is responsible for the bulk of the Network’s funding. It provides a secretariat which organises meetings, including paying the travel expenses of those who attend, and it is responsible for the Network’s website. Member States fund the work of their contact points, including their liaison with the judiciary and relevant authorities in their country.

I believe that we have achieved a good result in the negotiations of this proposal. As the Presidency intends to seek a general approach to this dossier at the November Council, I would be grateful if your Committee is able to clear it from scrutiny before then.

31 October 2008

**Letter from the Chairman to Lord Bach**

Thank you for your letter of 31 October which was considered by Sub-Committee E at its meeting on 19 November. We are grateful for your most helpful exposition of the changes made in this proposal and for providing a copy of the latest text. We note that the nature of the participation of professional associations remains under discussion.

We are pleased that you have been able to secure changes that ensure that the Decision would not prescribe matters which should be left for decision at national level, and that the emphasis is now on the supply of general legal information, rather than on its application or advice on its application to specific cases. We note however in this connection your information that the proposed new Article 3(2)(b) remains substantially unchanged. Is the reference to "courts or authorities responsible for the case" and to "the Network" generally consistent with the other changes made? And might not this new provision be more appropriately recasted and repositioned in Article 5 than in Article 3?

In your letter you point out that the deadline for opting in was the end of September (the proposal having been submitted by the Commission by communication dated 30 June 2008). The proposal was submitted to Parliament with an Explanatory Memorandum dated 21 July 2008 and it did not reach Sub-Committee E before the Summer Recess. It would be helpful if, when a decision whether to opt in is called for, this and the relevant date could in future be highlighted, which will enable the relevant Sub-Committee to be informed and to consider whether and how to comment on the proposal before the time for the decision elapses.

Although we hope the points in the first two paragraphs will be dealt with we now clear this matter from scrutiny.

24 November 2008
Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

I am writing to update you on the current position concerning the proposed EU Maintenance Regulation and to provide you with the latest draft of the text. I am sending this to you at this stage because the French Presidency wish to take this dossier to the JHA Council on 24 October and it would be helpful to have your views available beforehand if at all possible. If not, we will of course make it clear that any position is subject to a Parliamentary Scrutiny reserve.

The attached text is a translation provided by the Presidency - the latest official translation is not yet available. I provide below an overview of the main points and highlight the main changes since the last version you received.

The Regulation contains nine chapters and I will take each in turn.

CHAPTER I

This chapter deals with scope and definitions and has not changed in substance from the last version you received. The only significant change has been to include administrative authorities within the definitions, which was done to accommodate those Member States where the system is provided in that way. The Government is content with this chapter. Importantly, it makes the link between this proposal and the 2007 Hague Convention on the International Recovery of Child Support and other forms of Maintenance.

CHAPTER II

This chapter deals with jurisdiction. We consider that the general jurisdiction provisions provide for sound connection between the parties, the dispute and the jurisdiction seised, as well as permitting a degree of further choice for parties. We fully support the policy of this Regulation, which is to provide protective jurisdiction for maintenance creditors, who are likely to be more vulnerable parties. The UK delegation has succeeded in securing significant support for its proposal on subsidiary jurisdiction (Article 6) which would provide for a forum necessitatis. We considered this to be a more appropriate solution to subsidiary jurisdiction than resorting to the difficult exercise of identifying other jurisdictional grounds with a sufficient link. Although unlikely to be frequently needed, we believe it will be a worthwhile provision as it will enable access to justice to citizens who are unable to seise jurisdictions with which they have stronger connections, for example because of civil war.

CHAPTER III

This chapter contains the arrangements for the use of applicable law about which I have written before. You will recall that previously the proposal included rules to provide for the use of foreign law and this was a major point of concern for the UK. The current draft has removed those rules and instead contains a reference through which the EU can ratify the Applicable Law Protocol of the 2007 Hague Maintenance Convention. The UK would not opt in to that ratification which would thereby enable other Member States to use the applicable law provisions without the UK being bound by them. Removal of the rules from the body of the text has been seen as a major concession to facilitate the UK's participation in the instrument.

CHAPTER IV

The contents of this chapter have either been deleted or moved elsewhere in the instrument.

CHAPTER V

This chapter covers recognition, enforceability and enforcement of decisions. With the removal of the applicable law rules the consequences for how the exequatur procedure is applied within the EU has been the major remaining issue for the UK and others. Most Member States have made a link between the use of applicable law rules and the abolishment of exequatur and consider that it is only possible to abolish that process if the rules on applicable law within the Hague Protocol have been applied in establishing the decision. Although we have made clear that we do not accept this link, it is clear that we will not be able to participate in the Regulation unless exequatur remains when the recognition and enforcement of a UK judgment is sought elsewhere in the European Union.
The current Presidency text in section 2 of this chapter is based on the Brussels I Regulation and assumes that exequatur will not apply to judgments from other Member States entering the UK. The Government has pressed for this procedure to be kept as simple as possible and has asked for strict but realistic deadlines to avoid any undue delay in the process. Accordingly the new text includes timescales for certain aspects of the procedure in order to favour the swift processing of the case (see Articles 26(13) and 26(15)(5). In addition, we have argued for the inclusion of a deadline for completion of appeal procedures in Article 26-17. The current text contains only a reference to the appeal decision being given "without delay". At the most recent working group, there was broad support for the notion of a deadline consisting of a specific number of days with an "escape clause" whereby the specific deadline would not apply in cases of particular difficulty. We are optimistic that the next version of the text will contain an additional compromise on this point. We are also seeking that the general review provision in Article 51a makes a specific reference to the review of this remaining use of exequatur so that its total removal can be considered at that time. We hope that with the evidence of its application which will be available by then that other Member States will be prepared to abolish it altogether.

It may be helpful to provide a brief comparison with how the Regulation will work for other EU Member States in terms of recognition and enforcement. Under Article 25, there will be no exequatur procedure and recognition will be automatic. However, some of the tests which were previously applied at the exequatur stage are retained in another form. The one test which is abolished is the test of public policy. Under Article 26-3, a defendant who did not enter an appearance at the original hearing has a right to apply for a review of the original decision on the basis that he was not served with the document instituting the original proceedings in such a way and at such a time as to enable him to arrange for his defence, or because he was prevented from contesting the claim by reason of extraordinary circumstances and without fault on his part. The difference here is that this test is now evaluated (on the defendant's application) by the court making the original decision rather than the court considering recognition and enforcement. Equally, at Article 26-5, the court considering an application to enforce the decision obtained in the Member State of origin can refuse enforcement where limitation has expired or where the decision is irreconcilable with a decision in the Member State of enforcement or in a third state which fulfils conditions necessary for recognition in the Member State of enforcement. Again, this requires the debtor to make an application, but to the court of enforcement on this occasion.

CHAPTER VIA

This chapter covers access to justice and is almost entirely based on the provisions of the Legal Aid Directive and the 2007 Hague Convention. The Hague Convention provides for virtually universal free legal aid for child cases which make up the bulk of this work and this has been replicated in the Regulation.

CHAPTER VII

This short chapter deals with court settlements and authentic instruments and links to chapter V. Authentic instruments are not used in England and Wales although they are known in the legal system in Scotland. Authentic instruments, and court settlements, are defined in Article 2. Both categories benefit from the advantages provided by the Regulation, provided that they are enforceable in the Member State of origin.

CHAPTER VIII

This is an important chapter as it deals with administrative co-operation which is the major improvement on existing EU legislation in this area. It will be familiar to the Committee as this is largely taken from the Hague Convention and to some extent Brussels Ila. However, the Regulation breaks new ground by introducing new provisions (Articles 44 to 47) enabling data sharing between central authorities, and in relation to enforcement of maintenance in cross-border cases. I have written to the Lords Scrutiny Committee before (copied to the Commons) concerning the data sharing provisions in these Articles. Discussions on these Articles continue to ensure that the provisions are both effective in terms of recovery of maintenance, and compliant with data protection law. They may also be used to provide limited information prior to an application being made, in order to locate the alleged debtor and identify whether it is worth making an application, pursuant to Article 41b.

Following considerable persuasion from the UK delegation and others, the text of Article 44 is much clearer in terms of the obligations to share data, what data may be shared and with whom it can be shared. However, the most recent version of the text unexpectedly widened the categories of bodies who must share data with Central Authorities to "The entities in the Member States which hold the
information referred to in paragraph 1a... "Extending the scope of the provision to "entities" seems to make its application too wide to be proportionate and acceptable. At the most recent working group in Brussels, there was considerable opposition to this aspect of the draft. At the conclusion of the discussion, it was agreed that it would be for Member States to select the authorities who would be responsible for provision of the information requested. There will be an emphasis on the use of public authorities (which was the original intention) – Member States might if they wish make use of private bodies but there will be no compulsion to do so. We therefore expect the issues to be resolved in the next version of the text.

Further consideration is also being given to the drafting Article 47, which attempts to deal with the problematic balance between the need to process information fairly, which requires the defendant to be notified that data relating to him has been transmitted, and the risk that once he has this knowledge, he would use it to frustrate the effective recovery of maintenance, for example by dissipating assets. The conclusion at the recent meeting was that the decision on, and manner of, notification, would be left to national law, subject to the possibility of deferral for 90 days if there was a risk of prejudice to the claim arising from earlier notification. The Committee will, of course, be aware that national law has implemented the Data Protection Directive (EC Directive 95/46).

CHAPTER VIII A

This chapter deals with applications from public bodies. We are content with these provisions which have not changed significantly from earlier texts you have seen and the provisions mirror those in the 2007 Hague Convention.

CHAPTER IX

This covers the General and Final Provisions. They are standard provisions which have only given rise to one major debate for the UK; the review clause referred to above in the context of exequatur which we would like to be included in the general review in Article 51a. This is not as yet reflected in the text but received a degree of support in a recent working group, so we will continue to press for reference to review of exequatur in the text, or at least in a recital.

The Presidency would like to obtain political agreement at the JHA Council on 24 October. Subject to the outstanding issues in Chapter VIII, as mentioned above, the Government believes that our concerns about this proposal have been resolved and that we will be able to apply to opt in at adoption stage. Since the UK did not opt-in, the UK will not have a vote at the Council. Nonetheless, I would like to be able to be in a position to signify our wish to accept the measure under the terms of Article 4 of the UK/Ireland protocol. The views of your Committee before that would, accordingly, be very helpful.

12 June 2008

Letter from the Chairman to Bridget Prentice MP

This proposal was considered by Sub-Committee E at its meeting of 18 June 2008.

We are grateful to you for setting out the main substantive changes in the proposal and for providing a fundamental rights analysis. Given the data protection concerns raised in respect of Article 44-47, has the European Data Protection Supervisor been consulted and if so, what is his view?

As regards applicable law, we support the Government’s view that any option which removes the applicable law rules from the present proposed Regulation and which does not require the UK to sign up to the Hague Protocol would be acceptable. What would be the implications for the UK of the EU signing up to the Hague Protocol (your option (c))? We assume that accession would be authorised by a decision into which the UK could choose not to opt, but how would the UK’s opt-out be effected at international level? It seems to us that your options (b) and (d) are more straightforward and thus to be preferred.

We note that problems may arise for the abolition of exequatur if the applicable law rules are removed from the proposed Regulation. Although we understand Member States’ concerns, it would be unfortunate if the UK were to be denied the advantages of abolition, given that this is one of the significant benefits of the proposal. We note that there appears to have been some discussion of this question at the June JHA Council and that the Council “agreed on the principle goal of the Regulation, which is the complete abolition of exequatur on the basis of harmonised applicable law rules” (Provisional JHA Council Conclusions, 5-6 June 2008). We would be grateful for an explanation of what was agreed and the implications for the prospect of UK participation in the Regulation in future.
A separate Commission proposal on Member States’ ability to negotiate and conclude agreements with third countries in the area covered by the Regulation is likely to allay fears as to the effect of the present proposal on external competence. When is a proposal likely to be forthcoming?

We have decided to retain the proposal under scrutiny and would be grateful if you would keep us informed of developments.

18 June 2008

Letter from Bridget Prentice to the Chairman

Thank you for your letter of 18 June which crossed with mine of 12 June.

I can confirm that the European Data Protection Supervisor was consulted about Articles 44-47 after the Commission issued its proposal. The Supervisor welcomed the proposal and recognised its importance but emphasised the need for data protection principles to be respected. In particular he said the proposal should include the following: a complete and precise definition of the purpose for which the information is to be used; details on the maximum extent to which the information can be accessed; and clearer instructions that sensitive data can only be processed when it is strictly necessary. To comply with the Supervisor’s recommendations you will see that the latest versions of these Articles are much clearer about the purpose for which this information is to be collected and restrictions have been included on how that information is to be used. They also state who should have access to the information, a time limit within which it can be used, a need to ensure its confidentiality and provisions on notification to the person about whom the information is collected. These provisions are still subject to negotiation. We will want to ensure that the agreed text properly takes account of the Supervisor’s views and relevant legislation.

You asked about the implications for the UK of the EU signing up to the Hague Protocol (what was described as option (c) in the Explanatory Memorandum of 23 May) and how that would be effected at international level. As I explained in my letter of 12 June, it is likely that ratification of the Protocol will be based on a Council Decision to which our Title IV opt in will apply. We will ensure that the notification sent to the Hague Conference and any information provided to other countries makes it clear that we will not be applying the Protocol.

I agree with your view that it would be unfortunate if the UK were to be denied the advantages of the abolition of exequatur given that this is one of the significant benefits of the proposal. The Government’s preferred position is that exequatur should be abolished for all judgments irrespective of whether applicable law rules have been used. However it is clear that nearly all other Member States believe that there should be some link between the use of applicable law rules and the abolition of exequatur. The Council agreed that future work should proceed on that basis, although exactly how that link is to be made has still to be agreed.

As the process of exequatur currently rarely leads to a refusal to recognise judgments either here or in other Member States, the retention of exequatur for some judgments, while not ideal, is unlikely to make much difference in practical terms. However if work proceeds in this way we believe it would be a necessary and acceptable compromise to enable us to participate in the Regulation.

The way that exequatur will be retained for those Member States not applying the Hague Protocol will be discussed by the Civil Law Committee for the first time in mid-July. The Presidency has proposed that outgoing judgments from those Member States will be subject to a process based on the current procedure in the Brussels I Regulation. We are considering how workable that solution is. It is still to be determined how incoming cases from those Member States that do apply the Hague Convention will be handled. I will keep you informed of developments.

There is another possible scenario for dealing with applicable law and the abolition of exequatur. It has been suggested informally that, if acceptable to the UK, the applicable law rules contained in the Regulation could be confined to child maintenance cases and exequatur could be abolished for such cases. Other Member States would use the applicable law rules in the Hague Protocol in relation to maintenance disputes which did not concern children and a solution on exequatur would need to be applied to such disputes. We are currently consulting stakeholders on this suggestion but at first sight it could have its attractions. It would mean that there would be uniform application of the Regulation in terms of both applicable law and abolition of exequatur for all disputes involving children. In all but exceptional circumstances our courts would still not have to apply foreign law. This is because the overwhelming majority of maintenance cases involve children and, of those, in all but a handful the applicable law rules, which require the law applicable to the maintenance dispute to be the law of the state of where the child is habitually resident, mean the law of the forum would apply.

Accepting applicable law rules on this basis would therefore be likely to have only a very limited impact, and so might be acceptable to stakeholders who have expressed concern about the possible
impact on length and cost of legal proceedings of importing applicable law rules. On the other hand, we would not wish it to be seen as indicating that the UK’s wider concerns about applicable law rules more generally no longer existed. Again I will keep you informed of developments in this area and if this suggestion moves ahead I will let you know our position following consultation with our stakeholders.

Finally you asked when a proposal on Member States’ ability to negotiate and conclude agreements with third countries was likely to be forthcoming. We do not know for definite but at the moment we are expecting it to be issued during the French Presidency.

3 July 2008

Letter from the Chairman to Bridget Prentice MP

Thank you for your letters of 12 June and 3 July 2008 which were considered by Sub-Committee E at its meeting of 16 July 2008.

We welcome amendments to the data protection provisions in line with the European Data Protection Supervisor’s recommendations. We have not yet seen the latest text, however, and would be grateful if you would provide a copy when you next write.

As regards abolition of exequatur, we note the Decision of the Council to proceed on the basis that exequatur will be abolished only where Member States have signed up to the applicable law rules. Given that, as you say, exequatur rarely leads to refusal to recognise a judgment in any of the Member States, we regret that it has been deemed necessary to retain the process in these cases. Have Member States provided details of their concerns?

The suggestion that the UK might consider applying the applicable law rules in child maintenance cases, to allow the abolition of exequatur in those cases, is interesting. However, we note that if there is a significant problem in principle with the application of foreign law in maintenance cases, then acceptance of applicable law rules in child cases on the basis that in most instances this will be the law of the forum will not prevent the need to apply foreign law in the UK in a limited number of child maintenance cases. We would be grateful for your views on the implications of applying foreign law in those cases. We also share your concerns that accepting applicable law rules in some cases may undermine the UK’s general position of resisting applicable law rules in this area.

We note that discussions on linking abolition of exequatur to acceptance of applicable law rules are continuing and look forward to hearing from you on this in due course.

The proposal is retained under scrutiny.

17 July 2008

Letter from Bridget Prentice MP to the Chairman

Thank you for your letter of 17 July 2008.

I am enclosing a copy of the latest draft of the text as you requested. I did not do so in July as we knew that there would be a new draft after the July Working Group meetings.

You asked about the concerns of other Member States which lead them to wish to retain exequatur in respect of UK decisions. The underlying issue is partly due to a philosophical outlook which sees the use of applicable law rules as necessary to ensure that the most appropriate law is used to determine a case. Conversely, they argue that failure to apply those rules can lead to cases where the law applied has only a weak connection to the parties or party and that this is unfair. More specifically, in this instance, the argument is that the Hague Protocol rules include a protection for the debtor in which there is a defence against payment if the maintenance obligation underlying the decision is not known or recognised in the debtor’s own legal system. They suggest this is a necessary safeguard and without it they cannot remove exequatur since only through the exequatur process could they decline to enforce a decision which would not be recognised in the debtor’s own State. They suggest that since the UK will not have used the Protocol rules they do not have the same guarantees when faced with recognising and enforcing a UK decision.

We have argued that the application of the law of the relevant part of the UK here provides more than adequate protection (because, with the exception of civil partnerships, we only recognise a narrow category of maintenance obligations that are recognised throughout the EU). This has not, however, been agreed. It is clear from the proposal put forward in Council, which you were informed about earlier, that our decisions will continue to be subject to exequatur and we are now negotiating the content of that exequatur procedure and whether exequatur will also apply to incoming EU
decisions where the Hague Protocol was applied. I will keep you informed about this aspect as it progresses.

With regard to the idea of using applicable law for children cases, as I mentioned this had been floated informally by the previous Presidency as a possible compromise. Since then, Council has agreed to approach the applicable law rules by using the Hague Protocol in its entirety. The Presidency has withdrawn any suggestion of approaching applicable law other than through the Hague Protocol so this idea is no longer being considered.

I note that the proposal is retained under scrutiny.

5 August 2008

Letter from the Chairman to Bridget Prentice MP

Thank you for your letters of 5 August and 6 October 2008 which were considered by Sub-Committee E at its meeting on 22 October 2008.

The text represents a considerable improvement. We approve the general aim of the draft Regulation, and we welcome the fact that the applicable rules provisions of the Regulation do not apply to the United Kingdom; and also the inclusion of provision for a forum necessitates.

We continue to regret that requests from the UK will be subject to heavier formalities, amounting in effect to the retention of exequatur, but appreciate that most other Member States are reluctant at the moment to remove these. However we support continued efforts to minimise the practical effect of these formalities and hope that the outcome of the envisaged review will persuade others that they are not necessary.

We recognise that the text marks an improvement with regard to data protection but we are concerned that the data protection provisions should be clear and workable. You may wish to seek the views of the Information Commissioner. In this respect there are a number of specific concerns.

We share your concern to impose a clear limitation of the entities obliged to provide information to their Central Authority and note your confidence that it will be possible to agree a limitation which would enable them to be restricted by the requested state to (primarily) selected public authorities. We look forward to the outcome of the further negotiations on this point.

The Regulation is expressed to be subject to the Data Protection Directive, which is an improvement. We also note your indication that discussions are continuing to ensure that the provisions are, at the same time, compliant with Data Protection principles and effective. We think that this is an area where the present draft, particularly the new provisions of Articles 44–47, may still give rise to some difficulties in principle and practice.

First, we are concerned that the wording could lead to quite substantial personal data, relating to a debtor’s employment and financial affairs in a requested state, being transferred to a requesting state, for the main purpose as far as we can see of enabling the creditor then to use it to further enforcement proceedings in the requested state. We note the limitation in Article 46.2 on the disclosure by the requesting Authority of such information to the maintenance creditor, but the qualification in the second sentence (informing as to the address and existence of income or assets in the requested state) is uncertain in scope. If what is meant is that only the existence, but not the nature, detail or amount of any assets may be communicated to the creditor, it should say so. If more is meant, then the qualification risks eliminating the general principle of non-disclosure.

As the Data Protection Directive is intended to apply to requests for information, the question arises how the requested Authority (and the Data Controller) will perform their duties under that Directive. For example, will the mere fact of a request make it necessary for them to disclose the information, under either Article 7(c) or Article 7(e) of the Directive, which would seem circular? If not, they have to consider whether processing is necessary for the purposes of the legitimate interests of the third parties to whom the data are disclosed, under Article 7(f), having regard to the fundamental rights and freedoms of the data subject, which requires a judgment and might require them to have some information about the extent of the need for the data in the requesting state, although, no doubt, the making of the request itself would be entitled to weight. A similar or more acute issue could arise in respect of sensitive data.

A question might arise as to the position if a Member State were to exercise its right, in accordance with Article 13 of the Directive, to adopt legislative measures to restrict the scope of certain obligations and rights laid down in the Directive. Presumably, that would affect the supply of information under the Regulation.
Finally, we note that Article 47.2 envisages that a requested Authority may postpone information to the data subject for up to 90 days, if there is a risk that notification may prejudice the effective recovery of the maintenance claim. We are unclear how, in practice, a receiving Central Authority will form a judgment that informing a data subject of the request will prejudice effective recovery. Further, this provision appears in conflict with Article 11 of the Directive in relation to financial information not obtained from the data subject (which would comprise most if not all of the relevant information). Article 11 would require disclosure of the disclosure and its purpose “no later than the time when the data are first disclosed”—see also s.7 of the United Kingdom’s Data Protection Act 1998.

We feel it important that all the above matters concerning data protection are satisfactorily resolved and we are prepared now to clear this proposal from scrutiny.

27 October 2008

Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

Thank you for your letter of 27 October to Bridget Prentice. I am delighted that the Committee felt able to clear this dossier from scrutiny. I am writing to you in order to address the outstanding points raised in your letter.

Exequatur

I am pleased to be able to say that the final text presented for political agreement at Council on 26 October did indeed include specific reference to a review of the operation of the exequatur procedure applicable to decisions from Member States not subject to the 2007 Hague Protocol as part of the overall review of the instrument.

Further, specific deadlines were secured for the first stage of review of such decisions, as well as the first appeal stage, save where exceptional circumstances make adherence to the deadline impossible. It did not prove possible to secure a specific deadline on the second appeal stage of the procedure, although the court seised of such an appeal is obliged to give a decision “without delay”. However, the Government takes the view that since further appeal is likely to affect comparatively few cases, the lack of a specific number of days’ deadline on that stage is of less importance, and overall the new procedure is a significant improvement on the current operation of exequatur and an acceptable compromise.

Data Sharing Provisions

Entities required to provide information to the Central Authority

Ultimately, it did prove possible to negotiate an optional limitation on the public authorities charged with the duty of providing information to the Central Authority. Article 44 has been amended to add the following:

"Member States may designate the public authorities or administrations able to provide the requested Central Authority with the information referred to in paragraph 1a. Where a Member State makes such a designation, it shall ensure that its choice of authorities and administrations permits its Central Authority to have access, in accordance with this Article, to the information requested".

Where a Member State makes no designation, the obligation to provide the information falls onto a very wide range of public authorities. This provision was worded in this way to ensure that Member States could not avoid their obligations entirely by simply failing to designate any public authorities.

The UK intends to exercise the option to make specific designations of the authorities responsible for provision of information to UK Central Authorities, thus limiting the obligation to the most appropriate public authorities in the UK.

Transfer of information to requesting state

It may assist if I explain in a little more detail how data sharing is likely to work in practice. As you are aware, personal data on the debtor’s financial situation is only available where the creditor has already obtained a decision in his or her favour confirming that s/he is entitled to the payment of maintenance. This is the case whether the request relates to “specific measures” prior to actually applying for enforcement, or the enforcement application itself.

Of course, where the request is made prior to the enforcement application, the financial information which can be provided is very limited, relating only to clarifying the existence of debtor’s income or
assets in the requested Member State, not the extent of either. The Government considers this entirely appropriate - it makes sense for a creditor to be able to assess whether it is worth pursuing an enforcement application in the requested Member State by finding out if there are resources on that territory, prior to spending time and money in applying. However, the balance of the debtor’s privacy rights and the creditor’s rights to maintenance seems to favour this limited approach until such time as the creditor makes her application.

Where the creditor makes the application for enforcement, the financial information available is more detailed. The Government takes the view that the extent of information available under the Regulation is entirely appropriate given that decisions on potentially quite invasive enforcement measures need to be taken by enforcing authorities, and therefore those authorities need a realistic view of the debtor’s financial position in order to be fair to both parties. The Central Authority has to use "appropriate and reasonable" means to obtain this information, and so it would seem that these provisions would be used when other alternatives (such as voluntary provision of information by the debtor) had failed to produce necessary information to enable enforcement. To put the matter in context, it should be borne in mind that in ancillary relief cases in England and Wales, the parties have a duty of full and frank disclosure and so are obliged to disclose their financial affairs in minute detail to each other, bearing in mind that at that stage the applicant has not yet had the extent of her maintenance claim adjudicated upon, unlike the creditor seeking to enforce the decision in his/her favour under this instrument.

In addition, where financial information is sought by UK Central Authorities in order to facilitate an application to enforce a maintenance claim, the information will usually be for the use of the courts within the UK. This is because, whilst the maintenance decision itself may well have been established in another Member State where the creditor lives, it is usually the case that the enforcement application will be made to the courts of the Member State where the debtor lives, works and has resources. Therefore, where information is sought on the debtor’s resources from the UK Central Authorities, the information so obtained is most likely to be sent to UK courts hearing the enforcement application, rather than going to authorities in another Member State. The transfer of information in this situation will therefore frequently be internal to the UK.
Article 46(2) limitation on disclosure

The Government considers that the scope of Article 46(2) is sufficiently clear from the text of the instrument. When considering Article 46(2), it is necessary to consider that it refers to two different situations, for which different provision is made.

Where a specific measure under Article 41b is requested, the requested Central Authority indicates the address of the potential defendant to the requesting Central Authority. If the potential application relates to enforcement, Article 41b(1a) makes clear that the communication between the Central Authorities "shall, in addition, specify merely whether the debtor has income or assets in that State". This wording, and the reference in Article 46(2) to "merely indicating the existence of..." makes clear that it is existence, not extent, of resources that can be disclosed to the potential applicant. As explained above, this is appropriate because at that stage, the applicant only needs to assess whether an application for enforcement is worthwhile.

The situation is different where the applicant has made the application - Article 41b is no longer relevant. In this situation, Article 46(2) requires non-disclosure of the information to the applicant unless the procedural rules of the court seised require such disclosure. The Government is content with this wording because it is clear that by this stage, disclosure will be controlled by the judicial authority seised. Again, a comparison should be drawn with domestic court proceedings to establish a maintenance decision, in which parties are frequently obliged to disclose detailed personal data regarding their financial situations to each other. As pointed out above, where a debtor is in the UK, the application for enforcement will usually be heard by a domestic court.

Performance of the obligation to provide information by requested authorities

The obligation on a public authority to provide information on request by the requested Central Authority arises from the Regulation itself, which is of course directly applicable. This is apparent from Article 44(1). There will be no need for the requested authority to engage in the more complicated analyses that national laws implementing Article 7 (e) or (l) of the Data Protection Directive EC 95/46 (DPD) would require. Article 7(c) DPD is the necessary link here - the data controller (the public authority providing the information) is under a legal obligation to provide the requested information because of Article 44(1) of the Regulation, which is directly applicable in national law. Therefore, when a request is made of a requested authority pursuant to Article 44(1), that article creates a legal obligation on the requested authority to satisfy the request. Consequently in such circumstances the satisfaction of a request by the requested authority amounts to processing "necessary for compliance with a legal obligation" and so Article 7(c) DPD is satisfied. From a domestic perspective under the Data Protection Act 1998, s.35 (DPA) permits exemption from the non-disclosure provisions of the DPA on the basis that the data controller is required to make the disclosure by law. The obligation not to process sensitive personal data contained in the First Data Protection Principle therefore does not apply, because both the Schedule 2(3) condition and the Schedule 3(7) condition are met [respectively that the processing is necessary for compliance with an obligation to which the data controller is subject, and the processing is necessary for the purpose of, or in connection with, any legal proceedings].

Reliance by a Member State on Article 13 of the Data Protection Directive (DPD)

In response to your concern regarding use by a Member State of legislative measures under Article 13 DPD, it seems unlikely that such measures could be used to undermine the supply of information under the Regulation. Article 13 DPD provides for Member States to be able to enact restrictions upon the data rights of individuals. Thus it, for example, allows Member States to pass laws that exempt certain processing from the Article 10 notification requirements. If anything, Article 13 makes the supply of data between controllers under the Regulation easier, not more restricted because the purpose of Article 13 is to ameliorate the restrictions placed upon data where necessary. Where the Regulation itself provides for protective measures for the debtor, it would seem odd, as well as legally improper, that provisions of a Directive could be used to make national laws incompatible with rules contained in a Regulation - national law is of course not permitted to conflict with such directly applicable rules of European law.

Article 47(2)

It will certainly not be easy to form a view of the risk of notification prejudicing the outcome of a maintenance claim, since much will depend on the circumstances of each case. However, the requesting Central Authority will be in a better position to obtain evidence from the applicant (the creditor) that there is a risk of prejudice, and there will be specific provision on the relevant form to be sent by the requesting Central Authority to the requested Central Authority indicating that there is such a risk. The requested Central Authority will form its view on that basis.
As to the point regarding Article 11 of the Data Protection Directive, as set out above the disclosure concerned here is “expressly laid down in law” by Article 44(1). Therefore though Article 11 DPD would usually require notification to the data subject, Article 11(2) expressly excludes such a duty where the “disclosure is expressly laid down by law”. Thus in regard to this specific area of disclosure the DPD does not require notification, however nonetheless the Regulation provides its own independent notification scheme in Article 47.

13 November 2008

CIVIL JUSTICE: ROME I: REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

I am responding to the Commons European Scrutiny Committee’s request for further information concerning the Government’s consultation document entitled ‘Rome I- Should the UK opt in?’. I should like to mention that the issues raised are covered in greater depth in the consultation document.

I attach (at Annex A) the final text of the Regulation. This text differs very slightly from that produced in the Rome I consultation document following linguistic comparisons of the text in all EU languages. The final Regulation is due to be formally adopted in June.

The Committee has asked the Government to indicate precisely, which of its original concerns and objections have been addressed or removed by amendment to the original text and to what degree. I explain these further below. I also attach, at Annex B, the wording of the key provisions from the Rome Convention, the Commission’s original proposal and the Rome I Regulation for ease of comparison.

ROME I- KEY PROVISIONS FOR THE UK

Article 3 - Freedom of choice

Article 3 of the Regulation is an important provision as it enshrines, as the cornerstone of the Regulation, the principle of party autonomy in relation to choice of law. This principle, which is central to the 1980 Rome Convention, is important in delivering the benefits of legal certainty in international commerce.

The Government had three concerns with the Commission’s proposal:

a. it did not necessarily provide for the degree of certainty that must be demonstrated when choice of law had not been made by the parties;

b. the resistance of Member States to the presumption that where parties had made an exclusive choice of court agreement that it should also be assumed that the law of the country where that court was situated should also apply; and

c. that parties should be able to choose a law of contract that was not the national contract law of a state, provided that that law was recognised internationally or in the Community. The UK, in line with the majority of Member States, was not generally supportive of this proposal (which in subsequent negotiations was deleted) as it would give rise to legal uncertainty and there was insufficient demand for it from commercial operators.

Overall, the Government has done well in the negotiations on this provision. The terms of Article 3 of the Rome I Regulation are substantively the same as those of Article 3 of the Convention. The Regulation, however, contains two useful clarifications. First, choice of law by the parties need not be made only in express terms. It is sufficient for the choice to be clearly demonstrated by the parties by reference to the terms of the contract in the circumstances of the case. The additional flexibility available to parties is also useful and reflects commercial practice in some instances. The current position under the Convention is not entirely clear on this point. Secondly, the inclusion of a recital which enables a choice of court agreement to be considered as a factor in determining whether a choice of law has been clearly demonstrated is a useful addition. This reflects, in general terms, the current position under UK law. This inclusion is therefore useful as there are many situations where international commerce contracts provide for the exclusive jurisdiction of UK courts in determining the outcome of future disputes.

Article 4
This provision sets out the rules that apply when parties have not chosen the law of the contract between them in accordance with Article 3. In contrast with Article 4 of the Convention which establishes a complex but flexible framework based on a “closest connection” test, qualified by various presumptions, the Commission’s proposal aimed at achieving greater legal certainty at the cost of rigidity. The Government were concerned that the inflexibility proposed by the Commission could have an adverse effect particularly on commercial transactions such as those involving documentary credits (i.e. a commitment given to a party by the other party’s bank that they will make payment upon presentation of a pre-agreed, specified set of documents).

Negotiations concluded that Article 4 of the Regulation should adopt a simpler structure and instead of presumptions, apply various specific choice of law rules for particular types of contract. Where these rules are inconclusive, they will be subject to a general rule and further displacement rules. The purpose of this is to create the necessary degree of flexibility for those situations where the mere application of one specific choice of law rule would not, for various reasons, produce appropriate results. The Government is of the view that this mixture of specific rules, coupled with rules of displacement, strikes an appropriate and reasonably predictable balance between the competing objectives of certainty and flexibility. The improvements made to the provision both in terms of its structure and the clarifications provided represent an improvement over the law under the Rome Convention and that initially proposed by the Commission.

Article 5 (contracts of carriage - passengers)

Neither the Rome Convention nor the Commission’s Rome I proposal contained a specific rule to govern contracts for the carriage of passengers. However, because of support for such a rule by the majority of Member States, who wished to establish a greater degree of consumer protection in this field than currently exists, a rule was developed during negotiations. The Government was concerned that to include a rule for such contracts would preclude the application of party autonomy which is currently prevalent in this field. Member States were persuaded, however, to support the inclusion of a significant degree of party autonomy which will allow carriers to select the law of:

a. a passenger’s habitual residence;
b. a carrier’s habitual residence;
c. where the carrier has his place of central administration;
d. the place of departure; or
e. the place of destination.

The agreement to this level of party autonomy was considered a step forward by the Government and meets the concerns expressed by our transport industry who were initially concerned about the inadequate availability of party autonomy. The provision strikes a satisfactory balance between the interests of passengers and commercial operators. The Government therefore considers that this represents a good outcome for the UK.

Article 6 - Consumer contracts

The Commission proposed that the law applicable to consumer contracts should be the law of the Member State where the consumer was resident. This rule would govern all cross-border consumer contracts. This differed considerably from the Rome Convention which enables businesses and consumers to agree the law to apply to such contracts (in practice usually the seller’s law) subject to preserving the protective mandatory rules of the country where the consumer is habitually resident.

The Government were concerned about the impact on the operation of the single market of such a rule. Both the e-commerce and small business sectors had expressed concern that the provision was more likely to impede rather than support the workings of the internal market. There were also other concerns particularly in relation to the scope of the rule. Article 5 of the Rome Convention is currently restricted to contracts for the supply of goods and services. The Commission’s proposal, however, contained no such limitation and the UK in particular, were concerned that certain financial obligations and transactions would be covered by the Commission’s proposal. As a result there was general agreement by Member States that special consideration should be given to certain transactions where it was particularly important that only a single law should apply. These transactions have been excluded and parties can choose the law without restriction.

The Government negotiated on the basis of trying to achieve restoration of some degree of party autonomy, combined with specific provision for certain financial instruments. This has been achieved and the provision is now substantially in accord with the Rome Convention. The Government believes an appropriate balance between consumer and business interests has been reached.

Article 7 -Insurance contracts
Choice of law in relation to insurance is currently covered by the Rome Convention (for direct insurance risks outside the Community and all reinsurance risks) and the Insurance Directives (for direct insurance risks inside the Community). The Commission’s Rome I proposal envisaged that insurance should be dealt with broadly in the same way as that under the Convention. A proposal to include it in Rome I was made, however, during negotiations under the German Presidency, who were supported in their remit by a number of Member States. Their reasons for doing so were to ensure that all the relevant applicable law rules were situated in one instrument but in doing so they also wished to make some substantive changes.

The Government were generally sceptical about the comprehensive coverage of insurance in Rome I. Although it was acknowledged that the legal framework in relation to insurance was complex and inflexible, before any changes could realistically be made it was necessary to undertake a cost benefit analysis of the impact of any new rules. The Government argued in favour of retaining the status quo but were also able to reach a compromise on the basis of a consolidation of the current rules in Rome I.

The final text of the Regulation has achieved this latter objective and on this basis the substance of the current law has been retained. The Government regards this as a good outcome.

Contracts concluded by an agent

In its original proposal, the Commission included a specific provision on this topic which would have resulted in various changes of substance to the current position under the Convention. This provision was widely criticised by UK stakeholders and these criticisms were also voiced in other Member States. The Government is pleased that this provision has been removed from the Regulation and as a result the satisfactory position on contracts concluded by agents which currently operate under the Convention will continue to operate under the Regulation.

Article 9 – Overriding Mandatory Provisions

In their original proposal, the Commission proposed a provision in similar terms to that of Article 7(1) of the Convention which, given the required uniform application of Council Regulations, would not have been subject to any right of reservation by any Member State. As the UK currently has a reservation on Article 7(1), the prospect of applying this provision gave rise to widespread concern in commercial circles, particularly in the City of London. This provision was the principal reason behind the UK’s decision to opt out of Rome I as it represented the greatest single concern for commercial interests. Focus was therefore placed on finding a generally acceptable compromise that would be narrower in scope than the Commission’s proposal and would keep any legal uncertainty to a minimum. The final result of the negotiations is Article 9(3) which focuses on the discretionary application of certain rules of the country where the contract is to be or has been performed which renders the contractual performance unlawful. The Government's initial assessment is that the provision represents a good outcome to the negotiations. Not only does it generally reflect the position under English law in light of the Ralli Brothers decision but also constitutes an improvement in terms of legal certainty over the existing law.

Article 14- Voluntary assignment and contractual subrogation

The assignment of debts is integral to many financial instruments. The rules in this area have to be satisfactory as they are of critical importance to wholesale financial markets. In its original proposal, the Commission suggested a rule to regulate the priority of successive assignments in respect of third parties. There is no equivalent rule in the Rome Convention, with national law currently governing the area. Under UK law, the applicable law in such matters would be the law of the original claim and this remains the position notwithstanding that the claim may have been assigned several times. The Commission, however, proposed that the issue of priority should be governed by the law of the country where the assignor was habitually resident.

The Commission’s proposal was widely criticised by UK stakeholders in the financial sector who considered that such a rule would make it difficult to ascertain the applicable law and would create serious problems for debtors in cases of successive assignments. This would lead to doubt about the ownership of the debt after an assignment and in some cases the debtor would not know to whom his debt was owed. A further criticism of the proposed rule was that it would create legal complexity by adding a further applicable law rule in addition to those that already apply in Articles 14.1 and 14.2 of the Regulation. It was also feared that the rule would impose additional costs which had the potential to have adverse economic consequences for financial markets.

The Government argued that priority issues should be governed by the law of the original claim. However, in the limited time available to reach agreement on the Rome I Regulation, efforts made to reach a decision on a compromise were unsuccessful. The rule has therefore been excluded from the Regulation. Nonetheless there remains a desire to find a solution. The Regulation requires the
Commission to review this topic and, if appropriate come forward with a proposal within two years of the Regulation coming into force.

**KEEPING THE COMMITTEES INFORMED OF DEVELOPMENTS**

The public consultation on Rome I ends on 25 June. The responses, together with any concerns and issues raised by respondents shall be considered before any decision is made by the Ministry of Justice in conjunction with the Department for Finance & Personnel (Northern Ireland) and the Scottish Government about the UK’s opt in. I shall write to the Committees once a decision has been made. The Government hopes to be able to announce its decision in July.

15 May 2008

**Letter from the Chairman to Bridget Prentice MP**

Thank you for your letter of 15 May 2008 which was considered by Sub-Committee E at its meeting of 18 June 2008.

We welcome the final Rome I Regulation agreed by the Member States. As your helpful letter indicates, the final text addresses the UK’s original concerns and in some areas brings useful clarifications to the Rome Convention text. We would support a UK decision to opt in to the Regulation at this stage.

We have decided to clear the proposal from scrutiny.

18 June 2008

**Letter from Bridget Prentice MP to the Chairman**

The consultation on the Regulation closed on 25 June. Thirty five responses were received to the consultation and all but one agreed with the Government’s recommendation that the UK should now seek to opt in to the Rome I Regulation.

Respondents were of the view that, given the satisfactory outcome of the negotiations, there was an advantage to British business if the rules determining the governing law were uniform throughout the EU. Aligning UK law in this respect to that in the rest of the EU would reduce legal expense and transaction costs. In addition, some respondents expressed the view that our original decision to opt out of the Regulation had helped to achieve the final positive result. However, they also made the point that if the UK did not opt in to Rome I now having achieved such a good result, it could significantly weaken the effectiveness of our right to not opt in in future and damage our negotiating strength in relation to other EU dossiers.

It is my intention, subject to the endorsement of other Government Committees and the devolved administrations to write to the European Commission and set in motion the opt-in procedure. Although the Commission’s consent is formally required, I see no problem in this regard.

I am extremely grateful for the work undertaken by you and your Committee, which contributed throughout the negotiations to a successful outcome for the UK.

1 July 2008

**Letter from the Chairman to Bridget Prentice MP**

Thank you for your letter of 1 July, which was considered by Sub-Committee E at its meeting on 16 July. We are grateful for the information on the results of your consultation and welcome your decision, in principle, to opt in to the Rome I Regulation.

18 July 2008

**CIVIL JUSTICE: SUCCESSION AND WILLS**

**Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman**

I am writing further to Bridget Prentice’s letter of 10 July 2008 enclosing the Commission’s draft preliminary proposal on Succession and Wills to inform you of the latest developments. I am pleased to enclose a copy of the comments submitted by the UK in September.
As you will see, the comments reiterate the Government’s interest in a proposal that would bring real benefits to citizens, and our concern about significant aspects of the Commission’s draft preliminary proposal. In this respect the comments build on the UK Response to the Commission Green Paper in 2006 and the additional papers sent to the Commission in December 2007 and February 2008.

The Justice Secretary, Bridget Prentice and I have also raised our concerns with Vice President Barrot and with fellow Justice Ministers from other Member States. My officials have had meetings with Commission officials and have been in contact with the relevant officials from other Member States to explain the UK position. My officials continue to work closely with stakeholders in England and Wales, including other Government Departments, and they maintain regular contact with officials in the devolved administrations who are in turn working closely with the stakeholders in those jurisdictions.

20 November 2008

ANNEX

UK COMMENTS ON EU COMMISSION DRAFT PRELIMINARY PROPOSAL ON SUCCESSION AND WILLS

1. The United Kingdom thanks the European Commission for the opportunity to comment on the text of the draft preliminary proposal set out in the discussion paper circulated in June 2008. The UK’s general position on the proposed instrument remains as set out in the papers provided to the Commission in December 2007 and February 2008 and our response to the 2005 Green Paper.

2. We accept the draft text is only a preliminary proposal but we are concerned that it does not address the principal issues we raised. If the Commission’s proposal in 2009 is in broadly similar terms, we anticipate that it will cause the UK significant problems. This could be unfortunate because there are considerable numbers of our citizens living or owning property abroad, who could benefit from a well constructed Regulation that properly respects the common law tradition in this area. We accept that the diversity of legal traditions makes this difficult and that solutions will not be easy to find. We consider that there is still a great deal of work to do before a generally acceptable legislative proposal can be published, and we are very willing to work with the Commission to bring the preparatory work to a satisfactory solution.

3. In our reply to the 2005 Green Paper we argued that the breadth of the proposed instrument was itself likely to be an obstacle to progress. We recommended that serious consideration should be given to the development of choice of law rules in relation to entitlement on succession (‘who gets what’). We still consider that bringing forward a proposal focussing on entitlement might make agreement more readily achievable than persevering with a comprehensive instrument. From a successful beginning of this kind other measures might follow.

4. At the meeting in June 2008 the Commission indicated that if time permitted a further meeting of National Experts should be held. We would welcome such a meeting and, in any event, stand ready to discuss our concerns and to find mutually acceptable solutions with the Commission and other Member States.

5. We set out the UK’s principal concerns regarding the detail of the draft text below. We have been greatly helped in the preparation of these comments by experts and stakeholder organisations across the UK to whom we circulated the draft preliminary proposal for comment. We are very grateful to them.

Issues of major importance for the UK

6. Article 3.6 defines the scope of the law that is to govern the succession. Under this provision the Regulation will apply, not only to the question of which individuals are entitled to the deceased’s property, but also to national procedures governing the process by which property passes to the heirs. In particular the result of Article 3.6.2(h) and (i) is that a foreign procedure on succession under which property transfers directly from a deceased to his heirs will apply in relation to assets situated in the UK. The effect of this would be to by-pass the current procedure in the UK, under which those assets automatically transfer to personal representatives who are legally responsible for the payment of tax and debts. Under UK law a personal representative cannot distribute the assets until the inheritance tax has been paid. Allowing the heir to take property directly by-passes this system, threatening the ability to collect tax. It would also create major issues for land registration systems.
7. It is important for the legal certainty of lifetime transactions that valid gifts and other dispositions should not be negated by the operation of a foreign law of succession. The succession laws of many countries require extensive provision to be made for family members on succession and the UK has in principle no problem with applying such a law. The problem arises in those cases where the foreign law in question also provides, in some circumstances, for the reopening of certain lifetime dispositions by the deceased. This would undermine legal certainty generally and in particular guarantees of title given by land registration systems. Under Article 3.6.2(m) and (n) this kind of "claw-back" provision would fall within the scope of the applicable law and thus operate throughout the EU.

8. As regards interests that terminate on death, such as life interests and joint tenancies, these are in principle, and rightly, excluded from the scope of the instrument by Article 1.1.2(f). However this important exclusion appears to be undermined by the footnote to that provision which suggests that these interests may nevertheless be subject to "claw-back" provision if that is part of the applicable law.

Other significant issues

9. The important definition of "habitual residence" in Article 1.20) needs to be improved to avoid uncertainty and litigation. We invite the Commission to consider incorporating the following elements in a hierarchical scheme to define the centre of an individual's activities as suggested in our paper of February 2008:

- the law of the country in which the deceased has a permanent home available to him or her at the time of death;
- if he or she has permanent homes in more than one country, or in none, then the applicable law should be that of the country in which he or she has an habitual abode (which might be defined by reference to where he or she spent the most time in, for example, the year before his or her death);
- if he or she has permanent homes in more than one country, or in none, and has an habitual abode in more than one country, or in none, then the applicable law should be that of the country with which his or her personal and economic relations are closest.

10. The UK supports in principle the transfer provision in Article 2.2, but considers that its scope of application is too narrow, in particular it should also apply in the context of Article 2.3 (the subsidiary competence).

11. The provision proposed for the prorogation of jurisdiction (Article 2.210ption) is problematic. It would be inappropriate for an heir to be entitled to select a competent jurisdiction, particularly having regard to the need to protect the legitimate rights of other heirs, creditors and other third parties. It is unclear whether it is envisaged that a chosen jurisdiction should be able to deliver a judgment that would take effect in rem. It is also unclear how a choice made under this provision would affect any choice of forum made by a testator and whether a choice made by an heir would operate with exclusive or non-exclusive effect.

12. The provision (Article 2.3.1) dealing with subsidiary competence is seriously problematic in several respects. First, there is a lack of justification as to why the presence of a few assets in a Member State should, at the behest of an heir or "interested party", confer jurisdiction on the courts of that Member State in respect of all the assets of the deceased. These assets may be located in various countries around the world. Jurisdiction taken on such a tenuous basis would be exorbitant. The breadth of this proposed Jurisdiction would be likely to create problems in relation to non-Member States. Secondly, the use of the connecting factor of nationality is unsatisfactory. It may provide no meaningful connection to the State in which a person dies (he or she may have inherited parental nationality and never lived in the country in question). Using nationality as a connecting factor is unsatisfactory if an individual has more than one nationality or if the State of which the individual is a national has more than one jurisdiction. In these cases additional rules would be required.

13. The likelihood of problems in relation to non-Member States is exacerbated by the associated choice of law proposal that the Member State with Article 2.3.1 jurisdiction should apply its own law (Article 2.3.2). This would be likely, not only to generate uncertainty as to the applicable law, but also to encourage forum shopping and litigation. Further, the law applicable under this provision would frequently not be appropriate as regards assets, including immovables, principally located in a non-Member State where the deceased may have been habitually resident. This in turn could well give rise to parallel proceedings and/or a judgment that would be unenforceable
in that non-Member State. This risk is further increased by the lack of any power to stay proceedings in the Member State in question in favour of the courts of the non-Member State. We consider that these problems need to be addressed before a satisfactory solution can be found.

14. Article 2.6 (jurisdiction based on the location of an asset) is unsatisfactory. It does not create an exclusive jurisdiction in respect of succession disputes principally relating to land situated in a Member State (see the analogous jurisdiction under Article 22 of the Brussels I Regulation for such disputes which occur outside the succession context). There should be a provision that specifically confers jurisdiction on the courts of the place where the land in question is situated to determine entitlement issues relating to that land. Article 2.6 is helpful as far as it goes, but does not go far enough (it only concerns the administration and transfer of property). It does not cover the situation where the transfer has to be effected in a non-Member State. Nor does it cover in this context whether proceedings started under Article 2.1 and 2.3 should be subject to a power to stay in favour of the courts of a non-Member State.

15. Article 3.1 (the main choice of law rule) is defective. This rule should not be tied in the inflexible way proposed to the provisions on jurisdiction. There should be separate free-standing choice of law rules, with the possibility for national courts in some cases to apply a law other than the lex fori. This would reflect the fact that in the United Kingdom, as in the other Member States, succession is generally non-contentious. In the light of this, it is not appropriate for those concerned with the resolution of succession issues to have to go to court to establish the applicable law or to establish jurisdiction, even where there had been no previous possibility of proceedings, in order to show that the lex fori can apply. The current proposal places far too much emphasis on the application of the laws of Member States to cases that are fundamentally concerned with non-Member States. In line with the Rome I and Rome II Regulations it should be possible to apply the law of a non-Member State if that is the applicable law. The current inward-looking proposal is likely to create problems with non-Member States.

16. As regards Article 3.2 (freedom of choice) the use of the nationality criterion is problematic for the reasons given in relation to Article 2.3.1. The testator’s choice of the law of his or her habitual residence at the time when he or she makes his or her selection is likely to be the most useful of the options. Choice of the law of future nationality at death is unlikely.

17. Article 3.5 (particular inheritance regimes) creates a special exclusion from the scope of the applicable law for certain rules of national law that apply to assets located in the country in question. An exclusion of such a broad scope is unsatisfactory in that it could significantly undermine the benefits of legal certainty that uniform choice of law rules are designed to create. Consideration should be given to re-framing this provision in more limited terms designed to safeguard the application of the mandatory rules of the forum.

18. Article 3.6.2(0) provides that all issues relating to the revocation of wills should fall within the scope of the generally applicable law. This solution fails to consider, as it should, the different ways in which revocation can occur. In cases where a will is destroyed, where a later will is executed or where a subsequent marriage invalidating the will is entered into, it is important that the legal effects of these acts should be known at the time when they took place and in accordance with the law applicable to the act in question. It is not satisfactory that their legal effects should only be ascertainable subsequently. A testator should be able to know at the time of acting whether the revocation is effective. A will should not be revalidated if the testator later dies resident in another country under whose law the revocation is ineffective: such an outcome would defeat his or her expectations. In addition, the issue of the interpretation of the will should be governed by the law intended by the testator, and not by the law of the succession.

19. Article 3.8 (the public policy rule) is unsatisfactory in two respects. First, it would not be appropriate to render the rule inoperative in cases where the applicable law is the law of a Member State. There is no such restriction under the Brussels I, Rome I or Rome II Regulations and there is no justification for establishing it in this context. Secondly, the definition in paragraph (2) is unhelpfully vague and would merely serve to create legal uncertainty in relation to the public policy principle.

20. Chapter 4 lays down rules on recognition and enforcement. The UK has a general concern about the lack of clarity as to the relationship between these rules and the proposed European Certificate of Inheritance (ECI). We are concerned about the potential for the latter to undermine the safeguards contained in the former. Is it intended, for example, that there should be provision equivalent to article 4.2 (grounds of non-recognition) in relation to the ECI? If not, a person obtaining an ECI would be in a better position than a person in receipt of judgment from a foreign court.
21. Article 4.7 deals with issues relating to registration and transcription. The key issue here is whether national registers of legal interests in land would be obliged to register, as such, a foreign interest where that interest is unknown under the legal system of the Member State in question. It is important for the integrity and effective operation of these registers, which in the UK guarantee ownership, that there should be no such strict obligation. It should be sufficient for there to be registration of a property law right that is the closest national equivalent of the foreign right in question. Article 4.7 fails to provide adequate clarity on this important point. In this context the exclusion of “trusts” under Article 1.1.2 i) indicates a worrying lack of reciprocity.

22. Article 5.1 relates to the recognition and enforcement of actes authentiques. In broad terms they are to be given the same status as court judgments. Our concerns relating to Chapter 4 therefore apply equally here, but additionally the effect of the article is unclear to us. More fundamentally, the article fails to make any provision for the mutual recognition and enforcement of similar documents, such as grants of probate or letters of administration, from non-notarial jurisdictions.

23. Chapter 6 relates to the proposed ECI. In practical terms the ECI is potentially the most important article in the proposed Regulation. If a way can be devised to make the ECI function across the very different systems of law and administration in all Member States then it could bring a real practical benefit to all citizens rather than just the ones with a shared notarial tradition. As we explained in our paper of February 2008, we consider that by providing authoritative evidence of certain facts, the ECI could make it easier for foreign heirs to obtain grants of probate or letters of administration, and for UK-based personal representatives to deal with assets abroad. More consideration needs to be given to the interaction of the ECI with different legal and administrative systems, and to the nature of information available on public registers in different Member States, as this will affect how much information can be provided in the ECI. Too much remains uncertain as to the nature of the ECI, who may grant it, how fraud is to be prevented, what is to happen in the case of multiple grants and how it is to relate to foreign judgments and actes authentiques.

CIVIL JUSTICE: TRANSPARENCY OF DEBTORS’ ASSETS (7403/08)

Letter from the Chairman to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

This Green Paper was considered by Sub-Committee E.

We welcome the Green Paper and the useful options suggested by the Commission for addressing problems of cross-border debt enforcement. We strongly support the proposal that a manual of national laws and procedures be prepared and made widely available to improve information for creditors. We also welcome greater exchange of information, although we note the difficulties that may arise as a result of different levels of access in the Member States and the different nature of enforcement bodies. The Commission does not attempt to define what it means by “enforcement body” but indicates at page 4 of the paper that the focus is on “public” enforcement of judgments. It is not clear to us what this would cover in the UK context and we would be grateful for your comments. Who would be an “enforcement body” in the UK?

We are less persuaded of the scope for Community legislation to increase the information available in registers given the disparities in the nature and content of the registers identified by the Commission. Improving access to registers, through exchange of information procedures discussed above, appears more realistically attainable.

While the option of introducing a European Assets Declaration or an obligation to provide for a debtor’s declaration procedure appears attractive, we are concerned about the potential impact that an obligation to create or accommodate such a procedure could have in those Member States which do not currently adopt this approach. The Commission indicates that this is the case in Scotland although your EM suggests otherwise (paragraph 18). We would be grateful for clarification of the position as regards the UK jurisdictions.

More generally, although we support in principle the Government’s undertaking to ensure that EU measures are limited to cross-border cases as required by Article 65 TEC (and as will continue to be required if the Treaty of Lisbon enters into force), we consider that difficulties could arise in attempting to reach an agreed definition of cross-border in this context. Given that the aim of the options proposed in the Green Paper is to reveal assets held by a debtor in any Member State, every case is potentially cross-border: any debtor may own assets abroad, even where the case itself
involves a creditor and debtor with the same nationality and residence and a court action pursued in that Member State. On this analysis, the cross-border nature of the claim can only be established once full disclosure of the debtor’s assets has been made and it is difficult to avoid the conclusion that exchanges of information through enforcement bodies, facilitated access to foreign registers, a debtor’s declaration procedure or a European Assets Declaration, if introduced, should be available to all creditors in order to allow them to ascertain whether a debtor has assets elsewhere in the EU. However, this position is likely to offend against the principle that the proposal should not impact upon domestic laws and practices. We would be interested to hear your thoughts on this matter.

We have decided to retain the Green Paper under scrutiny.

15 May 2008

Letter from Bridget Prentice MP to the Chairman

Thank you for your letter of 15 May. In response to the Commission’s Green Paper and the Government’s Explanatory Memorandum of 27 March you asked a number of questions.

First you noted that the Commission had indicated that the focus of its Green Paper was on the public enforcement of judgments and you asked who would be an “enforcement body” in the UK. In England and Wales, the courts deal with enforcement on behalf of creditors. The county court or the High Court (depending on the size of the outstanding debt to be enforced) deals with the enforcement of county court and High Court judgments (to include awards made by tribunals or other bodies which, if statute enables, are recoverable as if payable under a county or High Court order). A magistrates’ court may also deal with the enforcement of some civil debts such as unpaid council tax or child maintenance.

Similarly in Scotland enforcement of debt normally starts in the courts. In many cases this will be the Sheriff Court but there are occasions when the Court of Session will consider actions put before them. Subsequent enforcement of any court judgment is instigated by creditors who can use a number of legal processes known as diligence and who employ Sheriff Officers to execute the process they have chosen to pursue.

In Northern Ireland the Enforcement of Judgments Office (EJO) is essentially the centralised unit for enforcing judgments of the courts. The EJO’s powers and procedures are contained in the Judgments Enforcement (Northern Ireland) Order 1981, and Judgment Enforcement Rules (Northern Ireland) 1981.

You also considered that improving access to registers through an exchange of information seemed more realistically attainable than legislation to increase the information available in the disparate registers identified by the Commission. I understand this view. As you will have seen in the Explanatory Memorandum, the Government highlighted the fact that not all Member States will hold the information suggested or if they do it may not be held in the form of a register. Therefore it will be difficult to increase the information available in a way that standardises the content in each Member State. This is something the Government intends to say in the UK’s response to the Green Paper.

Next you were concerned about the potential impact that an obligation to provide for a debtor’s declaration of assets could have in those Member States that do not currently have such a system and you asked for details of the procedures in the UK’s jurisdictions. In England and Wales, the court has the power to order a judgment debtor to attend court to provide information, for the purpose of enabling a judgment creditor to enforce a judgment or order against him. Under the Tribunals, Courts and Enforcement Act 2007, once the necessary regulations have been put in place, it will be possible, where there is a court judgment, for courts to obtain information on debtors held by Government Departments such as DWP or HMRC. A court will also be able to make an information order, which requires prescribed third parties to provide prescribed information about the debtor. It is envisaged that credit reference agencies and banks are likely to be recipients of such orders. However, such information will have to be requested on a case by case basis and its use will be subject to restrictions. Regulations are to be put in place which will restrict how information obtained by the court can be further used or disclosed to ensure protection of the debtor’s rights and to prevent the unlawful use of information.

In Scotland there is currently no obligation for the provision of a debtor’s declaration of assets. There are public records such as the Land Register which record information regarding a person’s heritable property. Part 16 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (the Act) will, once commenced, give Scottish Ministers a power to provide regulations to allow creditors to obtain information about debtors by making an application to a Sheriff. The purpose of the disclosure of relevant information will be to assist creditors enforce the payment of debts due to them. However this part of the Act is not likely to be commenced until mid to late 2010.
As part of the EJO enforcement process in Northern Ireland a judgment debtor is required to give information to an enforcement officer as to their means to satisfy the judgment. The debtor may be interviewed at their home or summoned for examination under oath. Following the receipt of a report of the debtor’s means made by the enforcement officer either the Master of the EJO or the Chief Enforcement Officer will make a decision as to the best way of enforcing the judgment based on the information as to the debtor’s assets.

Finally you questioned how easy it would be to restrict a European procedure to cross-border cases. While I understand your concerns I can envisage ways it could be possible. For example, as we want information to be open to request only after a creditor has obtained a relevant court decision on the merits of the claim which has shown a debt is owed; a European Debtor’s Declaration could be available only where the enforcement of a cross-border judgment is required to be enforced. A cross-border judgment could be defined on the basis of the existing definition in the European Order for Payment and Small Claims Regulations and could also include cases where a European instrument has been used - for example the European Enforcement Order. Obviously this is just a possible scenario. The Government’s position will be better informed once we have a clearer idea of the content and form of any future instruments that might follow from this Green Paper and decisions on the appropriate Treaty base have been made.

5 June 2008

Letter from the Chairman to Bridget Prentice MP

This Green Paper was considered by Sub-Committee E at its meeting of 25 June 2008.

We are grateful for the information you provide about the different UK jurisdictions. You do not indicate what effect a European Assets Declaration would have on the different UK procedures and on those Member States which do not have a debtor’s declaration procedure at present. We would welcome your views.

THE PURPOSE OF EU ACTION

It is, in our view, important to distinguish between the two issues which arise in relation to cross-border debt recovery. The first is that of the difficulty in obtaining information on the debtor’s assets where they are located abroad. The second is that of the actual enforcement of the judgment against those foreign assets. The Green Paper appears to address only the first of these problems, and it is important to bear this in mind when considering what constitutes “cross-border” in this context. We note that while your approach to defining “cross-border” is likely to be helpful in terms of the actual enforcement of the debt (through an assessment of the “cross-border” nature of the enforcement proceedings), it may be less appropriate for a procedure, linked to the principal proceedings, concerning access to information on assets. We discuss this in more detail below.

THE NEED FOR EU ACTION

As to the need for EU action in this area, the assertion that it is difficult for creditors to gather information on assets which are not located within the Member State of judgment will be difficult to maintain if it is shown that all EU domestic procedures provide a simple means for all creditors to access information on debtors’ assets, whether domestic or foreign. Do the various procedures outlined in respect of UK jurisdictions, both in place and pending, provide for information to be disclosed on all debtors’ assets, within and outside the UK? How many of the other 26 Member States provide for some form of debtor’s declaration or disclosure procedure which would be satisfactory, and does the procedure cover assets outside the Member State in question? Footnote 34 of the Green Paper provides some information but there appears to be no substantive analysis of the data collated.

DEFINING “CROSS-BORDER”

Assuming that there is a need for EU action then it seems to us that, if your proposed definition of “cross-border” were accepted, the proposals would apply in the following situations. First, the measure would facilitate the possibility for the creditor to obtain data on debtors’ assets where the creditor has obtained judgment in a Member State which is not his Member State of domicile or residence. Second, the measure would allow a creditor to obtain data on a debtor residing in another Member State, where the creditor has pursued legal proceedings in his own Member State. Third, the measure would permit a creditor to obtain data on a debtor residing in another Member State, where the creditor has pursued legal proceedings in a third Member State.
In the first case above, measures of the nature described in the Green Paper would assist a creditor unfamiliar with the legal system of the Member State of judgment to obtain information on the debtor, wherever those assets are and regardless of the debtor’s residence or domicile. In the second case, measures would assist a creditor in his local jurisdiction who has obtained a judgment against an individual likely to have assets abroad to obtain the information necessary to enforce his judgment against those assets. In the third case, both of the above advantages would accrue to the creditor.

In the first case, where the measure would assist a creditor pursuing legal proceedings in a Member State which is not his State of residence, then there may be a benefit in having either similar debtor’s declaration procedures or a European Assets Declaration. This is because the creditor’s unfamiliarity with the justice system in the Member State of judgment may otherwise be a hindrance to his possibility of enforcing his debt abroad. But even that view may be undermined where a simple procedure exists in the Member State of judgment for the creditor to find the information he seeks (a point which we raise above).

However, as regards the second case, where the creditor has pursued his claim in his own Member State, there is no unfamiliarity with the legal system and he can already avail himself of domestic procedures in the same way as his compatriots who pursue claims against residents. He would, of course, benefit from a new EU procedure if there is no domestic procedure available for him to access information on his debtor’s assets abroad. But under the Government’s proposed definition of “cross-border”, resident creditors of resident debtors would not be able to benefit from new EU procedures, even though those resident debtors may also have assets abroad. Take, for example, the case of proceedings in Scotland by two Scots. Scot 1 obtains judgment against a fellow Scot with a villa in France; Scot 2 obtains judgment against a Frenchman residing in France with a villa in France. Scot 2 would benefit from any new EU procedure, but Scot 1 would not, even though both debtors have villas in France. Given that the problem identified in the Green Paper is that of access to information regarding the debtor’s assets, a definition of “cross-border” which is limited in the manner proposed by the Government appears to fail to address the full extent of the problem identified.

In our view, it seems logical that if there is a need to improve creditors’ information on debtors’ assets abroad, then procedures for access to information on debtors’ assets should apply to all creditors and not merely those creditors involved in “cross-border”, as you define the term in your letter, proceedings. This need not offend against the “cross-border” requirement in Article 65 TEC: the “cross-border” element would be satisfied by the need to provide a procedure within the EU which would permit creditors to have ready access to information on debtor’s assets which are not located in the creditor’s country of residence or in the Member State of judgment. We would welcome your views on the above analysis, as we consider that it may assist in the decision as to which of the options outlined by the Commission in the Green Paper would be most appropriate to address the problem identified, while respecting the principle of subsidiarity.

We have decided to retain the Green Paper under scrutiny.

26 June 2008

Letter from Bridget Prentice MP to the Chairman

Thank you for your letter of 26 June.

At this early stage in the consultation on this subject it is difficult to say what effect a European Assets Declaration will have on the different procedures in the UK and other Member States. It will be the Government’s aim to ensure that, as far as possible, a European system is compatible with current UK procedures. It should be possible for a separate European procedure to stand alongside national systems.

We do not currently have information on how many of the other 26 Member States provide for some form of debtor’s declaration and whether that procedure covers assets in other Member States. We expect that such information will be provided by the Member States in their responses to the Green Paper. However a 2004 study prepared for the Commission by Professor Burkhard Hess of the University of Heidelberg found that 5 of the then 15 Member States did not have an assets declaration procedure. In those that did, only a minority obliged a debtor to declare assets in another country. Professor Hess concluded that the practical difficulties of a creditor were increased considerably when he or she sought information about a debtor’s assets in other Member States. On the basis of that information it appears that there will be added value in having a European Assets Declaration.

Under the current UK procedures, in both England and Wales and Northern Ireland it is possible for information to be obtained from a debtor as to his/her assets whether or not they are in the UK. It is also possible for a creditor in another Member State to use our national procedures to obtain information from a debtor provided he/she is in the relevant part of the UK and the judgment has
been recognised or registered here. As I explained in my letter of 5 June, in Scotland a power to provide regulations to allow creditors to obtain information about debtors by making an application to a Sheriff has not yet been commenced. It is too early to say how this procedure will work.

I agree with the distinction you draw between the difficulty in obtaining information on the debtor’s assets where they are located abroad and the actual enforcement of the judgment against those foreign assets and I appreciate that that distinction has an effect on any cross-border restriction. However I believe that these issues are closely linked. As I have stated in the Explanatory Memorandum of 27 March and my recent letter, the Government believes that information on a debtor’s assets should be available to a creditor only after he or she has obtained a relevant court decision on the merits of the claim which has shown a debt is owed.

I am very grateful for your detailed analysis of the cross-border issues. The cross-border restriction suggested in my letter of 5 June had two elements. The first was a definition based on the existing definition in the European Order for Payment and Small Claims Regulations. As you say, this would apply to the circumstances outlined in the first paragraph of the second page of your letter and cover the situation posed in the hypothetical case of the Scottish creditor obtaining judgment against a Frenchman residing in France with a villa in France. However, I went on to say that the cross-border element could include cases where a European instrument had been used.

The example I gave was the European Enforcement Order but this would apply equally to all instruments which provide for the recognition and enforcement of judgments from one Member State in another Member State, including the Brussels I and revised Brussels II Regulations. Therefore in your other scenario, the Scottish creditor who has obtained a judgment in Scotland against a fellow Scot who has a villa in France would also be covered by my suggestion where enforcement is sought abroad. However I appreciate that that would not cover cases where a creditor does not know whether the debtor has assets in another country and their national procedure does not enable them to obtain such information. I reiterate that without a clearer idea of the content or form of any future instrument it is difficult to say exactly what type of cross-border restriction will be appropriate but I agree that we need to see how such cases might be included.

10 July 2008

Letter from the Chairman to Bridget Prentice MP

Thank you for your letter of 10 July 2008 which has been considered by Sub-Committee E

THE NEED FOR EU ACTION

We find the absence of information on Member States’ debtor’s declaration procedures and their application to assets in other Member States surprising. We would expect this basic preparatory work, which relates to the very core question of whether there is a need for EU action in this area at all, to have been undertaken by the Commission before the Green Paper was prepared. As we have stressed in the past, there is a need for EU action to be clearly evidence-based and in the absence of details as to current practice, it is not apparent that there is a problem in this area.

On the basis of the 2004 study, which covered the then fifteen Member States, it would appear that there may be added value in EU measures. However, given the time-lapse and the enlargement of the Union since 2004, this study ought to have been updated to take account of developments. In this respect, we highlight the new procedure in Scotland, which was not available at the time of the study. Similar changes may have taken place in other Member States.

We expect comprehensive information to be collated prior to any legislative proposal in this field and look forward to seeing a detailed impact assessment should a proposal be forthcoming. Looking at the questions in the Green Paper, it is not clear that the Green Paper alone will yield the desired results.

DEFINING “CROSS-BORDER”

We are pleased that you recognise the need to consider how cases relating to an apparently domestic procedure but involving an asset abroad of which the creditor is not aware can be included in the scope of future legislation. We trust that you will make this point in your response to the Commission on the Green Paper.

We have decided to clear the Green Paper from scrutiny. We would be grateful for a copy of your response to the Green Paper, once it has been finalised.

23 July 2008
Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Defence to the Chairman

You wrote to Bridget Prentice on 23 July clearing this document from scrutiny but asking for a copy of the Government’s response to the Green Paper. I am pleased to enclose the response with this letter.

14 October 2008

ANNEX

GREEN PAPER ON EFFECTIVE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION: THE TRANSPARENCY OF DEBTORS’ ASSETS

Response from the United Kingdom

General comments

The United Kingdom (UK) welcomes the European Commission’s consultation on this Green Paper. As explained in our response to the Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts (March 2007), the UK supports measures which make it easier for citizens and businesses to enforce judgments across borders.

We have for some time been calling for improved European enforcement measures. While there has been agreement on a number of instruments that either produce European court decisions in cross-border cases, or allow national court decisions to be recognised in another Member State, nothing has been agreed that makes it easier for citizens and businesses to enforce those court decisions. While in the EU we have made it easier for creditors to obtain an enforceable court decision, we have more to do to ensure that they are helped in the enforcement process. At the moment, creditors have to know how to use the enforcement methods in another Member State - not necessarily very easy if they do not understand the language of that Member State. They do not necessarily know how long the procedure will take, what it will cost, or what kind of service they can expect.

The costs and difficulties encountered might mean that a creditor decides not to enforce their court decision. The lower the value of a claim, the less likely it will be that it will be pursued if there is uncertainty and disproportionate cost involved in enforcement action. This could have an impact on the use of the European Small Claims Regulation, when that comes into force in January 2009. That would be unfortunate, as this Regulation is precisely the kind of instrument that can bring real added value to Europe’s citizens and businesses.

This Green Paper, and the 2007 one on the attachment of bank accounts, are useful introductions to European enforcement procedures. We look forward to the way work proceeds on both subjects. However, we believe that this is only a start, and that enforcement should be one of the priorities of the next five-year work programme.

While the UK is enthusiastic to take forward work on enforcement, we do still need to be mindful of the added value of individual projects. For example, if all Member States currently have a system that allows a declaration of a debtor’s assets to be obtained wherever those assets are held, the case for a separate European procedure is not so strong. We note from Professor Hess’s 2004 study that not all (of the then) fifteen Member States did have such a procedure. Before proceeding with work in this area, it will be important for the Commission to ascertain the current situation in all Member States including the different systems in those Member States with different jurisdictions such as the UK.

We assume that the correct Treaty base for a proposal in this area will be Article 65 TEC and therefore that a European debtors’ declaration procedure should be restricted to cross-border cases. A definition of what should constitute a ‘cross-border’ case will need to be determined. We recognise the need to consider a mechanism that can cover cases where even though the parties are all in one Member State, there are assets in another.

In addition, it is important to ensure that any exchanges of information between national authorities, and retrieval of details from registers, must be in accordance with data protection principles and legislation so as to ensure proper protection is given to individuals’ personal data.

The UK makes the following comments:

**Question 1: Do you consider that there is a need for measures at Community level to increase the transparency of debtors' assets?**

2 Final draft 8 Oct 2008
Do you consider that the interlace between enforcement of judgments and debtor protection or the role of non-public organisations in the enforcement of judgments need explicit attention in this context? If so, which elements do you consider important?

The UK agrees that there is a need for measures at Community level to increase the transparency of debtors’ assets. Having procedures that make it easier to enforce judgments across borders will bring real benefits to EU citizens.

The UK does not support harmonisation of existing enforcement measures. It believes any new initiatives should complement, and not replace, current procedures. As we emphasise in our response to question nine, any European Assets Declaration procedure should be a separate procedure for cross-border cases, and not affect existing national processes.

The UK firmly believes there needs to be a balance between assisting creditors in enforcing their judgments, with appropriate safeguards to protect debtors’ rights. In particular, we are strongly of the view that information should only be requested once a creditor has successfully obtained a court judgment or order.

In addition, any system developed to assist transparency must be limited to the information strictly necessary for that purpose, have appropriate safeguards in place, and comply with the Data Protection Directive.

Question 2: In what ways do you consider that a manual containing all information about the enforcement systems of the Member States would be helpful?

In general, the UK thinks this would be very useful as a means of providing information on systems and for creditors to know the costs they might expect. It would provide transparency, identify common attributes, and act as an aid to creditors. The manual might include information about the types of public and commercial registers that are available to the public.

For the proposed manual to be of most use, there will clearly be a need to ensure it is kept updated. In addition, the information should be provided in an easy to use format, and in accessible language. The UK also supports its inclusion on the website of the European Judicial Network in civil and commercial matters.

Question 3: Should information available in, and access to, commercial registers be increased? If so, how and to what extent?

Question 4: Should access to existing population registers be improved? If so, how?

Question 5: Should access to social security and tax registers by enforcement authorities be increased? If so, how and to what extent?

(As many of the same issues arise in relation to all types of registers, we have combined our answers to questions 3, 4 and 5):

Work to improve access to registers is important and the e-justice project will help in allowing networking of national registers (insolvency, land and company registers, for example) through a single portal.

While improved access to information on registers will help to facilitate the enforcement of judgments, it has to be noted that not all Member States hold all types of information. If they do, it might not be held in the form of a register (the United Kingdom, for example, does not have a population register). Therefore, we do not believe it will be possible to standardise information across similar registers in each Member State. These registers vary according to national needs and requirements.

In principle, the UK can see the advantages in increasing access for enforcement authorities to information on registers, which is not generally available (for example, on social security and tax registers). However, the legal framework around such information, in particular from tax registers, means that we need to proceed with caution. Rights of access and data protection rules must be respected. In addition, where information is released we believe it should require an order from a court (or equivalent enforcement body) and should only be released to other enforcement bodies or courts. In this context, there will be a need to clarify the status of enforcement authorities. Such requests must be made on a case by case basis and be fully compliant with data protection and human rights legislation.

Question 6: Should the exchange of information between enforcement authorities be improved? If so, how?
Where information is already available in the public domain, the UK agrees that we should find ways to make it easier for national authorities to access that information. The e-justice portal should be one way to improve access.

In principle, the UK supports an improvement in the exchange of information not in the public domain between enforcement authorities, subject to stringent safeguards concerning data protection and the protection of debtors’ rights.

The UK believes that such information should be made available where a national court or enforcement authority (with equivalent status to a court) provides an order to obtain that information. Any exchange of information must be done on a case-by-case basis. Any information on debtors must be proportionate and relevant to the enforcement of debts.

**Question 7: Do you consider that a European Assets Declaration should be introduced?**

The UK believes that there will be added value to a European Assets Declaration procedure where current national procedures do not allow for the provision of information on a debtor’s assets in another Member State. Even where a creditor needs to obtain information from a number of debtors in different Member States where such a procedure already exists, the need to understand the provisions of the single European procedure, rather than applying each national procedure, will be more helpful.

However, the UK strongly believes it should be an additional European procedure, limited to cross-border cases (which will have to be defined) and should not affect existing national systems.

Concerning the two proposed models on page 11 of the Green Paper, the UK believes that debtors’ should be required to disclose all assets (first model). We do not believe the second model, which limits the debtor’s obligation to disclose assets sufficient for the recovery of the creditor’s claim, should be adopted. We consider that such a restriction may limit the creditor’s choice of action.

**Question 8: If so, under what conditions should it be possible to obtain it? Should there be sanctions for incorrect statements contained in the declaration? If so, which?**

The UK believes there should be two conditions. First, it must be only after a relevant court decision on the merits of the claim has been obtained. We will want to ensure that any European procedure respects this safeguard so that parties only have to provide information when it has been proved they are in debt. Second, only on a case by case basis.

The UK believes that such declarations should be made in person to a court (or equivalent national enforcement authority) in order to ensure the information can be verified and so that the debtor is placed under an obligation to tell the truth. For example, in England and Wales, such declarations are made under oath. Experience has shown that asking debtors’ to fill in forms and submit them by post rarely produces all the required information. Attendance before a Judge (or court officer) enables deficiencies to be identified and dealt with.

Sanctions for non-compliance and false statements should be proportionate and could include a period of short imprisonment (either served or suspended) at the discretion of the court.

We do not think the process should be affected by an offer of a payment, rather than making full payment. This is a declaration, not an enforcement method.

**Question 9: What degree of harmonisation do you consider appropriate for the European Assets Declaration? What should be the precise content of the European Assets Declaration?**

We do not believe there should be harmonisation of current national procedures. There should be a stand alone European procedure, which could be applied uniformly in each Member State.

The precise content of a European Assets Declaration will be different for individuals and corporate bodies and depend on the circumstances of each case. The UK suggests the following basic information should be included in a declaration:

- Name and address of debtor
- Employment and income sources
- Bank accounts - details and total amount of assets held
- Property
- Investment property or income
- Whether there are other creditors
- Statement of net assets and monthly income
For companies, it should also include the names and addresses of officers, the place of the registered office and company registration number.

It is essential that adequate safeguards be put in place to protect the information and prevent its fraudulent abuse.

**Question 10: Which other measures at EU level do you propose to increase the transparency of debtors’ assets?**

The UK has no further proposals.

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**COMPANY LAW: CIVIL LIABILITY AND FINANCIAL SECURITIES OF SHIP OWNERS**

\(5907/06, 14486/07\)

**Letter from Jim Fitzpatrick MP, Parliamentary Under Secretary of State, Department for Transport to the Chairman**

I am writing to update you on the progress of the Third Maritime Safety Package. This package of seven measures was launched in 2005 under the UK Presidency and there has to date been agreement in Council on five of the original proposals (port state control (EM 5632/06), vessel traffic monitoring (EM 5171/06), accident investigation (EM 6436/06), classification societies (EM 5912/06) – which has now been split into a regulation and directive – and carrier liability (EMs 6827/06 and 14302/07), the last of which is linked to the Athens Convention).

The remaining two proposed directives on Flag State Requirements (FSR) (EM 6843106) and Civil Liability (CL) (EMs 5907/06 and 14486/07) had attracted little support from Member States and had not had any substantive discussion at working group level until the Slovenian Presidency took them forward. Both dossiers were the subject of policy debates at the April 2008 Transport Council, but failed to attract support from the majority of Member States.

The Government considers that the FSR directive would have added to the exclusive Community external competence in respect of the responsibilities of flag States in a wide range of International Maritime Organization (IMO) instruments.

During the negotiations in the Council, the European Commission was prepared to accept the deletion of references to several IMO conventions in the FSR directive to help minimise the increase in Community competence in the maritime sector and to make the dossier more palatable to the Member States. However, whilst the Government supports the objective of improving flag State performance across the Community, it continues to consider that there are better, non-regulatory ways of achieving this without the need to increase Community competence, such as submitting to audit by the IMO – as the UK did in 2006. In addition, the Government argued that the real problem of poor flag State performance was with ships from a number of non EU flag States, a problem which this proposal would do nothing to address. Despite the efforts made by the Slovenian Presidency and the Commission to reduce the scope of the directive, the Member States felt unable to support the FSR proposal in April 2008 and no further consideration has yet taken place.

The Slovenian Presidency also pushed forward discussions on the proposed CL directive. The Government has always doubted whether the directive would work in practice. For example, applying higher limits of liability to shipowners will not provide a disincentive because the mutual system of marine insurance will simply absorb costs. The proposal would also impose a substantial additional burden on state administrations which would be tasked with certifying all ships on their registers (confirming that insurance is in place) and ships from third States entering Member State ports and installations.

The Government considers that the intended benefit of the proposal could readily be achieved by a Council Decision instructing the Member States that have not already done so to ratify the 1996 Protocol to the Limitation of Liability for Maritime Claims Convention (LLMC), 1976. The 1996 Protocol significantly increased the levels at which shipowners are entitled to limit their liability; twelve Member States (including UK) are parties and greater Member State ratification of this Convention would extend the coverage of the higher limits of liability.

Most of the EU Member States agreed at the April 2008 Transport Council that there was no need for Community legislation in this area. Indeed, there was even less support for this proposal than on Flag state. There has been no further discussion on the CL directive since the April 2008 Council meeting.

The French Presidency has indicated its desire to reopen the discussions on both FSR and CL in the second half of its Presidency and has scheduled a debate for the December 2008 Transport Council.
This is partly because the European Parliament supports both proposals and is pushing for the Council to agree them, and also as France has indicated its support for both dossiers.

Although supportive of FSR and CL, France does recognise that the majority of Member States continue to oppose both dossiers and that it will be very difficult to secure an agreement on them. The Presidency has therefore indicated that if, as expected, it proves impossible to reach a political agreement on both proposals, it will try instead to secure some form of Council Conclusion in place of the proposals.

On FSR, this is likely to involve the Member States to undergo IMO audit and to adopt the IMO Flag State Code and on CL to ratify the 1996 LLMC Protocol. The UK would be content for the Presidency to adopt such an approach, and I will update you on progress later in the year.

The European Parliament has now been sent the texts of six legislative measures referred to above which the Council has agreed. The French Presidency has already commenced the discussions with both the European Parliament and the Member States with a view to reaching second reading deals on these dossiers.

The early indications are that accident investigation and the two classification society proposals should be relatively straightforward, but that the remaining three proposals on vessel traffic monitoring, Athens (carrier liability) and port state control could be problematic. The Parliament wishes to consider the proposals as a package and, although there may be provisional agreement on several dossiers, if there is a need for conciliation it is likely to be on the entire six proposals and to begin in October or November. I will keep you informed of progress in due course.

10 July 2008

Letter from Jim Fitzpatrick MP to the Chairman

Thank you for your letter of 22 July 2008 concerning Sub-Committee B’s consideration of the Flag State proposal. I am writing to provide the further clarification that the Sub-Committee requested on two points of the proposal and to update you on progress on both Flag State and Civil Liability ahead of the 9 October Transport Council, where the Presidency now hopes that it may be possible to achieve political agreement on amended versions of both dossiers. You will also wish to be aware that the European Parliament has completed its second reading of the rest of the ‘Erika III package’ proposals (Port State Control (EM 5632/06), Vessel Traffic Monitoring (EM 5171/06), Accident Investigation (EM 6436/06), Classification Societies (EM 5912/06) - which has now been split into a regulation and directive - and Carrier Liability (EMs 6827/06 and 14302/07), the last of which is linked to the Athens Convention).

In your letter you asked:

i. WHETHER CONFORMITY TO INTERNATIONAL MARITIME CONVENTIONS (IMO) WILL ALLOW EU PORTS NOT TO ACCEPT UNSAFE SHIPS?

The IMO Conventions are international treaties which do not contain enforcement or prosecution provisions such as the right to refuse access to the ports of States Parties. Such provisions are left to individual States parties to apply in national law.

However, the issue of whether to ban certain ships has been considered in the proposed recast Directive on Port State Control (PSC, EM 5632/06). The Government’s view is that the introduction of permanent banning will not achieve the desired improvement in maritime safety. Although it will send a clear message to ship owners that sub-standard ships are not welcomed in Community ports, it would not prevent such ships from sailing through sea areas under the jurisdiction of Member States, providing such ships were on innocent or transit passage or exercising the right of freedom of navigation according to international law. The consequence of this is that Member States would find it difficult to inspect vessels which would not be able to enter their ports. The Member States have agreed with this view and the common position on the PSC proposal does not include permanent banning. Member States have, however, proposed that a ship should be banned for a period of 36 months following its third refusal of access from a Community port and will only be allowed to call again at Community ports once certain conditions have been met. These include a change of Registration and ownership. The UK supports this approach.
ii. Whether conformity to IMO Conventions will provide for the compatibility of insurance classification oversight procedures between ports of origin and ports of destination so that if a port of destination rejected a ship there would not be any curtailment of its insurance cover?

Conformity to IMO Conventions would also have no impact on insurance cover in such circumstances as they do not include any relevant provisions.

The decision to terminate insurance cover is a contractual matter between the shipowner and the insurance provider. It is therefore for the insurance provider to decide whether the rejection of a ship from a port, Community or otherwise, is sufficient grounds to withdraw the insurance cover. However, the IMO liability conventions require the State to issue a State Certificate attesting that insurance is in place in respect of the liabilities of the shipowner. Such certificates issued by States parties are mutually recognised by other States parties, unless there is doubt about the underlying insurance in which case a port State (which is also a State party) may detain the ship.

UPDATE ON THE EP SECOND READING OF THE PACKAGE, AND PROGRESS OF NEGOTIATIONS ON FLAG AND CIVIL LIABILITY

As you may recall, the European Parliament has consistently pressed for all of the maritime safety proposals to be considered as a package and has been very concerned about the lack of progress on Flag State and Civil Liability. The EP held its Plenary second reading of the rest of the 'Erika III package' on 24 September, and reinserted most of the amendments from their first reading that were not included in the Council common positions, meaning that conciliation is now the next stage for these dossiers. Because they had no assurances that the Council would adopt Flag State and Civil Liability the EP also included amendments relating to both dossiers into their amendments on Vessel Traffic Monitoring, Port State Control and Classification Societies.

In my letter of 10 July 2008 I indicated that the Presidency were expected to reopen the discussions on the Flag State and Civil Liability dossiers in the second half of their term, with a debate scheduled for the December Transport Council. However, that position has now changed. In the last few weeks, the French Presidency has been active in trying to secure a political agreement on both the Flag State and Civil Liability Directives. Following extensive negotiations during September, the Presidency is now seeking agreement at the Transport Council on 9th October on a Member State Statement and political agreement on substantially amended versions of the Flag State and Civil Liability directives.

a. The Member State Statement

The Statement, although not legally binding, provides a commitment from the Member States to ratify certain IMO Conventions, if they have not already done so, undergo IMO audit, improve their position on the Paris Memorandum of Understanding on Port State Control inspections so that they are on its “white list” by 2012, and adopt the IMO Flag State Code. None of these commitments are difficult for the UK to accept and we can therefore support the introduction of the Statement. Essentially, the Statement provides a good deal of the real substance which the Commission originally wanted in the Flag State proposal, but which the Member States were unwilling to sanction due to the significant transfer of competence which would have resulted from the original draft directive.

As it is a “statement” no competence issues are raised, and most Member States seem content to agree, although there are a few outstanding minor points of detail/clarification which need to be addressed in the forthcoming days.

b. The Flag State proposal

The latest version of the draft Directive is substantively amended from that rejected by the Council in March 2008. In order to secure agreement, the Presidency has removed most of the sections which would have increased Community competence and the latest draft requires EU Flag States to:

i. follow a consistent EU practice for allowing a ship to operate under its Flag, to accept new vessels on their registers; and for transferring vessels to another Flag State (including providing details of any deficiencies the vessel may have to the new Flag State);

ii. ensure that any detained vessels flying its Flag are brought into compliance with the necessary IMO ship safety requirements;

iii. maintain a database of information about the vessels on their registers; (iv) ensure that every five years they undergo an IMO Audit or an equivalent independent audit. This requirement may be

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3 The Paris MOU ranks Flag States according to the detention record of their ships being detained by Port State Control authorities. Ships on the 'black list' present the greatest safety and environmental risk, while those on the 'grey list' experience fewer detentions and those on the 'white list' perform best of all.
subject to a “sunset clause” in that it would cease to apply if the IMO Audit Scheme was made mandatory at the global level. This suggestion has been added as a means of trying to persuade the Member States to accept the Directive;

iv. develop and implement a quality management system for its Flag State responsibilities; and

v. report to the Commission if they appear on the Paris Memorandum of Understanding “grey list” on two successive years.

Although this is quite a long list, there is little of genuine substance and the Directive has such limited overall effect that it is quite hard to justify its added value. As presently drafted, the proposal does not address the real issue which is the poor performance of non EU Flag States.

It is understood that there is still a blocking majority on the Flag proposal even in its present diluted form. However, in view of the efforts being made by the French Presidency, the Commission, and the European Parliament it seems increasingly likely that further consideration both before and during the Council may enable an agreement to be reached. It is unfortunate that this means that I will be unable to provide you a report on the final negotiations in time for your Committee to consider them ahead of the Council. However, I wish to assure you that the UK, whilst seeking to minimise the impact of the proposal, is continuing to press for the proposal to be blocked on the grounds that it is not consistent with the principles of better regulation and will not achieve the Commission’s stated objective. Nonetheless, if a majority of the other Member States indicate their willingness to accept a weakened proposal at the Council, the UK will also be willing to agree to this, subject to securing a satisfactory agreement with the European Parliament on all of the third maritime safety package measures.

c. The Civil Liability proposal

Previous concerns regarding treaty law conflict with the United Nations Convention on the Law of the Sea and the International Convention on the Limitation of Liability for Maritime Claims are negated by the current text. The administrative burden on Member States to issue verification certificates to its merchant fleet and to third country ships calling at the ports of EU Member States has also been removed.

In recent weeks the French Presidency has sought the co-operation of the Member States in a concerted effort to achieve political agreement at the 9 October Transport Council. The proposal as currently drafted is now very close to what the Government can accept as it is limited to a codification of an existing International Maritime Organisation Resolution (A.898) on the responsibility of shipowners to maintain insurance, which the UK pressed for at the time.

However, although a great deal has been achieved in negotiations by the UK and like-minded Member States, the Government continues to be cautious about both the Flag State and Civil Liability proposals and our possible support for any political agreement will depend upon the outcome of negotiations with the Presidency and European Parliament on the other measures comprising the whole third maritime safety package.

I will, of course, keep you informed of the outcome of the Council discussions of both of these proposals.

1 October 2008

Letter from the Chairman to Jim Fitzpatrick MP, Parliamentary Under Secretary of State, Department for Transport

Thank you for your letters of 10 July and 1 October4. The parts of those letters concerning the proposed Directive on the civil liability and financial securities of ship-owners were considered by Sub-Committee E at its meeting on 8 October. We are grateful for the further update on progress with this dossier and the wider package of measures.

We note that the Presidency is actively seeking to secure agreement to this proposal despite earlier widespread opposition among the Member States, and that you regard the text currently under discussion as close to acceptable. We have not, of course, seen a recent text and, since there have clearly been significant changes, we do feel unable to clear this document without sight of the latest text or at least a description of the changes. We therefore retain the matter under scrutiny and look forward to your account of discussions in the Council this month.

9 October 2008

4 For previous correspondence please refer to Sub Committee B
Thank you for your letter of 9 October, replying to my letters of 10 July and 1 October concerning the proposed directives on Flag State and the Civil Liability of ship owners. I am now writing to update you on the outcome of the negotiations at the recent Transport Council on both of these proposals. I am pleased to let your Committee know that the UK was successful in ensuring our key concerns were met on both proposals at the Council, and that the UK was therefore able to support them.

**THE FLAG STATE REQUIREMENTS DIRECTIVE (6843/06)**

In the last few days before the Council met, there were further discussions on the requirement for each EU Member State to undergo an audit by the International Maritime Organization (IMO). The Member States agreed that their ability to meet a requirement to undergo an audit by the IMO, would also be determined by the IMO's available audit resources. At the Council, the Member States agreed therefore that they should undergo an IMO audit every seven rather than the five years, as I indicated to you in my letter of 1 October. In addition, a reference was added to provide the Member States with more time to undergo IMO audit, if they could provide evidence that the IMO was unable to carry out their audit within the seven year, period as required by the Directive.

In view of these further improvements to the IMO audit requirements, and the very substantial amendments which have been made to the draft of the Directive since it was first launched in 2005, the UK agreed to support the Directive at the Council. Our support was given, however, on condition that the European Parliament accepted both the Council text of the Flag State Directive and the achievement of satisfactory outcomes with the Parliament on the whole third maritime safety package.

The Council reached a political agreement on the Directive, and its accompanying Member State Statement, with little discussion.

**THE CIVIL LIABILITY DIRECTIVE (5907/06 & 14486/07)**

I am also pleased to report, that the UK was successful in ensuring that our key concerns, particularly those relating to the innocent right of passage of ships, as allowed under the United Nations Convention on the Law of the Sea (UNCLOS), were resolved satisfactorily in the run up to the Council.

At the Council, the UK raised our only remaining specific concern, which related to the provision enabling the Member States to expel an uninsured ship from one of their ports. The UK argued, that it was better to detain the ship until evidence of adequate insurance, in compliance with the directive is provided to the Member State, rather than simply expelling it and allowing it to continue uninsured around the coasts of the EU. Other Member States supported our view, and the UK was therefore able to secure an amendment to the text which resolved our concerns satisfactorily.

The proposed Directive introduces compulsory insurance provisions, and this is a useful addition to maritime safety in the EU. In view of the progress the UK has made to minimise the scope of this Directive and the successful negotiations both in the last few days before Council and at the Council itself, the UK was able to support it at the Council. As with the Flag State Directive, the UK support was conditional on the European Parliament accepting the text as drafted and on a swift conclusion to the negotiations on the rest of the third maritime safety package.

Following a satisfactory conclusion to the discussions on the expulsion issue, the Council reached a political agreement on the text of the Directive.

I note from your letter of 9 October that, in the absence of a revised text, Sub-Committee E felt unable to clear the proposal pending the outcome of the Council discussions. There has been no new depositable document since the Commission's amended proposal following the European Parliament first reading, which was the subject of EM 14486/07, but I attach a copy of the text that was agreed at the Council (Annex A). In addition, the fast-moving nature of the negotiations during the run-up to the Council meant that it was not possible to provide you with a definitive description of the changes made since EM 14486/07. However, I can now summarise these as:

i. the title of the directive has been amended from "the civil liability and financial guarantees of shipowners" to "the insurance of shipowners for maritime claims". This amendment reflects the changes made to the proposal;

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5 For previous correspondence please refer to Sub Committee B
ii. the definitions of "ship", "civil liability", "financial security" and "IMO resolution 930(22)" have been removed. The definition of "shipowner" has been refined and a new definition of "insurance" has been added. These amendments have provided greater clarity to the text;

iii. the introduction of the concept of "gross negligence" for ships flying the flag of third country states has been dropped. This avoids the introduction of a community system at variance with the established arrangements set out in Article 4 of the Convention on the Limitation of Maritime Claims Convention (LLMC 1976);

iv. the EU Member States have agreed, that the port state control authorities should verify the certificates required by the directive, and that a system of penalties for the breach of this requirement should be introduced;

v. the proposal to remove the ceiling of liability as set out in the 1996 protocol to the LLMC 1976 has also been dropped. If the proposal had been included, the EU Member States would have been obliged by community law to breach the LLMC convention limits, with a potentially significant impact on the marine insurance market;

vi. the requirement for the EU Member States to become a state party to the LLMC has been removed. This avoids the unnecessary interference in the EU Member States rights under international law;

vii. the "financial guarantee system", "community office", "solidarity fund", and "the right of direct action against provider of the financial security system" proposals were not supported by the Member States. These proposals would have created significant additional requirements and expense for both the insurance industry and the Member States without a commensurate benefit; and

viii. the references to the 1996 Hazardous and Noxious Substances Convention (HNS Convention) have been removed. Their inclusion would have created potential legal difficulties for the EU Member States in their ratification process of this Convention.

I regret that we gave our agreement to the proposal, ahead of scrutiny clearance by Sub-Committee E, and would like to assure you that we would not do so lightly. However, given the improvements made to the proposal in the key areas of importance to the UK, and in particular our success at Council in the resolution of our key remaining concern, the UK took the view, that we should support the proposal in order to secure these negotiated improvements.

28 October 2008

Letter from the Chairman to Jim Fitzpatrick

Thank you for your letter of 28 October. The part concerning the proposed Directive on the civil liability and financial securities of ship-owners (now renamed as the Directive on the insurance of ship-owners for maritime claims) was considered by Sub-Committee E at its meeting on 19 November.

We noted the exercise of the scrutiny override in this matter and understand the reasons why in the event this took place. However, although we appreciate that this was a fast-moving negotiation and that no new depositable document was formally created, we consider that the supply of detailed information at the point when it became clear that the Presidency proposal was, as your letter dated 1 October 2008 noted, very close to being acceptable would have been consistent with the overall aim of facilitating Parliamentary scrutiny; it would have enabled Sub-Committee E to give the matter substantive consideration at its meeting on 8 October 2008 and might have avoided the need for an override.

On the substance, we supported the achievement of the negotiation objectives of maintaining a close correlation of this proposal with the underlying international law in this area, and of minimising administrative burdens. We would however be grateful for further explanation as to how you consider that this legislation meets the principle of subsidiarity given the possibility of achieving the same benefit through more consistent ratification of the international law measures in this field.

24 November 2008
Letter from the Chairman to Ian Pearson MP, Economics and Business Minister, Department for Business, Enterprise and Regulatory Reform

This proposal was considered by Sub-Committee E at its meeting on 5 November. We clear this proposal from scrutiny.

Like you, we strongly support the EU’s programme for simplifying legislation and thus reducing the administrative burden on businesses and other organisations. We note that, from the UK perspective, the two main Directives have little impact and relatively few benefits would accrue from the proposed changes. Nevertheless, the proposed amendments would bring about a significant degree of simplification and associated savings and we agree that the proposal should be supported on that basis.

6 November 2008

COMPANY LAW: SHIP SOURCE POLLUTION (7616/08)

Letter from the Chairman to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E at its meeting on 21 May. The Committee decided to keep the matter under scrutiny.

The Committee agree that the aim of the draft Directive is unobjectionable: a legislative response to the judgment of the ECJ in case C-440/05 is necessary. Like you, the Committee considers that not to take account of the forthcoming judgment in case C-308/06 would be regrettable.

The Committee shares your concern about the lack of clarity in the draft as to the jurisdiction of Member States, a matter which was dealt with in Article 7 of the annulled Framework Decision. How do you propose that the issue of jurisdiction should be addressed in this Directive? In the case of offences committed on the high seas, how should the EU or the Member States ensure that offenders can be prosecuted?

More generally, we agree that the method of inserting criminal law requirements into Directive 2005/35 is liable to create problems. The drafting in this case compares unfavourably with that adopted in the similar case of the draft Directive on the protection of the environment through criminal law (the subject of EM 6297/07).

We note that you intend to examine this and other concerns in detail. We should be grateful for your assessment of these points in the light of your further examination of the draft.

22 May 2008

Letter from Bridget Prentice MP to the Chairman

Thank you for your letter of 22 May 2008 regarding the above dossier. Detailed discussions of this dossier continue and I will write in due course to give you an update in the light of further examination of the proposal. As regards process, it is expected that the forthcoming French Presidency will prioritise this dossier in order to secure finalisation before the end of their Presidency.

In the meantime, as regards your reference to jurisdiction, I can indicate that the UK has suggested a new recital that makes it clear that jurisdiction for offences committed in the sea areas referred to in Article 3 is to be governed by international law (the relevant international instrument is the United Nations Convention on the Law of the Sea, commonly known as UNCLOS). This seems to be the most straightforward option at the moment but negotiations are at an early stage and no firm positions have been adopted.

You ask how Member States should ensure that offences committed on the high seas are prosecuted. First of all, those Member States which are flag States may initiate proceedings against ships flying their flag irrespective of where an offence occurred and irrespective of where the pollution caused by the offence occurred or was spotted. Otherwise, UNCLOS Article 218 allows a State party to initiate proceedings against a ship for a breach of applicable international pollution rules and standards on the high seas when the ship in question is voluntarily within one of its ports or off-shore terminals. International ship-source pollution standards include those set by the International Convention for
the Prevention of Pollution from Ships (known as the MARPOL convention). To the extent that this Directive accurately reflects the MARPOL standards, a breach of the measures implementing the Directive would be a violation of applicable international rules and standards. The UK has provisions which enable us to prosecute on this basis in respect of those actions which are already offences under domestic Merchant Shipping law. We would expect other European Community Member States to have similar provisions in their national law.

19 June 2008

Letter from the Chairman to Bridget Prentice MP

Thank you for your letter of 19 June which was considered by Sub-Committee E at its meeting on 9 July. The Committee decided to keep the matter under scrutiny.

We are grateful for your explanation regarding enforcement in relation to offences committed on the high seas. We agree that a recital would be satisfactory to clarify the jurisdiction issue.

We look forward to your update as negotiations progress. When you write, we should be pleased if you would comment on how the particular concerns referred to in your Explanatory Memorandum have been addressed, and on the aspect of drafting quality mentioned in my letter of 22 May.

10 July 2008

Letter from Bridget Prentice MP to the Chairman

Thank you for your letter of 10 July regarding the above dossier. I attach the latest Presidency working text of the amending Directive for your and the Committee's information.

I am pleased to say that the enclosed text reflects UK drafting suggestion on key measures. Our concerns about the jurisdiction provision have for example been adequately dealt with in Recital 9 in the Annex.

The other issues also raised in paragraphs 19-23 in the Explanatory Memorandum have now been resolved appropriately. First as you suggest in your letter of the 22 May, a drafting structure more in keeping with the approach adopted in the Environmental Crime Directive has been employed. In this structure the obligations regarding criminal offences are built on to the basic provision of the original Directive in respect of polluting infringements, which is preserved. This allows for the inclusion of an exception from the criminal law obligations for minor cases. We believe these changes and the further inclusion of Recital 7 satisfactorily ensure that the criminal law obligations do not exclude the possibility of Member States employing alternative administrative solutions where appropriate. The text proposed by the Commission at new Article 5a (2) and 5c (2) has now been removed. The intended purpose of that provision has been more effectively expressed at new Recital 6. The Commission's proposed amendment to Article 4 dealing with secondary participation in offences is now replaced by a proposed new Article 5b, which restricts the obligations to offences committed with intent. In addition we are satisfied that the new structure removes the need to further clarify the scope of the exceptions at Article 3(2) of the adopted 2005 Directive.

As regards the Directive's acknowledgment of the exceptions built in to the MARPOL regulations the latest text in Article 1(4) updates cross-references to MARPOL but more importantly removes the ambiguous reference to the crew "when acting under the master's responsibility" at Article 5(2) of the 2005 text. Although the new text does not achieve parity with the scope of the MARPOL exceptions themselves it does go slightly further than the provision of the annulled Framework Decision which it replaces in so far as it relates to all infringements under 2005/35 and is not restricted to the criminal offences previously covered by the Framework Decision. We are satisfied that this amount to the best achievable balance between respecting the international standards whilst establishing an effective EU regime.

It should also be noted that Article 2 of the amending Directive extends the implementation deadline to eighteen months.

Finally, on 3 June 2008 the European Court of Justice (ECJ) announced its decision in the case brought by INTERTANKO and other shipping industry organisations relating to the 2005 Directive on Ship Source Pollution. The Court ruled that the validity of the Directive cannot be assessed in the light of the international standards (MARPOL and UNCLOS) and also ruled that the term "serious negligence" afforded sufficient legal certainty so its use was not invalid. Accordingly, the judgment does not have any direct consequences for the draft amending Directive.

We expect the French Presidency to shortly seek confirmation from the Committee of Permanent Representatives that the text as amended can form a mandate to engage in negotiations with the
European Parliament. At the moment it is not clear when the Parliament will commence consideration of the instrument. In the circumstances and to the extent that you are satisfied that all the Committee's points have been dealt with it would be very helpful if the Committee could consider the proposal at the next opportunity.

4 October 2008

Letter from the Chairman to Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

The letter of 4 October from your predecessor, Bridget Prentice MP, was considered by Sub-Committee E at its meetings on 5 and 19 November. The Committee decided to clear this matter from scrutiny.

We are grateful for the copy of the latest Presidency working text. The quality of the drafting in this text is an improvement over the original proposal.

We agree the text of Recital 9 does now provide clarity as to the jurisdiction of Member States.

We are also grateful for your explanations of how the concerns set out in paragraphs 19–23 of the Explanatory Memorandum have been addressed and agree these represent a satisfactory outcome.

We would, however, be grateful to learn the outcome of the consultation with key stakeholders.

24 November 2008

COMPANY LAW: SIMPLIFIED BUSINESS ENVIRONMENT FOR COMPANIES IN AREAS OF COMPANY LAW, ACCOUNTING AND AUDITING (11771/07)

Letter from Gareth Thomas MP, Parliamentary Under Secretary of State for Trade and Consumer Affairs, Department for Business, Enterprise and Regulatory Reform to the Chairman

In your letter of 16 October 2007 to Stephen Timms about the above Communication, you asked for further information on:

— the outcome of the Government’s consultation on the Communication and the detailed approach that the Government intends to take in forthcoming Council discussions, and

— the reasons why some Member States oppose simplification, and the extent to which opposition to simplification comes from Governments and not from industry and their professional advisers.

While the 22 November 2007 Competitiveness Council conclusions included a strong general commitment (based largely on a UK text) to addressing simplification proposals as a matter of priority (extract attached), the detail of Council discussions during 2008 will be determined to a large extent by the proposals for reform that the Commission eventually submits to the Council and European Parliament. I thought, therefore, that it would be helpful to reply now that both the Commission’s summary of responses to its consultation and the Commission’s 10 March 2008 Communication on Fast Track Actions for reducing administrative burdens have been published, and the scope of Council discussions during 2008/2009 is, therefore, a little clearer. A copy of the Commission summary, which was published at the end of last year, is attached. I set out the implications of this for Council discussions later in this letter.

The key message is that, while the Commission believes there is insufficient support from both Member States and stakeholders to repeal whole Directives, it is proposing four Fast Track proposals for company law simplification and is considering further specific simplification measures for those Directives in the context of the EU administrative burdens programme. As Stephen pointed out during Council discussion of the conclusions in November 2007, the Government view is that such measures should embrace repeal of parts of the Directives.

I also attach the response that my Department sent to the Commission’s consultation on its Communication. That response represents the results of our consultation of UK business, investors and professional advisers. In brief, consultees welcomed the Commission’s intention to simplify company law. A large majority also agreed with the principle that Directives - or parts of Directives - that do not confer a cross border/internal market benefit should be repealed. An important general point to emerge was that, while consultees differed on the extent of deregulation in some areas,

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4 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 240
there was a strong view that the decision on the right level of regulation should be made by national
governments, not at EU level. So, a key aim of simplification of EU law was that it should afford
Member State governments flexibility to decide the right level where there is no internal market
consideration.

Some Member States agree with our general views. Others do not. The reasons for this differ from
State to State, but the main reasons for their position are:

— a reluctance to contemplate any dilution of the acquis;

— a genuine difference of opinion over what constitutes a cross border/internal market
benefit - some Member States believe that detailed harmonisation is necessary in order
to create a level playing field;

— a belief that it is the task of EU law to provide legal certainty, even where the matter
regulated is solely or primarily domestic in nature.

The Commission’s summary of responses to its consultations demonstrates the different views among
Member States. On your question as to whether opposition to simplification comes from
governments or from industry, the summary notes:

“In the area of company law, reactions to the proposals seemed to be influenced mainly by
geographical origin and less by the sector the respondents belonged to. However, this was not the
case for the proposals concerning accounting and auditing where support came in particular from
companies and, in many instances, from investors and public authorities whereas the reactions from
the side of the accounting and auditing profession and from consultancies to these proposals were
often critical.”

As I have noted, the main outcome of the Commission’s summary of its responses is that there is
insufficient support for the Commission to proceed with its Option 1 – repeal of the entirety of four
company law Directives. There is, however, support for Option 2 - specific simplification measures
for those and other Directives. We kept in close contact with Commission officials during the
process – including arranging a meeting between them and UK stakeholders in London - and it is clear
that they believe they have insufficient support from both the Member States and, crucially,
stakeholders to make Option 1 realistic.

In the area of accounting and audit, the Commission summary notes significant support for perhaps
the major reform - the creation of a new category of micro-company that would be exempt from all
the accounting and audit requirements of EU law. Views on the other reforms are more mixed.

In the light of this, our detailed position has been:

— to continue to stress that, while Option 1 for repeal of whole Directives may not be
practicable, any sensible reform under Option 2 must include repeal of specific
provisions of those Directives;

— to support early agreement as Fast Track Actions on simplification of the 1st and 11th
Directives (on company and branch registration) and two accounting provisions, where
there is the most support for reform (the Commission has now brought forward these
proposals and they are currently being discussed in Council Working Groups);

— to support action on further accounting and audit simplification, in particular the
proposal for a new, exempt form of micro-company. In December 2007, a high level
group of independent advisers to the Commission on its EU administrative burden
reduction target was set up under the chairmanship of Edmund Stoiber, former minister
president of Bavaria. The group has 15 members from various backgrounds, including
European accounting and small business umbrella organisations and a former member of
the UK Better Regulation Commission, Michael Gibbons. In the area of company law,
the high level group voted on 29 May 2008 in favour of exempting micro businesses
from accounting and auditing requirements in the 4th and 7th EU company law
directives. The Government welcomes this decision as we estimate that this could
deliver annual administrative savings to micro enterprises in the UK alone of around
£200 million.

— to support specific simplifications of the 3rd and 6th Directives (on mergers and divisions)
that will aid the competitiveness of EU companies (while noting that UK companies are
little affected by these Directives);

— to focus our efforts on longer-term reform of the 2nd Directive (on capital maintenance
and distributions), which would, we believe, benefit UK companies most among the
company law proposals
25 June 2008

Letter from the Chairman to Gareth Thomas MP

Thank you for your letter of 25 June which was considered by Sub-Committee E at its meeting on 16 July. We are grateful for your detailed update on this matter and your view on the sources of opposition to a more radical package of measures to reform EU company law. We are glad that proposals for legislation, which you considered should be given priority, are now under discussion and trust that further measures of simplification can successfully be pursued.

17 July 2008

COMPANY LAW: STATUTE FOR EUROPEAN PRIVATE COMPANY (11252/08)

Letter from the Chairman to Ian Pearson MP, Economics and Business Minister, Department for Business, Enterprise and Regulatory Reform

The Explanatory Memorandum on this proposal from your predecessor, Gareth Thomas MP, was considered by Sub-Committee E at its meeting of 8 October. The Committee decided to retain the proposal under scrutiny.

The Committee looks forward with interest to the results of the formal consultation planned to take place shortly. In the meantime it would be interested to be informed of the views which the CBI, the British Chamber of Commerce or the Law Society have expressed on the detail of the proposal in the course of their recent discussions with BERR.

10 October 2008

Letter from Ian Pearson MP to the Chairman

Thank you for your letter of 10 October on the above European proposal. As requested my officials have sent to the Clerk of the Committee views from stakeholders as part of informal discussions. As you will see almost all comments are supportive of the proposal but highlight concerns in the areas of capital level, articles of association and ensuring that the details of the proposal meet the needs of business. All points which are being discussed as part of the Working Group.

The BERR formal consultation ends on 21 November 2008; however the French Presidency has informed officials that they aim to reach agreement at the Competitiveness Council on 1/2 of December. This is ambitious and we will be working with both the Presidency and other Member states to ensure that any form of agreement does not compromise the quality of the regulation.

We have informed those organisations whom we expect to respond to the consultation of the revised timetable to encourage them to send in their responses as soon as possible.

Bearing in mind the new timetable I hope that the views expressed by stakeholders will enable you to clear this proposal from the scrutiny process with the proviso that we will of course keep you informed as things move forward.

24 October 2008

Letter from the Chairman to Ian Pearson MP

Thank you for your letter of 24 October which was considered by Sub-Committee E at its meeting on 19 November. We are grateful for your account of the views of the main stake-holders. We decided to clear the proposal from scrutiny.

We share the general view that experience of the current forms of European company suggests that the number of firms taking up the proposed new form of company is not likely to be large, at least initially. Nevertheless, we welcome the proposal as providing a corporate form which should potentially be useful to some enterprises, while not preventing the use of other forms of company where businesses find them more suitable to their needs. The key for businesses will be a Regulation that is clear, legally certain and that minimises compliance costs.

24 November 2008
Letter from Ian Pearson MP, Department for Business, Enterprise and Regulatory Reform to the Chairman

Thank you for your letter of 18 November 2008. I would like to respond to the questions raised by Sub-Committee A and update you on the progress of the negotiation.

I am grateful to the Sub-Committee for clearing the proposal. As you will know, the Presidency intend to seek agreement to it among several financial services dossiers at the ECOFIN Council on 2 December in order to allow negotiations with the European Parliament to proceed.

Sub-Committee A has asked how Directive 94/19/EC defines ‘credit institutions’ and what effect this may have on depositors in separate banks which are part of the same group. The Directive defines a credit institution as ‘an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account’. This embraces banks and building societies.

The Directive applies the guarantee to deposits with separate companies within the same group. Depositor protection in the UK is framed in terms of all the accounts held in a firm operating under a single authorisation by the FSA.

The FSCS protection limit therefore applies on a per-person, per-authorised institution basis. The European proposals would not modify this, except insofar as the Commission is tasked, among other things, with reporting by December 2009 on the scope of products and depositors covered.

Any future modification is likely to be implemented through changes to FSA rules not through primary or secondary legislation to amend the Financial Services and Markets Act 2000. The FSA has invited comments on the per-authorised institution criterion in its consultation on compensation schemes, published in October (CP08/15). It has said that it will consider simplifying the eligibility criteria and may bring forward proposals in a further consultation in the New Year. The Sub-committee has asked when the FSA expect to publish the results of its consultation paper on compensation limits. That is a matter for the FSA. However, I understand that the consultation closes on 5 January 2009 and rule changes and a policy statement will be published later in 2009.

I would also like to update you on the progress of the negotiations on amendments to the Directive. The Government has continued to support an increase in the minimum level of compensation, a shorter pay out deadline and the move to compensate 100 per cent of eligible deposits.

Member States have reached agreement, subject to the views of the European Parliament on an increase to €50,000 when the Directive enters into force and to €100,000 by 31 December 2011. The limits will be inflation-linked. The payout delay should be reduced from three months to 20 days, with a further 10 days in exceptional circumstances, by December 2010. Compensation will extend to 100 per cent of eligible deposits. Further measures include a requirement for guarantee schemes to cooperate and schemes must be stress tested regularly.

A provision authorising the Commission to propose temporary increases in a crisis has been withdrawn. Instead there is a commitment to further work in a number of areas. The Commission is tasked with reporting by December 2009 on:

— the effectiveness of payout procedures
— the determination of contributions to schemes
— the effectiveness of cooperation arrangements
— the potential impact of increasing the limit to €100,000
— whether €100,000 should become an upper limit, it will do so unless the report finds against.

I believe that, taken together, these changes represent a significant improvement in the protection afforded to depositors and the effectiveness of the Directive. Further improvements are likely to follow the Commission’s report in December 2009.

24 November 2008

Letter from Ian Pearson MP to the Chairman

The EU Competitiveness Council is taking place in Brussels on 1-2 December. I shall be representing the UK on 1 December and this letter covers the business to be taken on that day.
The two main agenda items are likely to be the response to the economic crisis, and the European Private Company Statute. The European Commission will present its response to the economic downturn. This will be followed by an exchange of views by Member States. The Council will subsequently be invited to agree on certain aspects of the European Private Company Statute.

— The other substantive agenda items for which BERR is responsible will be:
  — A progress report and an exchange of views on a legal framework and policies on gambling.
  — Adoption of Council Conclusions on the Commission’s Communication on clusters in the European Union: implementing the broad-based innovation strategy.
  — A progress report on copyright term extension.
  — A proposal for a regulation on the Community patent and a report on the state of play for a European patent court.
  — Agreement of Council Conclusions on a Small Business Act for Europe

There will be eight further items taken under Any Other Business for which BERR is responsible:

i. A progress report by the Presidency on two draft Directives on defence procurement and intra-Community transfers of defence-related products.

ii. Information from the Presidency on a proposed Regulation on cosmetic products.

iii. Information from the Presidency on a proposed Directive on the safety of toys.

iv. A presentation from the Commission on a proposed Directive on consumer rights.

v. At the request of the Dutch delegation an update on Better Regulation

vi. A presentation by the Commission on its Communication on the raw materials initiative.

vii. Information from the Portuguese and Estonian delegations on the creation of online companies via digital signatures.

viii. Information on the priorities of the forthcoming Czech Presidency.

27 November 2008

COMPETITION LAW: DAMAGES ACTIONS FOR BREACH OF EC ANTI-TRUST RULES (8235/08)

Letter from the Chairman to Gareth Thomas MP, Minister for Trade, Investment and Consumer Affairs

Your Explanatory Memorandum on this Paper was considered by Sub-Committee E at its meeting of 8 October. The Committee decided to retain the document under scrutiny.

The Committee would be interested to see the Government’s response (even informal) to the White Paper and looks forward to receiving the results of the forthcoming separate Government consultation on improving the competition regime.

In the meantime the Committee expressed its concern with the proposal to codify the definition of damages. In particular it was concerned that such an exercise could result either in a provision which was too general to bring real added value over and above the general principles already handed down by the ECJ; or in a provision so detailed that it imposed too much rigidity on the assessment of damages.

10 October 2008
CRIMINAL JUSTICE: CONFISCATION OF CRIME RELATED PROCEEDS, INSTRUMENTALITIES AND PROPERTY (5785/08)

Letter from the Chairman to Vernon Coaker MP, Parliamentary Under Secretary of State, Home Office

Thank you for your letter of 21 April 20087 which was considered by Sub-Committee E at its meeting of 30 April 2008.

The Government’s commitment to carrying out by July a comprehensive check on whether UK legislation complies fully with all aspects of the Framework Decision is welcome, although why this exercise was not carried out in time to meet the March 2007 deadline remains unclear. We trust that in future the Government will aim to complete such assessments in time to meet the relevant deadlines.

We have decided to clear the report from scrutiny and look forward to receiving a copy of your report in the summer.

1 May 2008

Letter from Vernon Coaker MP to the Chairman

Thank you for your letter of 1 May in response to mine of 21 April 20088 about the above Framework Decision. In my letter I undertook to report back to you by July on the work we were carrying out to assess whether UK legislation complies fully with the Framework Decision.

We have now completed this exercise and have sent a comprehensive report to the Council and the Commission on the provisions transposing the Framework Decision into UK law, as required by Article 6.2 of the Framework Decision. The report seeks to demonstrate that UK has discharged the obligations of the Framework Decision. The Council Secretariat have indicated informally that they are content with the report. I am now enclosing for information a copy of the report, as promised in my earlier letter.

21 July 2008

CRIMINAL JUSTICE: CROSS-BORDER ENFORCEMENT IN THE FIELD OF ROAD SAFETY (7984/08)

Letter from the Chairman to Jim Fitzpatrick MP, Parliamentary Under Secretary of State, Department for Transport

This proposal has been considered by Sub-Committee E

While we welcome measures to reduce road deaths within the EU, we have a number of concerns with the present proposal.

First, we have in the past stressed the need for evidence-based legislation. We therefore welcome the impact assessment prepared by the Commission and the separate impact assessment prepared by the Government. It is, however, not clear to us what figures were available to the Commission in arriving at their estimates. It appears that they did not have relevant figures for all Member States and that a number of assumptions are made as to approximate statistics through extrapolation from an unidentified number of Member States. We would be grateful for some clarification as to the information which the Commission had at its disposal in drawing up its impact assessment.

More fundamentally, we question the selection by the Commission of Option 3 as the basis for the current proposal and, if Option 3 is really the only practicable proposal, whether any of the options are sufficiently worthwhile. Given that the Commission is seeking to cut road deaths by a further 16 000 before 2010, a proposal which will at best save 100 lives per year does not appear to be a very effective strategy. Other options with greater life-saving potential were discussed in the impact assessment, but the reasons for rejecting them appear sparsely addressed.

While the current proposal is limited to exchange of information, Option 4 would extend to mutual recognition of evidence, to allow the matter to be pursued by the Member State of registration where the person involved does not pay the fine and thus improve the chances of the penalty being

7 Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 203
8 Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 203
enforced. Such a proposal would, on the Commission's estimates, save between 210-240 lives per year, a significant improvement. We agree that prosecution in the Member State of registration rather than the Member State of offence – which is what Option 4 would involve - raises issues which require careful examination. But page 7 of the Commission’s EM gives only the briefest explanation as to why Option 3 is preferred to Option 4. We would welcome your views on the concerns raised by Option 4 and whether this might have provided a viable alternative to Option 3.

Further, throughout the Commission’s EM and its impact assessment, and notwithstanding earlier advice from the Impact Assessment Board, the Commission fails to distinguish between two separate problems requiring different approaches for their resolution. The first problem to be tackled is that of cross-border enforcement of penalties imposed on non-residents. As indicated above, around 400 deaths are in play as regards this problem. The second problem to be tackled is that of the vastly different levels of road safety in the different Member States. The Commission points out that while there were only 46 deaths per million inhabitants in the Netherlands in 2005, there were 222 per million in Lithuania. This second problem is not restricted to cases involving non-resident drivers but relates to the domestic enforcement practices in place in the Member States in question. In order for this problem – which the Commission estimates to involve around 25 000 deaths – to be tackled, action to improve domestic enforcement practices would be required. Clearly, Option 3 can do nothing to tackle this greater problem. Only Option 5 would improve the overall level of enforcement and potentially save some 5 210-5 240 lives. In rejecting Option 5, the impact assessment makes general reference to subsidiarity concerns and to overlap with the Financial Penalties Framework Decision but again the Commission do not address in any detail the reasons for their conclusions. Again, we would welcome your views.

As regards the specific proposal, we think that it would be helpful to set out more clearly in Article 1(2) the scope of the proposed Directive. Notwithstanding Recital (6), it is not immediately clear that the system is intended to apply to fixed penalty notices only. Article 1(2) indicates that the Directive applies “insofar as the sanction to be imposed for the offence concerned is or includes a financial penalty”, which might suggest a wider scope than that which we understand is intended. Article 5(2) dealing with “Offence notification” is in terms which suggest a limitation to decisions made in the first instance to impose a fixed penalty, but we think that, one way or another, the scope ought to be beyond doubt.

We note that issues arise from the fact that some states impose penalties on the owner and some on the driver of the vehicle, and that it is envisaged that the notification procedure will in the latter case lead to identification of the driver (if different from the owner). Neither Article 5 of the draft Directive nor the language of the draft official notification addresses the resulting issues satisfactorily at present. We would be grateful if you would keep us updated on developments.

On a point of clarification, you state in your EM (paragraph 8) that the Framework Decision on the Mutual Recognition of Financial Penalties (FDFP) applies only to cases first pursued in a national court and not to fixed penalty notices. However, Article 1(a)(ii) of the FDFP provides for the Framework Decision’s provisions to apply also to decisions by an authority other than a court provided that there has been an opportunity to have the case tried by a criminal court. Do you agree that this provision extends the FDFP’s scope to fixed penalty notices? We note the terms of Article 20(2) of the FDFP, which allows Member States to limit the scope of the Framework Decision to court decisions for a period of 5 years, and of section 80(5) of the Criminal Justice and Immigration Act 2008, which covers outgoing requests and appears to exclude fixed penalty notices from the definition of “financial penalty” unless the Lord Chancellor makes a specific order extending the concept to such notices. It is interesting that the corresponding provisions of the Act regarding incoming requests contain no such exclusion. Has the UK chosen to avail itself of the opportunity provided under Article 20 to limit temporarily the FDFP’s scope and is it the Government’s view that a partial declaration – covering outgoing but not incoming requests – is permissible under that Article? If so, has the UK made the relevant declaration to the Secretary General of the Council? We would be grateful if you would provide a copy together with details of the rationale behind the limitation. What is the position in other Member States?

Information as to the local speed limits and drinking limits for drivers would be helpful to ensure that non-resident drivers are aware of their obligations, given that they vary across the EU, and could improve compliance with traffic regulations. The Commission do not indicate whether they have plans to improve awareness: would you support action in this area?

Finally, we note that this proposal relates only to financial penalties and does not cover penalty points or disqualifications. The Commission’s recent Communication on disqualifications arising from criminal convictions in the EU indicated that the Commission would propose a Framework Decision to replace the 1998 Driving Disqualifications Convention. Is this still envisaged and if so, when is a proposal likely to be introduced? Are there any plans to introduce proposals on a uniform system for penalty points?
We have decided to retain the proposal under scrutiny.

16 June 2008

**Letter from Jim Fitzpatrick MP to the Chairman**

On 22 May 2008 the Department for Transport submitted an Explanatory Memorandum on this proposed directive. You wrote on 16 June 2008 that Sub-Committee E had considered the proposal and set out a number of concerns that had been raised. I am writing to update you on progress so far with this proposal, to provide answers to the questions raised by Sub Committee E, and to notify you that there is some uncertainty over the prospects for the proposal’s consideration at the Transport Council on 8-9 December.

As stated in the original EM, the Government broadly supports the road safety aims of the proposal, subject to some detailed concerns about practical implementation. However, consideration of the proposal in Working Group brought to light significant concerns about the question of Community competence over criminal matters and the correct legal base for this proposal and discussions have focussed on that issue. The concern is over whether Community provisions on enforcement must be related to the enforcement of autonomous Community rules and not, as proposed, the enforcement of national legislation. In the light of this issue, a number of Member States, including the United Kingdom, came to the view that the only legally sound way to take forward legislation on cross border enforcement was as a third pillar measure in the sphere of justice and home affairs and so argued that the proposal should not be taken forward as a first pillar Transport Directive. The Commission, Presidency and some other Member States remained of the view that the proposal should be taken forward as a first pillar measure, on the grounds that it would be quicker and would provide more opportunity for involving the European Parliament.

During a policy debate on the proposal at the October Transport Council, 15 Member States, including the UK, expressed the view that cross-border enforcement of road safety offences should be progressed in a third pillar forum. In the light of this, the Presidency has brought forward revised proposals in Working Group, based on a hybrid approach. This involves a first pillar measure on the exchange of vehicle registration information, but excluding the previous provisions relating to use of that data for the purpose of enforcing certain financial penalties. The assumption is that the elements relating to the enforcement of penalties would be dealt with subsequently in a separate third pillar measure, but cannot properly be proposed or considered in a first pillar forum.

However, the latest Presidency proposal has not succeeded in addressing previous concerns and has raised some new ones. It is a much wider proposal than the original, re-titled as a Directive on Measures Regarding the Improvement of Road Safety within the European Union. It is no longer limited to the issue of cross-border enforcement, instead setting requirements for the enforcement of road safety legislation within all Member States and for the provision of statistical information on the number of enforcement checks and the provision of information to drivers on the details of national legislation. This gives rise to significant concerns on the grounds of subsidiarity, as these proposals are not proportionate, nor are they necessary to achieve the original objective of improving cross-border enforcement. They would also interfere in operational policing matters, which should be the responsibility of Chief Officers of Police and not the subject of legislation at European or national level.

Discussions are still ongoing, but the latest position is that in any case the Presidency proposal seems unlikely to be workable. Without reference to enforcement or other follow-up action, it is unclear for what purposes vehicle registration data would be exchanged. By avoiding reference to any offence or infringement, the provisions on data exchange are widely drawn, which gives rise to data protection concerns. It is also likely to be the case that any data exchanged under a first pillar measure can only be used for purposes within the scope of the first pillar. Such data cannot be used for purposes that fall within the third pillar, including the enforcement of criminal offences. This would seem to make the hybrid approach unviable.

The European Parliament has not yet had its Plenary first reading of the proposal, but is likely to do so in December. At this stage, it is not clear what plans the Presidency has for the December Transport Council. However, as noted in the original EM, this proposal is one of the Presidency’s priorities and it is likely that they will wish to make every effort to achieve a general approach on a compromise proposal. At present it looks very unlikely that this will be possible, and it seems more probable that there will be a further debate. Nonetheless, I felt that it was important to update your Committee on the current progress of the dossier even though it is possible that the position may change in the approach to the Council. I understand that, due to the Parliamentary timetable, your opportunities for consideration of the proposal are limited and it will not be possible for your Committee to consider a later letter before the Council takes place. We would, of course, be reluctant to give agreement to a general approach ahead of Scrutiny clearance, and I wanted to assure
your Committee that, in the unlikely event that the Presidency is able to come forward with a compromise that is acceptable to the majority of Member States, the UK would not be willing to support it unless convinced that it was the best deal that could be achieved.

Turning to the questions raised in your letter of 16 June, firstly you asked what figures were available to the Commission for its impact assessment. We are not aware of all the information to which the Commission may have access. The Commission did request all Member States to provide information on their current enforcement practices, under the Commission Recommendation on enforcement of 2003 (2004/345/EC). According to section 2.2.1 of their Impact Assessment, only 6 Member States had provided such information, including the United Kingdom. However, the Commission may also have had access to information from other sources.

You asked whether the Commission's option 3, the basis for their proposal, is really the only practicable proposal, rather than option 4. As described above, consideration of this proposal has shown that it is not a practicable option, at least as the subject of a Commission proposal for first pillar legislation. This is because legislation dealing with criminal penalties and procedures is properly a matter for the third pillar.

This would clearly also apply to option 4, which would involve prosecution of offenders by the authorities in their state of residence. We do not know why the Commission based their proposal on option 3.

The French Presidency has said that there is annually something like 2 million speeding offences by non-resident drivers in France, including over half a million British vehicles. If such offences were to be pursued through the courts in the state of vehicle registration, as in option 4, that volume of cases, together with offences committed by UK vehicles in other Member States, would place a significant burden on the UK courts system. It would also raise significant practical difficulties about the exchange of evidence between different legal systems.

As for option 5, this would involve harmonisation of road safety enforcement practice within Member States. Again, we do not know why the Commission based their proposal on option 3 rather than option 5. However, we note that the latest Presidency proposal does include elements of option 5, in particular setting specific standards for the volume of enforcement checks. As explained above, this gives rise to significant concerns on grounds of subsidiarity. This is a police operational matter and should not be the subject of Community legislation. It would also place a burden on UK police forces by requiring them to devote resources to a large volume of checks that might be used more effectively elsewhere.

We do not think that this approach of a specified volume of checks would be an effective way of improving road safety. The easiest way for police forces to meet the specified volume is to carry out checks on the busiest roads at the busiest times. This would not necessarily catch high-risk offenders. Our experience suggests that it is much more effective to target enforcement activity at times and in locations that are most likely to catch high risk offenders. This will vary between localities and the circumstances will be very different in different Member States, which could not be taken into account by any number of checks set at EU level.

There is significant variation in the maturity of road safety policies across the 27 Member States and it would not be right to impose on all of them measures that are designed to address issues that only arise in some of them. Legislation and enforcement is only one such kind of measure. Others that can also improve road safety and contribute to significant casualty reductions include the physical road environment and infrastructure, on both high speed and urban roads, driver training and testing, road safety education and publicity for all road users. None of the Commission options addresses these issues. Legislation is not necessarily the most effective ways to achieve the Commission's casualty reduction target.

We have domestically been taking forward measures in all these areas, which has contributed to the significant reduction in road accident casualties in Great Britain over the last 40 years. We have one of the best road safety records in Europe and are making good progress towards our own national casualty reduction targets, which are to reduce the numbers killed and seriously injured in Great Britain by 40% by 2010, compared with the 1994-98 baseline, and the numbers of children aged 0-15 killed or seriously injured by 50% over the same period. By 2007 total fatal and serious casualties were 36% below the baseline and child fatal and serious casualties were 55% below the baseline. We are now working on a new strategy and targets beyond 2010 and intend to consult on our proposals next spring. Additional EU legislation would not necessarily help us to achieve our casualty reduction objectives and proposals such as those in option 5 could divert us from measures which would be more effective.

You also raised some specific questions about the Commission proposal. On the matter of fixed penalty notices (FPNs), it is not intended that the Directive itself should be limited to FPNs. It aims to
cover all financial penalties for the four specified offences. Its effect in practice in the UK would probably be limited to FPNs, as that is the way we deal with speed and red light offences that are detected by camera. But that would not necessarily be the case in other Member States, who may not use FPNs at all. I am sorry if our original Explanatory Memorandum did not make that clear.

As discussion of the Directive has focussed on the question of Competence and the legal base, there has been no detailed discussion of some of the practical issues raised in our original Explanatory Memorandum, including ensuring that it was able to cover both driver liability and keeper liability penalty systems. We will keep you updated if there are any further developments, which, as mentioned earlier, we would expect to be in the context of a new third pillar proposal.

Turning to your observations and questions concerning the Framework Decision on Mutual Recognition of Financial Penalties (FD), you asked for clarification about the statement in our EM (at paragraph 8) that the FD only applies to cases first pursued in a national court and not to fixed penalty notices and contrasted it with Article 1(a) (ii) of the FD, which provides for the FD to apply to decisions by an authority other than the court, provided there has been an opportunity to have the case tried by a criminal court. You asked whether this provision extends the FD’s scope to FPN.

You asked a number of questions about Fixed Penalty Notices in relation the EU Framework Decision on the Mutual Recognition of Financial Penalties. I understand the Ministry of Justice and its legal advisers are reviewing this particular point. I will write again once Ministers have made a decision.

The Ministry of Justice has no plans to take advantage of Article 20 (2) and temporarily limit the scope of the FD for a period of five years. We do not know the position in other EU Member States.

You asked whether we would support action to provide information on speed limits and drink-drive limits to non-resident drivers. We note that the latest Presidency proposal includes such requirements, though it does not make clear how they should be achieved. While the provision of such information is useful, we do not think that legislation in this area is necessary or proportionate.

The main source of information on speed limits, drink drive limits and other information about driving on roads in Great Britain is the Highway Code. There is a separate but similar edition for Northern Ireland. The new edition of the Highway Code published in September 2007 included metric equivalents for all speed limits, in order to provide better information to drivers who are not resident or are newly resident in Great Britain. The Code is available through bookshops and newsagents and is also freely available online. The text is also available for free to other publishers (subject to certain licence conditions). This includes those who wish to translate the Code into other languages and we are aware that it has been translated into a number of languages, including Polish.

In addition, motoring organisations in the UK such as the AA and RAC provide similar information to their members and to the public on driving requirements here and in other Member States and no doubt their equivalents in other Member States do the same, including information for those travelling to the UK. We understand that the Commission is also compiling such information with a view to providing it to drivers across the EU. We would be happy for the Commission to do so, but see no need for it to be a matter for legislation.

Your final question concerned penalty points. I am unaware of any formal proposal for a Framework Decision to replace the 1998 Convention on Driving Disqualifications (98/C 216/01), or of current EU intentions for such an instrument. The Department for Transport is currently working with Irish and Northern Ireland colleagues to institute as soon as possible mutual recognition of driving disqualifications between the United Kingdom and Ireland within the framework of the 1998 Convention and I expect to lay Regulations shortly as part of that exercise. I know of no plans to introduce proposals on a uniform system of penalty points in the EU. Recognising existing disparities at national level, I recently agreed with my Irish and Northern Ireland colleagues that we should continue to work together to see what could be done to introduce mutual recognition of penalty points for motoring offences between those three jurisdictions.

20 November 2008

CRIMINAL JUSTICE: ECRIS CONVICTIONS FOR SEXUAL OFFENCES AGAINST CHILDREN (10122/08, 11434/06, 13524/06)

Letter from Meg Hillier MP, Parliamentary Under Secretary of State, Home Office to the Chairman

I am writing in response to Susanah Street’s letter of 29 May to Eldon Ward [not printed] requesting an update on the proposed Framework Decision on prohibitions arising from convictions for sexual offences against children.
Joan Ryan wrote to the Commons European Scrutiny Committee on 19 April 2007 on the proposed Framework Decision on prohibitions arising from convictions for sexual offences against children.

She indicated that it had been agreed by the Article 36 Committee that a provision would be incorporated into the proposed Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States. This was taken forward and the text of Article 6(2) of the Framework Decision reads:

When a person asks for information on their own criminal record, the central authority of the Member State in which the request is made may, in accordance with national law, submit a request to the central authority of another Member State for information and related data to be extracted from the criminal record, provided the interested party is or has been a resident or a national of the requesting or requested Member State.

If such a request is made in the context of criminal proceedings the requested country must provide the information. If the request is made for any other purpose than criminal proceedings the requested country need only reply in accordance with national law.

At the time of Joan Ryan’s letter it was unclear what consequences this agreement would have on negotiations for a separate Framework Decision on prohibitions arising from convictions for sexual offences against children. However, we have since been informed that negotiations for such a framework decision will not be continuing.

This is disappointing as the provision in the Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States will only cover judicial disqualifications contained on the criminal record. It will not require Member States to exchange information about administrative prohibitions.

We believe, therefore, that there are still issues to be resolved. We are engaged in extensive efforts at official level to seek support from other Member States for reopening discussions on this issue, and, where appropriate, making such discussions a priority for future Presidencies. We will endeavour to ensure that progress can be made and will update you on any developments.

19 June 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 19 June 2008 which was considered by Sub-Committee E at its meeting of 2 July 2008.

We, too, are disappointed that negotiations on the sex offenders proposal are to be discontinued. As we indicated in our letter of 7 June 2007 in respect of the proposed Framework Decision on the organisation and content of the exchange between Member States of criminal record information, the effect of the general provision in Article 6(2) will vary in the different Member States depending on the vetting system in place. You highlight in your letter the further problems arising from the failure of some Member States to record disqualifications on the criminal record, and we recall that the question of how to deal with different practices for handing down and recording disqualifications was one of the difficulties in the original negotiations on the sex offenders proposal.

In this regard, we would welcome your explanation as to the definition of “supplementary penalties” and “security measures” in Article 11(1)(a)(iv) of the Framework Decision on the organisation and content of the exchange of criminal record information. We note that such information must be transferred, regardless of whether it has been entered in the criminal records. Although Article 11(1)(b)(iv) provides that information on disqualifications need only be transferred where it has been entered on the criminal record, we would be interested to hear whether you consider that the terms of Article 11(1)(a)(iv) could cover any relevant disqualifications.

While it is unfortunate that there is no appetite for EU legislation in this area, we commend the Government for continuing their efforts to seek support among other Member States for reopening discussions on this matter in due course.

We have decided to retain the proposal under scrutiny and look forward to hearing from you as regards the interpretation of Article 11.

3 July 2008

Letter from the Chairman to Meg Hillier MP

This proposal was considered by Sub-Committee E at its meeting of 2 July 2008.
We welcome this proposal to implement Article 11 of the Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States. However, we would be grateful for clarification regarding three aspects of the proposal.

**ANNEXES A AND B**

We note that the annexes have been inspired by the pilot project and that their content derives from the analysis of the needs of all 27 Member States, taking into account delegations’ comments at a 2007 experts meeting. We would be grateful for your views on the suitability of the tables in the annexes for the UK. Would arson resulting in serious physical harm to a person, for example, fall under category 081300 (exposing to danger of loss of life or grievous bodily injury) or 160500 (aggravated arson)?

**COMMISSION SUPPORT ROLE**

Article 3(5) provides the Commission with a general supporting and monitoring role. What is envisaged here? We note from the legislative financial statement (page 40) that only 2.5 officials or temporary staff are expected to be assigned to the project in the longer term. Will these resources be adequate?

**COSTS**

The Commission’s EM (page 5) highlights that budgetary implications of the proposal will be covered “to a large extent” by the EU criminal justice programme. Paragraph 25 of your own EM also addresses the financial implications of the proposal but the position is not very clear and we would welcome further details of the extent to which expenses at EU and UK level will be covered by the EU’s budget and by specific EU funding programmes.

We have decided to retain the proposal under scrutiny.

3 July 2008

**Letter from Meg Hillier MP to the Chairman**

Thank you for your letters of 3 July informing me that both the ECRIS proposal (10122/08) and the prohibitions documents (11434/06 and 13524/06) remained under scrutiny. You also asked several questions about regarding the ECRIS proposal (10122/08):

a. Are the tables in the annexes suitable for UK offences?

b. Is the financial/staffing provision envisaged in the proposal for the Commission sufficient?

c. Can the Home Office provide more detail on the financing of this work within the UK, and regarding Framework Decision 2008/xx/JHA on the organisation and content of the exchange of information extracted from criminal records between Member States?

d. You sought clarification of the terms "supplementary penalties", "security measures" and "disqualifications".

This letter seeks to answer both of yours as your question on 11434/06 and 13524/06 relates back to Article 11 of Framework Decision 2008/xx/JHA on the organisation and content of the exchange of information extracted from criminal records between Member States and of course the ECRIS proposal is designed to implement the same article, albeit a different part.

**ANNEXES A AND B**

The Home Office has discussed the tables in the annexes with colleagues in the Scottish Government and the Northern Ireland Office. We are content that they are suitable for the United Kingdom. We consider that it would be neither feasible nor desirable to seek to list all definitions of offences that exist in each UK jurisdiction, let alone those of all twenty seven Member States. The great majority of United Kingdom offences can be categorised easily. We accept that there are certain jurisdiction-specific crimes, for example the Scottish common law offences of “hamesucken” and “plagium” which though not listed can be effectively categorised (under assault and theft respectively). There are also some classes of offence that do not appear to have an ECRIS category, for example those relating to obstruction, begging and vagrancy. We consider that they could be categorised within 1209 00 "public order offences, breach of the public peace" or within the open category 1200 00.
You also asked about arson - whether arson resulting in serious physical harm to a person would fall under category 081300 (exposing to danger of loss of life or grievous bodily injury) or 160500 (aggravated arson). I am advised that this would more properly fit within the aggravated arson category. More generally we know that work will be needed to ensure consistency where offences might come into two separate categories. This will be done by training workers in the UK Central Authority for the Exchange of Criminal Records.

COMMISSION SUPPORT ROLE

At the first meeting of the Judicial co-operation Working Group on 11 July the Commission envisaged its role as being confined to technical assistance, for example a helpdesk function on S-TESTA, and some central statistical monitoring. Given this we think that the staffing suggested in 10122/08 will be sufficient to deal with the limited amount of work being undertaken by the Commission.

COSTS

Costs incurred at central level will be met from the EU budget. These costs relate to the network (S-TESTA) and interconnection software which the Commission will provide to those Member States who choose to use it. Costs will include those incurred in technical monitoring as well as a helpdesk service. The Commission also expects to collect statistics on traffic through the network.

Implementation at national level is the financial responsibility of the Member States, but funding is available to all Member States under the criminal justice financial programme 2007-13 (€12m is ring-fenced under the annual work programme for this financial year). Member States can apply for financial assistance for improvements to national criminal records systems so that they can exchange information electronically with other criminal records systems, obtaining up to 70% co-financing. The United Kingdom has already secured €514,357 in relation to the pilot project (NJR). It would be open to us to apply for additional funding under future annual work programmes.

SUPPLEMENTARY PENALTIES/ SECURITY MEASURES

The terms "supplementary penalties" and "security measures" refer to additional disposals (ie beyond what we would understand as a sentence) that are issued by a court. They are not equivalent to disqualifications as far as the UK system is concerned, where they are generally issued by professional bodies such as the General Medical Council, for example following a criminal conviction.

21 July 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 21 July 2008 which was considered by Sub-Committee E at its meeting of 8 October 2008.

We are grateful for your clarification as to the meaning of “supplementary penalties” and “security measures”. We are content to clear the proposals from scrutiny. I am writing separately in relation to the ECRIS proposal.

9 October 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 21 July 2008 and for your further Explanatory Memoranda of 28 August and 2 October. Sub-Committee E considered all three communications at its meeting of 15 October 2008.

We are grateful for your confirmation that all UK jurisdictions are content with the annexes to the proposal. In particular, we are pleased to see that consideration of how best to ensure consistency of categorisation has already begun and welcome plans to ensure adequate training for officials involved in criminal record information exchange. The amendments to the draft Decision agreed in the Council Working Group are helpful.

We have decided to clear the proposal from scrutiny. (I have written separately in relation to the proposed Framework Decision on prohibitions arising from convictions for sexual offences against children, to which your letter also referred.)

16 October 2008
Letter from the Chairman to Rt Hon Baroness Scotland of Asthal, Attorney General, Office for Criminal Justice Reform, Ministry of Defence

Thank you for your letters of 15 and 23 April 2008 which were considered by Sub-Committee E at its meeting of 30 April 2008.

We welcome the changes introduced to the draft which strengthen references to fundamental rights and to the ECHR. However, it is to be regretted that the present draft still does not make clear that the conclusiveness of any certificate issued and the execution of a decision rendered in absentia are both subject to compliance with the ECHR, as interpreted by the Strasbourg Court, and that a person challenging a certificate could raise this objection in the executing State. We recognise that Member States are obliged to respect the ECHR in their transposition of this Framework Decision but consider that there would be a clear benefit in setting out this right beyond any doubt in the text of the instrument.

As we have said in the past, we consider that statistical and other information is important in assessing the need for and required extent of any legislation. In this case, we consider it unfortunate that no impact assessment was conducted at EU level in order to establish the extent of the problem and once again we urge the Government to encourage Member States to carry out impact assessments prior to pursuing legislative initiatives. In the absence of an EU impact assessment, a UK impact assessment could have provided useful information regarding problems linked to the execution of EAWs in the UK and particularly the effect of Article 5(1) of the EAW Framework Decision. It is therefore disappointing that the Government have decided not to conduct an impact assessment and that statistics regarding the frequency of trials in absence cases are not available. We continue to stress the need for evidence-based legislation.

We have decided to clear the proposal from scrutiny. We would be grateful if you would provide a copy of the text finally agreed.

1 May 2008

Letter from Rt Hon the Baroness Scotland, Attorney General, Office for Criminal Justice Reform, Ministry of Justice to the Chairman

Thank you for your letter of 24 April 2008 about the consideration of this proposal by the Committee on 2 April. I note that this dossier is retained under scrutiny.

I very much welcome the chance to consider the Committee’s opinions and views on this dossier. You have asked several questions and invited my comments on a number of issues on this proposal and I am grateful for the opportunity to provide this.

First, you suggest that there should be a "safeguard clause" inserted into the Framework Decision as a means to ensure that the ECHR is respected and that Member States undertake not to action any part of the Order which conflicts with it. I understand, and fully agree with, the Committee’s concern to ensure the dossier does not impinge on the rights enshrined in the ECHR. We believe that the European Supervision Order FD does not contain any ECHR non-compliant Articles and that the best way to secure this further is by the careful drafting of each provision, removing the need for a "safeguard clause".

Second, you ask if I have raised the question of consulting the Council of Europe on this proposal. I had undertaken to consider this in light of the views of other Member States, but given the lack of progress on this dossier since your Inquiry into the proposal last year there has not yet been an opportunity to do so. I will of course keep your suggestion and canvass views as soon as an opportunity arises.

Third, I note your comment on the setting of deadlines within this Framework Decision. It appears that there is a typing error in the new draft text and the reference to Article 11 should be to Article 12.

9 Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 209
10 Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 223
12, which lists the grounds for refusal. This will need to be raised in the next Working Group. I am most grateful to you for pointing this out.

Fourth, you mention your disappointment that the issue of dual criminality has been introduced into the Framework Decision. This is very closely linked to the introduction of the European Arrest Warrant as the return mechanism for the Order and there will need to be careful discussion on how to make this practicable; for the EAW to work as a surrender mechanism, this new instrument must be fully compatible with it. There is a tension between, on the one hand, using the EAW as a surrender mechanism for the European Supervision Order and avoiding the UK being bound to supervise bail for offences that it does not domestically recognise and, on the other hand, not introducing unnecessary grounds for refusal of requests under the European Supervision Order. There has been no discussion in working groups on the issue of dual criminality since the new draft has been issued and I will ensure officials raise it in the context of discussing interaction with the EAW.

Fifth, you raise issues about how breaches of the European Supervision Order are to be dealt with. I agree with you that there is a need for clarification on these points and that there will need to be provisions on how the issuing State will consider a breach of an Order, whether it is contested or not. It has been our position that the executing State needs to have powers of arrest to prevent a breach, where this is necessary. I believe that where the breach is minor it should be accepted that the executing State should use its discretion on whether any action need be taken or not. These concerns have been raised with other Member States by my officials at Working Groups but there has been little discussion on this sort of detail so far. I will ensure that officials continue to engage on this.

Sixth, you ask for more details on the Government’s concerns about the possible impact of this proposal on domestic bail laws and processes. It is our view that bail decisions should be made in accordance with national law and it should be clear that the instrument will not confer any “rights” to bail. The availability of the European Supervision Order is only intended to be a factor that the courts can consider in determining what form of remand is appropriate in all the circumstances of an individual case, which is the stated aim of the proposal. We believe that it would be useful for The Rt Hon the Baroness Scotland QC the Framework Decision to specifically make this clear and we will be seeking to ensure that wording is included. I am keen to hear of any specific concerns which the Committee may have.

Seventh, you ask if it is likely that this proposal will be agreed before the Treaty of Lisbon comes into force. It will not be formally adopted within this timetable because negotiations cannot be concluded quickly enough to allow time for the necessary parliamentary and constitutional procedures to be completed in some Member States. The Council would need to be close to finalising the text now for there to be a reasonable prospect of adoption. The French Presidency is therefore unlikely to devote extensive Working Group time to it.

Finally, I would also like to take this opportunity to respond to your letter of 7 March in which you raised your concerns about not having received any update on this Framework Decision, especially in light of the new draft text having been issued in December 2007. Your letter crossed with mine attaching the Explanatory Memorandum and the new draft text which you have now, of course. It is our practice to provide prompt updates on EU dossiers. There has been little development in this dossier, with only one Working Group immediately after the new version was published, and officials gave priority to other more immediately pressing issues. However, I am extremely sorry that this delay occurred especially in this instance which, as you rightly point out, was on a dossier on which your Committee had held an Inquiry. I would like to assure you that my officials will ensure that this does not occur again.

30 May 2008

Letter from the Chairman to the Rt Hon Baroness Scotland of Asthal

Thank you for your letter of 30 May 2008 which was considered by Sub-Committee E at its meeting of 18 June 2008.

We welcome the revised structure of the new draft proposal which we consider brings some clarity as regards both the objective and the mechanism of the new ESO procedure. However, we consider that there are a number of issues which will have to be addressed, and we outline them below.

FUNDAMENTAL RIGHTS

We note your comments as regards a safeguard clause but disagree that careful drafting would remove the need for such a clause. A safeguard clause, as its name indicates, is intended to support
specific provisions and, given that the European Convention of Human Rights is a living instrument and the Court’s case-law continuously develops the rights it contains, a safeguard clause is in our view necessary as it is not possible to foresee all likely fundamental issues which will arise in the context of the framework decision.

We urge you to press for consultation of the Council of Europe without delay. This proposal has already undergone substantial changes, and it is clear that the Council of Europe’s input at the earliest possible stage will ensure that changes are moving in the right direction.

DUAL CRIMINALITY

We appreciate the difficulties which arise as a result of the introduction of the European Arrest Warrant as the proposed return mechanism in the present proposal. However, in our view the ESO should not be compromised in an attempt to squeeze a fit between the two instruments. Changes to the EAW instrument may be required to accommodate the proposed new system and we suggest that one such change could be to remove absence of dual criminality as a ground for non-recognition of an EAW where the EAW is made in the context of an ESO. In such a case, a suspect returned on an EAW to face charges which do not constitute an offence in his Member State of residence will nonetheless have received an overall benefit by being released on bail prior to trial.

ROLES OF ISSUING AND EXECUTING STATES

We are pleased to see that you support our position on the need for clarification of the roles of the issuing and executing States. In particular, we welcome your agreement with our recommendations concerning the need for provisions on establishing a breach of the ESO, the need for powers of arrest and the need for discretion for the executing State to deal with minor breaches. We would be grateful if you would keep us informed of the progress of negotiations in this area.

EAW-ESO RELATIONSHIP

Aside from the specific issue of dual criminality, we reiterate the need for careful thought as regards required amendments to the EAW if it is to be used as the surrender mechanism in the ESO procedure. We look forward to hearing from you as regards developments in the Member States’ thinking.

IMPACT ON DOMESTIC BAIL LAWS AND PROCESSES

We note your concerns and agree that a clarification that the ESO does not give rise to any right to bail would be helpful.

As you know, our July 2007 Report European Supervision Order, 31st Report of 2006-07, HL Paper 145 is awaiting debate. In light of the substantial changes to the proposal since we reported and the continuing developments in the negotiations, we have decided to withdraw our recommendation for debate but we retain the proposal under scrutiny.

18 June 2008

Letter from the Rt Hon Baroness Scotland, Attorney General to the Chairman

Thank you for your further letter of 18 June about the consideration of this proposal by the Committee on the same date. I note that this dossier is retained under scrutiny and that you have decided to withdraw the Committee’s recommendation for a debate on this issue. You will have seen from Bridget Prentice’s letter to you, dated 3 July, that we expect the French to devote some time to this dossier during their Presidency.

I am pleased to see that we are of the same mind on the way forward on many aspects of this dossier. All your comments will be kept within view when it becomes possible to make further progress. However, there are a couple of points I would like to pick up on in the interim.

On seeking a view from the Council of Europe, you will appreciate that I would need to canvass the views of other Member States on this matter. I will be doing so at the first opportunity.

I will also bear in mind your comments on the need for a safeguard clause: as you know, my view is that its inclusion would be unhelpful from a more general perspective (inevitably entailing the inclusion of such a clause in the majority of proposals). As regards your comments on dual criminality, again, this is something that I will consider carefully. The idea you present is interesting but will require discussion with those in the Home Office who hold the policy on the operation of the
European Arrest Warrant. More generally, you will of course appreciate that the application of dual criminality as a pre-requisite for assistance in The Rt. Hon the Baroness Scotland QC judicial cooperation in criminal matters is an issue which cuts across a wide range of policy areas and EU proposals and so requires careful thought in order to ensure that policy and practice are consistent.

25 July 2008

**Letter from the Chairman to Rt Hon Baroness Scotland of Asthal, Attorney General, Attorney General’s Chambers**

Thank you for your letter of 25 July which was considered by Sub-Committee E at its meeting on 15 October. We note that this was an interim response to my letter of 18 June, and look forward to your further thoughts on the points in my letter and information on the progress of negotiation on this matter in due course. Meanwhile the matter remains under scrutiny.

16 October 2008

**Letter from the Chairman to Rt Hon Baroness Scotland of Asthal, Attorney General, Office for Criminal Justice Reform, Ministry of Justice**

This proposal for a Council Framework Decision was considered by Sub-Committee E in its meeting of 19 November 2008. The Committee welcomes the revised structure of the new draft proposal and thanks the Government for addressing and clarifying the Committee’s concerns.

**Consultation with the Council of Europe**

The Committee notes that you have not had the opportunity to canvass the opinions of the other Member States as to the value of consultation with the Council of Europe. The Committee continues to feel that this would have been a valuable course of action to ensure the smooth interaction between the European Supervision Order and the rights that the Member States all share as protected by the ECHR.

**ECHR Safeguard Clause**

The Committee notes your comments as regards a safeguard clause and that Article 4 should maintain respect for the fundamental rights and values enshrined in Article 6 TEU.

**Interaction of ESO and EAW**

The link between these measures has in the past caused the Committee concern and progress has been made in this regard. In particular, the Committee notes the clarification of jurisdiction in Article 15 and the inclusion of Article 16 (4) allowing (though only where it is a requirement of national law) defendants a hearing via telephone or videoconference before variation of bail conditions and/or the application of a European Arrest Warrant.

In addition, the Committee welcomes the clarification in Article 13 (h) in relation to the rules concerning dual-criminality and the interaction between the ESO and the EAW.

**Respective Roles of Issuing and Executing State**

The Committee notes the substantial amendments made, particularly to Articles 15-17 and Article 19, and also that further discussions are contemplated. These will hopefully further clarify the respective roles of each state and facilitate the smooth and efficient monitoring of an ESO.

This whole area was of particular concern to the Committee in its Report on the early draft of the measure (European Supervision Order, 31st report (2006-07) HL Paper 145) – see, in particular, Chapter 5. Whilst we appreciate that Article 15(5) has already proved controversial we remain concerned about its present scope. The wording accepts that the executing state must be able to take steps to protect its own public and victims. However, this may not cover all the concerns expressed in paragraph 172 of our Report, which referred also to the risk of interference with evidence. Further, unless protecting victims is given an extraordinarily wide meaning, the present wording does not cover the concerns mentioned in paragraphs 162 and 167-8 of that Report, or enable the executing state to take urgent temporary measures to protect the issuing state’s interest in the return of the defendant for trial. For example, the executing state could, to take Judge Workman’s example, still be unable to act in relation to a defendant on bail observed to be in the process of boarding a plane to South America. Is this intended?
The Committee is glad to note that Articles 5(2) and 6 will allow Member States to designate both appropriate competent authorities and central authorities to assist. Some of the functions to be performed by competent authorities will clearly be judicial, indeed are required to be by Article 5(3) or are necessarily so, as in the case of Article 15(5). Others are not or may not be, e.g. Articles 16(3), 17(2)(a) and (c) and 19. A central authority may have a relevant role in identifying the appropriate competent authority in any context.

IMPACT OF DUAL-CRIMINALITY ON ESO

As the Committee has pointed out in the past, the inclusion of a dual-criminality requirement within the ESO proposal could potentially undermine its stated aims of facilitating cross-border non-custodial pre-trial supervision of defendants. The Committee welcomes the Government’s decision to accept the return of UK nationals subject to an ESO for offences not illegal in the UK. This will ensure that UK nationals will be able to secure the advantages of an ESO and avoid long periods of pre-trial detention in other Member States.

The Committee also welcomes the fact that the Government is seeking clarification and further amendment to Article 12 to ensure that it cannot be read so as to imply that an ESO will only apply to the most serious offences as this too would seem to undermine the stated aims of the proposal.

We note that the Presidency will seek political agreement to the proposal at the Council meeting on 27/28 November. In the circumstances, although as we note above we continue to have reservations on certain aspects of the text, we are content to clear this proposal from scrutiny.

24 November 2008

CRIMINAL JUSTICE: JUDICIAL NETWORK (5039/08)

Letter from Meg Hillier MP, Parliamentary Under Secretary of State, Home Office to the Chairman

I am writing to update you on the negotiations for the draft Council Decision on the European Judicial Network.

A number of improvements have been made to the text since negotiations commenced in January. Extracts from relevant Articles are attached behind for your information.

ARTICLE 4 - FUNCTIONS OF CONTACT POINTS

The responsibility placed on EJN contact points for the organisation of training has now been amended to a duty to be ‘involved in and promote the organisation of training’. This achieves the objective of improving training in judicial co-operation whilst still maintaining appropriate discretion for Member States’ to determine how training is organised.

The Article also now details the role of the EJN National Correspondent in co-ordinating national contact points, including participation in meetings of National Correspondents. A separate role of National EJN Tool Correspondent has been created to ensure that information related to his or her Member State on the EJN website is properly maintained and up to date.

This person may be an existing contact point.

ARTICLE 10 - TELECOMMUNICATION TOOLS

All references in the Article to a secure telecommunications network have been amended to refer to “connections”. It is not intended to create a new purpose built network for the work of the EJN. Instead, contact points will have access to a secure web based e-mail service currently being developed and implemented for Eurojust.

ARTICLE 12 - INFORMATION TO THE COUNCIL AND COMMISSION

has now been incorporated into a revised Article 15. References to the Presidency playing a role in reporting on the activities of the EJN were considered inappropriate and have now been removed.

Negotiations on the draft Council Decision have progressed considerably in the Council working group and it is likely that the French Presidency will seek a general approach on the proposal at the JHA Council in July.
One of the issues outstanding concerns the requirement in Article 11 for contact points to report to Eurojust any cases which fall within Eurojust's competence and into certain specified categories. The requirement is closely related to Article 13 of the Eurojust Decision which places certain reporting requirements on Member States. The UK and a number of other Member States have argued that Article 11(1)(b) is superfluous to the requirement in Article 13 of the Eurojust Decision. You will be aware that the Presidency intends to seek an agreement on Article 13 of the Eurojust Decision at the JHA Council in June. Another possibility under discussion would be to remove all the requirements for reporting cases to Eurojust from the EJN Decision and consolidate them in the Eurojust Decision, in this case in Article 25a which deals with co-operation with the EJN.

3 June 2008

ANNEX

ARTICLE 4

Functions of contact points

3. At their respective level the contact points shall be involved in and promote the organisation of training sessions on judicial cooperation for the benefit of the competent authorities of their Member State, where appropriate in cooperation with the European Judicial Training Network.

4. The national correspondent, in addition to his tasks as a contact point referred to in paragraphs 1 to 3, shall:
   a. be responsible, in his Member State, for issues related to the internal functioning of the network, including the coordination of requests for information and replies issued by the national competent authorities;
   b. be the main responsible for the contacts with the EJN Secretariat including the participation in the meetings referred to in Article 6;
   c. where requested by its Member State, give an opinion concerning the appointment of new contact points

ARTICLE 10

Telecommunication Tools

1. The European Judicial Network shall ensure that:
   a. the information provided under Article 8 is made available on a website which is constantly updated;
   b. secure telecommunications (...) connections are set up for the operational work of the contact points of the European Judicial Network; as a first step a simplified system of exchange of information between contact points shall be established;
   c. the secure telecommunications (...) connection makes possible the flow of data and of all requests for judicial cooperation between Member States, as well as between them and the national members, national correspondents of Eurojust and liaison magistrates appointed by Eurojust;

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2. The secure telecommunications (...) connection referred to in paragraph 1 may also be used for their operational work by the national correspondents, national correspondents for terrorist matters, the national members of Eurojust and liaison magistrates appointed by Eurojust. It may be linked to the Case Management System of Eurojust referred to in Article 16 of Decision 2002/187/JHA.

3. Use of secure telecommunications does not preclude direct contacts between contact points.

ARTICLE 15

Assessment of the operation of the European Judicial Network

1. The European Judicial Network (...) shall report to the Council, the Commission and the European Parliament in writing every second year on its (...) activities and management, including budgetary management (...).

2. The European Judicial Network may in the report referred to in paragraph 1 also indicate ( ...) any criminal policy problems within the Union highlighted as a result of the European Judicial Network’s activities and it (...) may also make proposals for the improvement of judicial cooperation in criminal matters.

3. The European Judicial Network may also submit any report or any other information on the operation of the European Judicial Network which may be requested by the Council or the Presidency.

CRIMINAL JUSTICE: ORGANISED CRIME AND CORRUPTION (6335/08)

Letter from the Chairman to Vernon Coaker MP, Parliamentary Under Secretary of State, Home Office

This proposal was considered by Sub-Committee E.

We welcome the proposal for a study into the links between organised crime and corruption. As we have previously emphasised, we strongly support evidence-based legislation and such a study will provide a helpful basis for consideration of what future action may be required to combat this issue.

We trust that the study will involve the collation of relevant statistics, in cooperation with the Commission’s expert group on the policy needs of data on crime and criminal justice, to allow an assessment to be made of the need for, and appropriate extent of, any proposed legislation.

We have decided to clear the working document from scrutiny.

15 May 2008
Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

Thank you for your letter of 3 April 2008 regarding the above dossier. I understand that, as a result of liaison between officials, you are aware that this response would be delayed to allow for clarification of the outcome of the Presidency’s informal negotiations with the European Parliament on this dossier.

In your letter you inquire about the assessment of any financial implications for the UK as a result of this dossier and you also refer to the views of the European Parliament.

A financial assessment was made before the adoption of the Framework Decision by Department for Environment, Food and Rural Affairs. The view then was that the instrument imposed no additional financial burden on the UK. As regards areas of offending, the draft Directive differs from the annulled Framework Decision only in so far as it includes provision on protected habitats. Conduct causing the significant deterioration of habitats is already covered by domestic criminal law. In addition the draft Directive affords much more discretion on Member States in the determining the nature and levels of penalties than the Framework Decision. We are confident therefore that this Directive will result in no additional financial burden for the UK.

As regards the views of the European Parliament, I enclose a draft final consolidated text (not printed, COM (2007) 51 final), reflecting the amendments upon which the Council and the European Parliament have reached informal agreement. You will note that there are only few substantive differences between this text and that which was recently deposited. Recitals previously numbered as 9 and 13a are deleted. There are two new recitals dealing with the impact of subsequent legislation and the continuing validity and integrity of other non-criminal enforcement systems, respectively. As regards offences the proposed Article 3a dealing with intentional offending has been abandoned. Article 3(b), 3(e) and 3(i) have been redrafted so as to accord more closely with the relevant Community or EURATOM legislation. Article 9 is amended so as to require Member States to submit transposition correlation tables. All of these changes are acceptable to the Government and are consistent with the United Kingdom’s negotiating objectives. Indeed the United Kingdom played a key role in the development of the agreed text, much of which reflects United Kingdom drafting suggestions. The enclosed text also includes the Annexes referred to in Article 2 of the draft Directive. The Government is satisfied that these Annexes list all the relevant Community and EURATOM legislation necessary to ensure the effectiveness of the instrument.

The Committee of Permanent Representatives will meet on May 21 to endorse the proposed text as amended for a first reading agreement. The European Parliament will meet in plenary later the same day and is also expected to adopt the amended text. The Directive is on the draft agenda for the JHA Council of 5-6 June for political agreement.

I hope that I have now dealt with all the concerns of the Committee in respect of this draft Directive. If that is the case, then in view of the Presidency’s and European Parliament’s planned timetable for agreement of the instrument it would be very helpful if the Committee could consider the proposal at the next opportunity.

13 May 2008

Letter from the Chairman to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for your letter of 13 May and the latest text. These were considered by Sub-Committee E at its meeting on 21 May.

We are grateful for your further update and for your information on the financial impact of this proposal. We have no further comments on the draft Directive and, on the basis that the European Parliament is not expected to make any amendments to the current text, we clear this matter from scrutiny.

22 May 2008

11 Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 236
Letter from Liam Byrne MP, Minister of State, Home Office to the Chairman

I am writing to bring you up to date on the Government's position on the proposed EU Directive providing for criminal sanctions against employers of illegally staying third country nationals.

As you will no doubt have seen, an Explanatory Memorandum was recently produced regarding Council Document 10770/2008, the French Presidency's compromise text aimed at addressing points of concern raised by Member States during discussions at Council Working Group level. The document supersedes document 9871/07 and I hope many of the points you have raised previously about this Directive will have been addressed by the Explanatory Memorandum.

Nevertheless, it has come to my attention that some of the points you raised are still outstanding, and I would like to take this opportunity to address those issues.

SECONDARY MOVEMENTS

Thank you for drawing my attention to the recent paper by the Centre for European Policy Studies. I am not aware of any specific Home Office studies which have looked at whether different standards in regulation of the employment of illegal migrants leads to increased secondary movements.

LEGAL BASE

As you have indicated, the judgment in Case C-440/05 Ship Source Pollution has now been handed down. The implications of the judgment remain a matter of contention but our view, which is shared by other Member States, is that the judgment is not authority for a generalised Community competence in criminal law and has in effect gone no further than to confirm competence in respect of measures to protect the environment from serious harm. We therefore do not consider that the Community has the competence under Title IV to legislate to require Member States to apply criminal law to infringements of Community rules.

In addition, it should be noted that the rules these measures are seeking to enforce are not European Community rules or national law implementing Community rules but, in a very large part at least, rules of national law only; for example, the definition of illegal third country nationals is a rule of national law only. The Government does not consider that the Community has competence to apply criminal sanctions to rules of national law that do not implement Community law.

You also ask whether the Government is content with the Title IV legal base for the proposed Directive, given that it appears to be mainly concerned with employment and working conditions. The subject matter and scope of the proposal has now been identified as being to prohibit the employment of illegally staying third-country nationals in order to fight illegal immigration. In domestic legislation provisions for sanctions against employers who employ illegal migrant workers are contained in immigration legislation (specifically the Immigration, Asylum and Nationality Act 2006) and not labour legislation. On this basis, the Government believes that it is appropriate for the proposal to be brought forward as an illegal immigration measure under Article 63(3)(b) TEC.

PRIVATE EMPLOYERS

A large number of delegations have expressed views at working group level that they believe the definition of employer should be left to national law. We have supported this view. Several changes have been made to the definition of employer in the compromise text, and the current text is as follows:

"employer" means any person including legal persons, for or under the direction of whom a third-country national exercises activities that are or ought to be remunerated under applicable national law;


"MANIFESTLY INCORRECT" RESIDENCE PERMITS

You asked whether any clarity is needed on the extent of the employer's responsibility to identify false papers. Our domestic law is, I believe, clear on what the UK Border Agency would consider to
be a manifestly incorrect document. The 'Comprehensive Guidance for Employers on Preventing Illegal Working', published in February 2008, provides the following guidance for employers:

The falsity [of a travel document or visa] would be considered to be 'reasonably apparent' if an individual who is untrained in the identification of false documents, examining it carefully, but briefly and without the use of technological aids, could reasonably be expected to realise that the document in question is not genuine. Equally, where a prospective employee presents a document and it is reasonably apparent that the person presenting the document is not the person referred to in that document, then you may also be subject to legal action, even if the document itself is genuine.

The current version of Article 4, paragraph 2 is as follows:

Member States shall ensure that employers are considered to have fulfilled their obligation under paragraph 1(a) unless the document presented as a valid residence permit or another authorisation for stay is manifestly incorrect or the employer knows that it is a forgery.

There has been extensive discussion at Working Group level about whether it is necessary to define the meaning of 'manifestly incorrect'; the current suggestion is that the Preamble will attempt to clarify what constitutes a manifestly incorrect document.

NOTIFICATION OF COMPETENT AUTHORITIES

The original draft of the Directive included a requirement for employers to notify 'competent authorities' when they start and stop employing an individual. I have given consideration to a number of options for altering existing systems to make them capable of dealing with this additional requirement. One possibility might be to integrate the requirement with the current tax system, where an employer must notify HM Revenue and Customs when they start and stop employing an individual, but as this would require primary legislation as well as significant and costly changes to administrative process and IT systems I do not think it is desirable option. The current National Insurance system would also be unsuitable, because of differences between domestic requirements for Employment agency workers. Under the National Insurance system it is the employment agency which acts as employer for payment of PAVE, while the proposed Directive places notification responsibility with the end labour user. I therefore do not consider that integrating the notification requirement with existing systems is achievable.

It is very difficult to quantify the cost implications of introducing an entirely new system to handle notifications, particularly as the proposed Directive does not specify the extent of the information an employer would be expected to provide. At the very least, it would be necessary to design and create a secure electronic database to store the information provided by employers, for which the costs would be considerable. Officials have estimated the potential cost to businesses of complying with the requirement as between £12 million and £201 million, based on the assumptions set out in our Regulatory Impact Assessment, which I have enclosed for ease of reference. I acknowledge that this is an extremely broad cost range, but it reflects the fact that we cannot be certain of many relevant factors, such as the job turnover rate of third-country national migrant workers, and the level of seniority of the human resources staff companies will employ to carry out the notification requirement. In addition, the notification requirement may reduce the flexibility of the UK labour market.

Member States recently decided to remove the requirement for an employer to inform the authorities when an individual ceases to be employed, but few share the UK’s position that the notification requirement should be removed completely.

An additional concern about this element of the draft Directive is that it only imposes a notification requirement on non-EU nationals. This may lead to discrimination if employers favour applications from EU nationals in order to avoid having to incur costs by complying with the notification requirement.

BACK PAYMENTS

The original draft of the Directive would have imposed a requirement that Member States ensure employers paid any outstanding remuneration to illegally employed third country nationals, and not to take removal action until the back payment was made. In my view, this Article was unnecessary, especially as our domestic legislation already includes sufficient incentives and routes for migrant workers to come to the UK and work legally.

The Article presented real questions about providing illegal migrants with protection under UK law. There was a danger that, contrary to the stated intent of the proposed Directive, a Government guarantee of back payments would act as a significant additional pull factor to signatory countries and
actively encourage illegal migrant workers to be complicit in exploitation, as they would be confident of receiving any outstanding remuneration from the relevant Government. This could mean that there would be a greater risk to Member States with a higher minimum wage. In addition, a Government guarantee of outstanding remuneration would place illegal immigrants in the UK in a more favourable position than British nationals, who would have to resort to legal action to seek any back-payment of wages.

I am pleased to inform you that this Article has been significantly redrafted following discussion at working group, and the current draft would not require Member States to ensure back payments are made. Nevertheless I continue to have concerns about this Article, which are outlined in the Explanatory Memorandum to Council Document 10770/2008.

**SUB-CONTRACTING**

The original text of this Article would have undermined UK contract law by requiring joint and several liability for employment practices across the supply chain. It would have imposed significant additional burdens on main contractors on due diligence throughout the supply chain and would probably have led to a significant reduction in the use of contractors in the UK economy.

Following extensive discussion at Working Group level, the Article has been significantly redrafted to remove liability from all elements of the contractual chain. The amended Article places responsibility on the main contractor and allows for the liability to be applied further down the chain if necessary. This is an improvement, but the Government's position remains that the nature of liability should be defined in national law.

**INSPECTIONS**

The latest draft of the proposal has been amended in relation to inspections. The current version would require Member States to take a risk assessment approach to carrying out inspections. In the Government's view, this is a significant improvement, although it is disappointing that there remains a requirement for Member State to inspect at least five per cent of places of employment per year.

The Government does not think it appropriate for the Directive to impose a specific requirement for the volume of inspections. The most efficient way of deploying our Immigration resources is to move towards risk-based enforcement of the immigration rules in accordance with the harm matrix. In its current state the proposed Directive would prevent us from achieving this objective.

**HUMAN RIGHTS**

The Equality Impact Assessment, enclosed for ease of reference as part of the Regulatory Impact Assessment, analysed the potential for differential impact on any group. Whilst we recommend that employers should check the documents of all potential employees, the threat of a criminal sanction may make employers more cautious about employing someone who is or appears to be a third country national. There is potential for a stigma to become attached to those who will be required to demonstrate their immigration status. In addition, further controls on the use of migrant labour may result in some communities feeling that they are being particularly targeted by the legislation.

23 July 2008

*Letter from the Chairman to Phil Woolas MP, Minister of State for Nationality, Citizenship and Immigration, Home Office*

The EM of 29 July and letter of 23 July 2008 from your predecessor, Liam Byrne MP, were considered by Sub-Committee E at its meeting of 8 October 2008.

**HUMAN RIGHTS**

Thank you for your assessment of the human rights position of the proposal. While you point to Member States’ obligations to ensure respect for fundamental rights when implementing Community measures, we would support proper consideration of the human rights implications during the negotiations stage. This would allow specific provision to be made for fundamental rights protection where required. We trust that you will have regard to whether any specific provisions regarding, for example, data protection are required in the present Directive.
LEGAL BASE

We support your comments on the absence of a legal base and look forward to hearing from you as to the progress of negotiations to have Article 10 (criminal offence) removed. Can you confirm that there is no question of the UK opting in to this proposal while this article remains.

PRIVATE EMPLOYERS

The definition of employer clearly requires further thought in the working group. Are there significant disadvantages in not agreeing a uniform definition? Like you, we are concerned about any definition agreed in the present illegal immigration context being transferred across to other fields. Is this likely to occur?

"MANIFESTLY INCORRECT" RESIDENCE PERMITS

We are grateful to you for setting out the test under UK law. We consider it important to clarify the term “manifestly incorrect” in the recitals and look forward to hearing from you on developments.

NOTIFICATION OF COMPETENT AUTHORITIES

Your assessment of the impact of a notification system on the UK is most helpful. You say that other Member States do not support your view that the requirement should be removed altogether. Are they in a different position from the UK as regards the possibilities of integrating the notification scheme with existing systems?

We share your concerns that third-country nationals may be discriminated against by prospective employers if administrative burdens are too heavy. How do other Member States respond to these concerns?

FINANCIAL SANCTIONS

We look forward to hearing from you as regards your consultation exercise into levels of civil penalties for illegal employment under the Immigration, Asylum and Nationality Act 2006.

BACK PAYMENTS

We are surprised that you still have concerns about the provisions on back payments. It would seem to us that the provision as currently drafted reflects the position in the UK where an individual can introduce a claim for back payments to be decided on a case-by-case basis. We would support such a right for all workers, not merely those who are third-country nationals. We would be grateful for your comments.

SUB-CONTRACTING

We welcome the changes to Article 9, insofar as they prevent main and intermediate contractors from being held liable for the whole contracting chain. However, we think the revised drafting of Article 9 raises some questions.

First, paragraphs (1) and (2) give no indication of the circumstances in which the client or the subcontractor may be liable “in place of” the employer (contrast paragraph (3) where the criterion is knowledge). Second, are the words “in place of” appropriate? May there not be circumstances in which joint liability is appropriate (eg. if both or all parties involved know of the illegal employment)? Third, the inter-relationship of paragraphs (2) and (4) is not easy to follow, although we think the intention must be that “intermediate subcontractor” excludes any “contractor of which the employer is a direct subcontractor”.

We note what you say as regards your preference for contractual liability to be defined under national law and look forward to hearing the views of the working group in due course.

The proposal is retained under scrutiny, but document 9871/07 is cleared as superseded.

9 October 2008

Letter from Phil Woolas MP to the Chairman

Thank you for your letter of 9 October about the proposed EU Directive providing for criminal sanctions against employers of illegally staying third country nationals.
HUMAN RIGHTS

I am grateful for your comments regarding the need to ensure proper consideration of human rights implications during the negotiation stage. As you are of course aware, all Community legislation must comply with the general principles of Community law, including the protection of fundamental rights. This will be addressed throughout the negotiation process, not least in discussions with the European Parliament, who are co-deciders in this dossier.

Prior to issuing the proposal for an EU Directive on this matter, the Commission carried out a detailed impact assessment which considered the possible human rights implications. It concluded that the introduction of an EU Directive would have a positive impact on fundamental rights in a number of ways, including the reduction of exploitation, human trafficking, organised crime and smuggling. It was also noted that the proposal could lead to a possible negative effect on the protection of personal data, depending on what measures are taken by employers and authorities to ensure the confidentiality thereof. Officials will continue to participate in discussions where possible to seek to address these issues.

LEGAL BASE

Officials continue to participate in discussion of the text at Working Group level in order to influence negotiations on the issue of whether there is a sufficient Community legal base for the inclusion of criminal sanctions in the text. Our position continues to be that we support Member States who favour the removal of criminal sanctions.

Once a final text has been agreed by the Council and the European Parliament I will deposit that text for parliamentary scrutiny. In parallel, we will scrutinise the final text with Whitehall colleagues in order to review our opt-in position and decide whether the United Kingdom wishes to request permission to participate in the Directive post-adoption.

PRIVATE EMPLOYERS

The Government considers that Member States should be allowed flexibility to implement the Directive in a way that fits different labour markets, and achieves similar end results. Although it is difficult to judge whether it is likely that an EU definition would be transferred to other fields, as the Committee suggests, we consider there to be a foreseeable risk of such a development. As I explained more fully in the Explanatory Memorandum of 29 July, defining the employer in these terms does not sit easily with UK employment law and could unwittingly extend the coverage beyond the target group. For these reasons the Government does not think this Directive is the best place in which to discuss a Community definition of "employer".

'MANIFESTLY INCORRECT' RESIDENCE PERMITS

You emphasised the need to provide clarity on the extent of an employer’s responsibility to identify false papers. Discussions on the inclusion of a text in the recital to clarify the nature of employers' obligations in this area are ongoing.

NOTIFICATION OF COMPETENT AUTHORITIES

You asked whether other Member States are in a different position to the UK as regards the possibility of integrating the proposed notification scheme with existing systems. I am able to confirm that the majority of other Member States already have some form of notification system in place whereby employers must notify the authorities when they employ a third country national.

FINANCIAL SANCTIONS

The consultation exercise on levels of civil penalties for illegal employment under the Immigration, Asylum and Nationality Act 2006 was concluded last year, and a report on the results, ‘Shutting Down Illegal Working in the UK: Illegal Working Action Plan Update and Next Steps’, was published in November 2007. This report is available to view on the UK Border Agency website:

BACK PAYMENTS

The current text is an improvement on the original draft in relation to the responsibilities to be placed directly on Member States on the back payment of outstanding remuneration. Nevertheless, I remain seriously concerned about the message this Article would convey to those who may be attracted to work illegally in the EU if we were obliged to reverse the current position in UK law that individuals are unable to enforce claims for outstanding remuneration in respect of unlawful contracts of employment.

SUB-CONTRACTING

On sub-contracting, the Government's position remains that the nature of liability should be defined in national law. Other Member States have expressed concern about the Article as currently drafted and the exact wording is still under discussion.

24 October 2008

Letter from the Chairman to Phil Woolas MP, Minister of State for Nationality, Citizenship and Immigration, Home Office

Thank you for your letter of 24 October which was considered by Sub-Committee E at its meeting on 19 November. We are grateful for your responses to the points we raised on the Presidency text.

Noting that many issues remain under negotiation, we retain the matter under scrutiny. We should like to have an update on the proposal when the negotiations have further advanced to the point when the outstanding issues have been resolved and the text is ready for agreement. In particular, we remain interested in the fate of Article 10 (criminal sanctions), the definition of “employer” and the drafting of Article 9 (subcontracting).

On the issue of back payments, we note your view that the current draft may be inconsistent with existing law and would convey the wrong message to those attracted to work illegally. But would not the provision on recovering outstanding remuneration reinforce the dissuasive effect of the measure, whose objective is to deter employers, by preventing the employer of a migrant illegally staying in the country from benefiting by retaining unpaid wages?

24 November 2008

CRIMINAL JUSTICE: THIRD COUNTRY NATIONALS CONVICTED IN THE EUROPEAN UNION (11453/06)

Letter from the Chairman to Meg Hillier MP, Parliamentary Under Secretary of State, Home Office

Thank you for your letter of 4 April 2008 which was considered by Sub-Committee E at its meeting of 30 April 2008.

We note the Government’s preference for a comprehensive biometric Index of third-country nationals convicted in the EU in order to fill the gap left by EU legislation on exchange of criminal record information of EU nationals and to provide the level of proof of identity required. We have previously expressed the view that there may be a case for inclusion of biometric data and your explanation of experiences of the exchange of data on UK nationals is persuasive. However, in light of disparities in practice across the Member States, we support the interim solution of exploring possibilities for establishing an alphanumeric database, with the long-term aim of extending it to include biometric data. As we have previously indicated, we would expect biometric data to be used for verification of an individual’s identity only. We also reiterate the need for robust data protection provisions in any future legislative proposal.

In your letter, you refer to a Commission non-paper, which formed the basis of the Article 36 Committee discussions. We assume that this paper was prepared in light of the responses to the questionnaire issued by the Commission to Member States. We would be grateful if you would provide a copy of the Commission’s findings and/or the Commission non-paper for our information.

We have decided to clear the working paper from scrutiny.

1 May 2008

12 Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 229
Letter from Meg Hillier MP

Thank you for your letter of 1 May informing me that you had decided to clear the working paper from scrutiny.

In your letter you asked for a copy of the Commission non-paper and the Commission’s findings from their consultation exercise in 2006. While we would not normally send the Committees internal working documents we do want to be as transparent as possible within Council rules so have therefore decided, in this case, to send you the non-paper (not printed, DS 272/08). I am afraid we do not yet have a copy of the Commission’s findings or a timetable for them being issued. I will send you a copy, again on an exceptional basis, when we receive it.

14 May 2008

DATA PROTECTION: DATA PROTECTION DURING POLICE AND JUDICIAL COOPERATION

Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

I am writing to update you on the current position and the likely next steps on the Data Protection Framework Decision.

Thank you for your response of 22 May 2008 to Bridget Prentice’s letter of 29 April. Bridget mentioned that the European Parliament had been asked to deliver an opinion on the DPFD by April 2008. It finally adopted its opinion on 23 September 2008. However, with the current text having already been discussed and agreed in juris-linguist (in June 2008), the Council is likely to adopt the text without further amendment. The Government intends to support the Framework Decision if, as expected, the Council moves to adopt it formally before the end of the year.

As you know, we view the adoption of the DPFD as a positive step. The absence of overarching minimum standards in the third pillar means that where information is exchanged then it will be subject to differing standards of data protection, assuming that the Member State has, like the UK, applied the first pillar directive to certain aspects of processing in the field of police and judicial co-operation in criminal matters. The DPFD will address that lacuna. It will enhance data protection and improve information exchange between law enforcement authorities.

5 November 2008

FUNDAMENTAL RIGHTS (12668/07, 13025/07, 13327/08)

Letter from Michael Wills MP, Minister of State, Ministry of Justice to the Chairman

I am writing to you to clarify the Government’s position on the inclusion of fundamental rights analysis in the explanatory memoranda of EU proposals submitted for parliamentary scrutiny.

In my letter of 26 July 200713, I confirmed that, effective from the 2007 summer recess, the Government would include a fundamental rights analysis, in respect of Article 6(2) of the Treaty on European Union, in the explanatory memoranda of EU legislative proposals submitted to scrutiny.

Since then, I understand some uncertainty has arisen in respect of whether an analysis was required for EU proposals with minimum or no impact on the UK or UK citizens in Europe, in particular Title IV EC or Schengen measures into which the UK has not opted. Some confusion also arose in respect of Common Foreign and Security Policy (CFSP) measures which, because of their nature, do not require implementation in UK law.

Government officials recently had a very helpful meeting with the legal advisers of both Parliamentary EU Scrutiny Committees further to explore the respective position on the inclusion of the fundamental rights analysis. Largely thanks to this meeting, it was clear that, though a fundamental rights analysis was indeed required for all EU proposals submitted for scrutiny, there is a certain flexibility in terms of the depth/length of the analysis for proposals that do not (or have a minimum) impact on the UK and UK citizens in Europe.

On this basis, I would like to clarify that the Government’s position broadly remains that agreed in 2007, thus Government Departments should continue to provide a complete explanatory memorandum, inclusive of the fundamental rights analysis in respect of Article 6(2) of the Treaty on

13 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 206
European Union, for all EU legislative proposals submitted for scrutiny. They should also continue to provide, as a matter of best practice, a fundamental rights analysis on CFSP proposals in so far as such issues arise.

However, there is flexibility on the depth/length of the analysis for those EU legislative proposals that do not (or have a minimum) impact on the UK or UK citizens in Europe. In the case of Title IV EC or Schengen measures to which the UK has not opted in, for example, a less detailed analysis may be appropriate. On the other hand, if the lead Department is aware that the Government is likely at a later stage to opt into the EU measure under scrutiny, then the lead Department should provide a more thorough fundamental rights analysis.

In case of uncertainty about the appropriate depth/length of the analysis or in cases where the lead Department needs an extension of time to complete the analysis, the lead Department will contact the Cabinet Office or the Clerks to the Scrutiny Committees, as appropriate. The Cabinet Office will clarify the existing scrutiny guidance for Departments where necessary.

8 May 2008

Letter from the Chairman to Michael Wills Esq MP

Thank you for your letter of 8 May. I am sorry that this reply has been delayed, in part by the time needed for consideration of your letter by the relevant Sub-Committees and in part by the May recess.

I welcome the outcome of the discussions between officials of your Department and other Departments and the legal advisers to the two scrutiny committees, and your confirmation of the arrangements agreed last year for including fundamental rights analyses in EMs. The Committee is content with the clarification outlined in your letter.

The analyses are important for our scrutiny of proposals. We acknowledge that Departments must have a degree of flexibility, but we will continue to expect a depth of analysis appropriate to the content of a proposal, whether or not the Government has decided to opt in, where it has that option.

19 June 2008

Letter from Michael Mills MP to the Chairman

I am writing to update you on the progress made on the establishment of the European Union Agency for Fundamental Rights.

The Agency formally became operational on 1 March 2007 on the basis of Regulation EC 168/2007. Since then, both the Agency's Management Board and Executive Board have been established. In my letter of 31 July 2007, I informed you about the appointment of Marie Staunton, as UK member, and Sarah Cooke OBE, as UK alternate member, to the Agency's Management Board. The Council of Europe also appointed Guy de Vel, as member, and Rudolf Bindig, as alternate member, to the Agency's Management and Executive Boards.

In the event, the negotiations on the Agency's 5-Year Multiannual Framework and the cooperation agreement with the Council of Europe took longer than expected. Your Committee had already cleared both proposals in October 2007 and I am pleased to inform you that both documents have now been adopted. The co-operation agreement with the Council of Europe was signed on 18 June 2008.

I am equally pleased to report that on 7 March 2008, the Agency's Management Board appointed Morten Kjaerum as the Agency's Director. The appointment procedure is complex: the Agency's Management Board formally appoints the Director on the basis of a short-list of candidates prepared by the Commission and after both the European Parliament and the Council have expressed their opinions on the candidates' suitability for the post. The Commission had short-listed two candidates: Dario Carminati (Italy - Representative of the United Nations High Commissioner for Refugees in Angola), and Morten Kjaerum (Denmark – Director of the Danish Institute for Human Rights). In February 2008, both the European Parliament and the Council, particularly the Slovenian Presidency, expressed their preference for Morten Kjaerum.

The final step in the establishment of the Agency was the appointment of the Scientific Committee by the Management Board on 4 June 2008. The Committee is composed of eleven independent human rights experts who will guarantee the scientific quality of the Agency's reports.

Since 1 March 2007, the Agency, partly relying on data collected by its predecessor, the European Monitoring Centre on Racism and Xenophobia, has already published five thematic reports and, in
June 2008, its first Annual Report which commended the UK for having "the most comprehensive system for recording racist crime in the EU" and "the most effectively applied legislation fighting ethnic discrimination in the EU". The report, like all Agency’s reports, is available on the Agency’s web site (http://fra.europa.eu/fra/index.php?fuseaction=content.dsp cat content&catid=1).

Now that the Agency’s establishment is concluded, the Agency will be able to focus its efforts on monitoring fundamental rights issues within Community law and ensuring complementarily with the Council of Europe and the Organisation for Security and Cooperation in Europe. In respect of the Council of Europe, I am pleased to report that the newly appointed Director, Morten Kjaerum, and the Chair of the Management Board, Anastasia Crickley, attended the meeting of 19 June of the Rapporteur Group on External Relations. This meeting provided an opportunity for the Council of Europe to meet and ask questions to two key figures of the Agency, and what I hope to be the starting point for fully implementing the co-operation agreement.

9 September 2008

Letter from the Chairman to Michael Wills Esq MP

Thank you for your letter of 9 September which was considered by Sub-Committee E at its meeting on 22 October. We are grateful for your helpful report of progress.

23 October 2008

Letter from the Chairman to Michael Wills Esq MP

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E at its meeting on 22 October, and the proposal is now cleared from scrutiny.

We welcome the proposed involvement of Croatia in the work of the Agency, and the fact that Croatia will make a financial contribution. We note that you are seeking clarification on the calculation and budgetary treatment of the proposed contribution by Croatia.

23 October 2008

FUNDAMENTAL RIGHTS: CONSULAR PROTECTION: EU ACTION PLAN 2007-2009 (5947/07)

Letter from Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office to the Chairman

Thank you for your letter of 24 April in reply to mine of 24 March 2008.14

Although Member States were asked to provide written comments on the Commission Action Plan by 29 March, in the event only four Member States did so, the UK among them. The UK input was made at official level. I enclose a copy of the text. Other Member States made broadly similar points, although only one commented at a similar level of detail.

As the Explanatory memorandum of 5 February 2008 made clear, the Government shares the Commission’s overall desire to improve consular co-operation at EU level. We agree that there is scope to improve Member States’ consular assistance further still, through joint work and co-ordination, and will continue to work with colleagues to do so. Although we have reservations about some of the proposals in the Action Plan, we recognise the Commission’s wish to contribute to this discussion.

The Action Plan was not the subject of substantive discussion at the COCON meeting 01 14 April, although the UK officials present at that meeting reiterated our concerns about some aspects of the Plan, and proposed a fuller discussion at the next COCON in June. Despite doubts expressed by a number of Member States, the Commission stated their intention to go ahead with their proposed study of consular legislation and practice. They undertook, however, to take on board Member States’ comments to avoid duplication with previous exercises.

On the issue of including Article 20 wording in passports, I did not intend in my letter to suggest that Member States were actively opposed to it. Discussion at the 2 February COCON meeting covered a variety of aspects, including whether Committees other than COCON should be involved in the discussion; what should be the timing for the introduction of the wording; and whether the wording

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14 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 204
should be taken directly from Article 20 or should use a different, more accessible form of words. I would add that there is no suggestion of replacing any of the existing text in British passports. The proposal is that Member States' passports include additional text to remind EU nationals that they can seek consular assistance from other Member States where they have no consular representation of their own.

As regards formalisation of Article 20 TEC arrangements, Article 8 of the Vienna Convention reads as follows:

"EXERCISE OF CONSULAR FUNCTIONS ON BEHALF OF A THIRD STATE"

Upon appropriate notification to the receiving State, a consular post of the sending state may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State."

This article does not ensure that citizens of one State can be represented by another State where the receiving State objects. However, I am not aware of any occasions wherein practice such objections have been raised, either in relation to representation by one EU Member State of citizens of another, or in relation to other similar arrangements such as the long-standing informal arrangement whereby British missions provide consular assistance to unrepresented Commonwealth nationals, or the arrangements for mutual assistance between Scandinavian countries. It is no doubt in this sense that some Member States argue that existing provisions of the Vienna Convention on Consular Relations adequately cover the issue. The British Government's view remains as set out in our response to the Commission's Green Paper of 2006:

"THE CONSENT OF THE THIRD COUNTRY AUTHORITIES"

The UK understands the importance of obtaining the consent or acquiescence of the receiving state in providing consular assistance to Member States' unrepresented nationals. However, whether this requires Member States to negotiate bilateral agreements with third states depends on the agreements and arrangements already in place with the receiving states. For example, Article 8 of the Vienna Convention on Consular Relations allows consular assistance to be provided to non-nationals where the receiving state has been notified and been given an opportunity to object. In our experience, receiving states are generally content for assistance to be provided by other Member States. Consequently, the need for consent clauses in bilateral agreements is unproven in many circumstances.

However, the UK recognises the value of these provisions in facilitating such assistance. Consequently, we would welcome discussing the possibility of "consular provisions" in the context of any consultations held with the Commission pursuant to Decision 88/384/EC. Of course, it would be inappropriate for any Member State to commit in advance to the inclusion of such provisions. The negotiation of agreements with third states is complex and difficult. Whilst the inclusion of a "consular provision" may be uncontroversial in some instances, its benefits are unlikely to justify efforts to negotiate it in many others. Moreover, any such provision would be without prejudice to the division of responsibility amongst Member States' missions for unrepresented nationals."

10 May 2008
matter for national authorities. Some of the proposals in this Action Plan, as with the original Green Paper, involve a greater role for the Commission that sits uneasily with this position.

We also wish to make clear that we do not accept that Articles of the Treaty Establishing the European Community (TEC) and the Lisbon Treaty establish or confirm a legal right to consular assistance. Under the domestic law of some Member States nationals do have such a right. But in many others, including the UK, consular assistance is provided as a matter of policy. Article 20 TEC provides for the provision of consular assistance to unrepresented Member States' nationals on the same terms as it is provided to their own. It does not require setting minimum or equal standards for consular assistance amongst Member States.

**ACTION PLAN: SPECIFIC PROPOSALS**

Section 1: Introduction. The Commission have identified the protection by diplomatic and consular authorities of Union citizens in third countries as "one of the strategic policy objectives for the Commission in 2007". We welcome the acknowledgement that high standards are already applied by Member States, and agree that there is more that could be done. The stated aim of the Commission Action Plan is "to assist Member States to fulfil their obligations in this field".

Section 2: The need to strengthen protection. UK experience accords with the view that there are a relatively low number of requests for consular assistance from unrepresented EU nationals. We collect figures for serious assistance cases and assistance given to EU nationals makes up a small percentage of all of our assistance cases.

The table below shows the number of these assistance cases where support was given to ED nationals with comparative figures against UK missions globally.

<table>
<thead>
<tr>
<th>Year</th>
<th>ED Cases</th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003/04</td>
<td>147</td>
<td>24,761</td>
</tr>
<tr>
<td>2004/05</td>
<td>366</td>
<td>26,691</td>
</tr>
<tr>
<td>2005/06</td>
<td>120</td>
<td>27,772</td>
</tr>
<tr>
<td>2006/07</td>
<td>98</td>
<td>34,874</td>
</tr>
</tbody>
</table>

The numbers of people travelling are increasing, and it is very possible that requests for assistance will increase, but we do not believe that the figures extrapolated in the Commission's paper as an estimate of unexpressed demand are a good basis on which to commit potentially significant resources.

The very successful UK/ France-led Lead State concept for crisis situations provides an excellent precedent for co-operation between Member States in the area of Consular Assistance.

We have commented separately by COREU on Decision 95/553/EC, which we believe continues to serve its purpose well.

**Section 5.1: Information for Citizens.**

— The UK has no difficulties with the Commission recommendation for the reproduction of Article 20 TEC in passports, but would welcome a clearer, more concise wording of the Article. We do not favour the interim use of stickers in current passports, which would involve a disproportionate use of resources. Instead we would aim to include suitable wording in future reprints of UK passport booklets.

— A Commission poster on consular protection could be a useful contribution to public information.

— We welcome the concept of a EU website on consular protection which would include information on member States' representation in third countries and links to national sites, but it should not attempt to summarise, synthesise or duplicate Member States' travel advice.

— The idea of an EU telephone number on consular protection would be problematic. Given the number of languages that would be required for operation, it would be very expensive, and it is not clear what it would add to existing national provision.

**Section 5.2: Scope of protection for Union citizens.**
As was stated in discussion at the COCON meeting on 1 February, we have serious reservations about the proposal for a study "to assess the extent and nature of discrepancies in legislation and practices in the field of consular protection". The project is likely to be costly and resource-intensive, and it is by no means clear what are intended to be the outcomes. We are already aware that there are areas where Member States legislation and practices differ. There may be value in, for example, seminars to share experience and best practice in specific areas, but these areas are best identified by Member States on the basis of their experience rather than by a study of this kind.

The Action Plan proposes to extend consular protection to Union citizens' family Members who are third country nationals. This is an area where Member States' practices differ, and where harmonisation is unlikely to be feasible. We have concerns with the statement that "the Commission will examine the possibility of providing consular protection under article 20 TEC to Union citizens' family members", It is not clear whether the Commission will try to show that Article 20 requires this extension, or if they propose to provide the protection themselves, which would be beyond the Commission's remit.

Simplifying procedures for identification and repatriation of remains is an area where there is value in further co-operation - but primarily between Member States rather than the Commission. The UK is currently looking at the possibility of accession to the Strasbourg Convention and we are happy to pursue other areas for work on repatriation of remains.

We would welcome simplifying procedures for (reimbursement of) financial advances, but again we are not clear why the Commission needs to be involved in this.

The UK has not experienced significant difficulties in providing and being reimbursed for financial assistance to unrepresented Member States' nationals. We do not favour a system of common offices to provide financial assistance, due to the complexities involved of administering 27 kinds of financial arrangement, but would be open to consideration of a central clearing house for repayments between Member States.

Section 5.3: Structures and resources. Setting up joint consular offices in specific countries by otherwise unrepresented states is a sensible step, which already takes place in the form of co-location. But we believe that the establishment of such offices should be at the decision of the Member States concerned, on the basis of an identified need. We do not believe that it is an appropriate approach for the Commission "to set up a common office in co-operation with Member States".

Section 5.4: exchange of best practices and training. There is a role for the exchange of best practice and training. Future seminars should produce clear outcomes and an agreement as to how they will be taken forward.

Section 5.5: the consent of third country authorities.

The UK believes that (under the Vienna Convention) all that is required for the effective operation of Article 20 in a third country, is notification and absence of objection on the part of the receiving state. While a formal agreement (through "a clause in future bilateral agreements") could reduce the danger that under certain circumstances a third country might object, seeking formal agreement of all third countries would be a major task. Our view is that this is an issue that can be looked at on a case by case basis, and that there should be no presumption of the inclusion of such "consent clauses" in future agreements.

We are concerned by the statement that "in the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations ... in matters falling under Community competence in line with the case-law of the Court of First Instance". We should be grateful for clarification as to what is intended by this. As noted above, it remains our strong view that the provision of consular assistance to their citizens is a matter for national authorities.
THE WAY FORWARD

As concluded in our response to the Green Paper, the UK shares the belief of the Commission that there are opportunities to enhance the co-operation between Member States in their provision of consular assistance to unrepresented nationals. We would welcome a wider debate among Member States within COCON as to how best to take these opportunities forward, which could draw as appropriate on the Commission Action Plan.

Letter from the Chairman to Jim Murphy MP

Thank you for your letter of 10 May 2008 which was considered by Sub-Committee E at its meeting of 21 May 2008.

We are grateful to you for providing us with a copy of the UK’s comments on the Action Plan. We found this document to be very helpful and, as we have previously indicated, we share many of the Government’s views.

We are also pleased to see that there is general support for the inclusion of Article 20, in some form, in all passports issued in the EU. We look forward to hearing more specific information as to the envisaged timetable and wording of the provision.

The Commission’s decision to undertake a study on consular laws and practices raises some concerns. As we have previously indicated, we are not persuaded that Article 20 allows the adoption of minimum standards in this area and it is not clear to us what the purpose of the exercise will be. Insofar as it facilitates the sharing of best practice we acknowledge that it could be useful, but we emphasise the need for costs and resources to be proportionate to the aim of the exercise. Has the Commission indicated the likely cost and timetable of the proposed study?

We have decided to retain the Communication under scrutiny and look forward to hearing from you following the COCON meeting in June.

22 May 2008

Letter from Jim Murphy MP to the Chairman

Thank you for your letter of 22 May in reply to mine of 10 May.

You asked about the European Commission’s planned study of consular legislation and practice. The Commission have told us that the study will run for eight months or so from September 2008 at a total budgeted cost of €150,000. It will be funded from the Commission’s Citizenship and Fundamental Rights budget. The Commission’s plan is that the results of the study will be presented to Member States for discussion and assist with identification of common training needs.

10 June 2008

Letter from the Chairman to Jim Murphy MP

Thank you for your letter of 10 June 2008 which was considered by Sub-Committee E at its meeting of 18 June 2008.

We are grateful for the information you provide on the timetable and cost of the Commission study into consular assistance. We are reassured to see that its intended purpose is to assist with identification of common training needs.

The Communication is retained under scrutiny and we look forward to receiving your response to the outstanding issues in Lord Grenfell’s letter of 22 May 2008.

18 June 2008

Letter from Jim Murphy MP to the Chairman

Thank you for your letter of 18 June requesting further information outlined in your letter of 22 May.

You asked about more specific plans for the timetable and wording in relation to the printing of Article 20 TEC in UK passports. We are considering the inclusion a simplified version of Article 20 in the next generation of UK passports which will incorporate fingerprint data. Introduction is planned for the final quarter of 2010. To date we have not yet had discussions with IPS on the precise wording to be used. We do not propose to use stickers in the interim period.

1 July 2008
Letter from the Chairman to Jim Murphy MP

Thank you for your letter of 1 July 2008 which was considered by Sub-Committee E at its meeting of 16 July 2008.

We welcome the agreement of timetable for the introduction of Article 20 TEC into UK passports although it is disappointing that this cannot be achieved before the final quarter of 2010.

We have decided to clear the Communication from scrutiny.

17 July 2008

Letter from Jim Murphy MP to the Chairman

Thank you for your letter of 18 June requesting further information outlined in your letter of 22 May.

You asked about more specific plans for the timetable and wording in relation to the printing of Article 20 TEC in UK passports. We are considering the inclusion a simplified version of Article 20 in the next generation of UK passports which will incorporate fingerprint data. Introduction is planned for the final quarter of 2010. To date we have not yet had discussions with IPS on the precise wording to be used. We do not propose to use stickers in the interim period.

18 July 2008

INSTITUTIONS: EUROJUST AND THE EUROPEAN JUDICIAL NETWORK (5037/08, 7254/08, 5039/08, 10663/08, 10221/1/08)

Letter from the Chairman to Meg Hillier MP, Parliamentary Under Secretary of State, Home Office

Thank you for your letter of 27 March 2008 and that of your colleague, Mr McNulty, of 16 April. These were considered, together with the revised text and new EM, by Sub-Committee E at its meeting of 30 April 2008.

We note from the Presidency conclusions following the April JHA Council that a general approach has been reached on aspects of the proposal relating to the composition of Eurojust, its tasks, the status of national members and Eurojust’s staff. We would be grateful for your explanation of why we were not advised in advance of the Presidency’s intention to seek a general approach on these aspects.

More generally, the Committee has previously expressed concern regarding the practice of agreeing a general approach on parts of a proposal in the context of the Europol dossier. It would appear that there is now limited scope for amendment to the articles agreed. What is the likely consequence of the partial general approach for negotiation of the remainder of the proposals?

PRESIDENCY INITIATIVE

You say that you consider the Note to the Initiative to be sufficient in the present case and that there is no need for an impact assessment. As we pointed out in correspondence with you on the Commission’s Communication on this subject, relevant statistical information is helpful in establishing whether there is a need for action and, if so, the extent of any proposed action required. We consider it regrettable that no impact assessment has been carried out in the present case. In particular, such information might have been useful in assessing the extent of any need for provisions to deal with urgent cases and provisions improving cooperation and exchange of information between Eurojust and the EJN.

EUROJUST AND THE EJN

We welcome your support for clarification of the relationship between Eurojust and the EJN and look forward to hearing from you on this matter in due course.

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15 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 211
16 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 211
EMERGENCY CELL FOR COORDINATION

We agree that the emergency cell for coordination should not be granted specific powers and that it is sufficient that all delegations be contactable at all times.

NATIONAL MEMBERS

We are pleased to see that provisions introducing a minimum mandate for Eurojust members and restricting the conditions in which they can be removed have been retained in the revised draft. We note that the Government’s concerns regarding granting the Eurojust member greater access to database than that afforded to national prosecutors appear to have been addressed in revised Article 9(4).

POWERS FOR NATIONAL MEMBERS

Thank you for your detailed explanation of the Government’s position regarding powers for national members. We would welcome your assurances that UK involvement in Eurojust will not be hindered by the decision to limit the powers of the UK national member compared with the powers of national members from other Member States. We look forward to hearing how negotiations on Article 9a progress.

DATA PROTECTION

Your undertaking to press for the European Data Protection Supervisor to be consulted on the provisions of this proposal is most welcome. Have your efforts been successful?

EJN ORGANISATION OF TRAINING

We agree that EJN contact points should not be over-burdened but consider their involvement in training to be desirable. We trust that the Government will ensure that EJN contact points are given the resources and assistance required to ensure their participation in training where appropriate.

EUROJUST NATIONAL COORDINATION SYSTEM, LIAISON MAGISTRATES AND THE EJN SECURE TELECOMMUNICATIONS NETWORK

We look forward to hearing from you as regards developments once these provisions have been discussed in more detail in the working group and in time for us to examine the provisions prior to the planned agreement of the proposal in June.

COSTS

You suggest that there may be costs arising from provisions on access to national databases and the establishment of a central coordination mechanism. We would be grateful for further details of the anticipated costs once these have been clarified.

The proposals are retained under scrutiny.

1 May 2008

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 1 May. I am writing to update you on developments regarding the draft Council Decision on the strengthening of Eurojust (7254/08).

OUTCOME OF THE APRIL JHA COUNCIL

As you know, the last Council was asked to endorse Articles 2, 7, 9, 10 and 30. We welcomed the progress made so far on this dossier, whilst maintaining a substantive reservation on Article 7 and our Parliamentary scrutiny reserve on the whole document. In your letter you state that you were not advised in advance of the Presidency’s intention to seek a general approach on these provisions at the April JHA Council. However, we informed you of this timetabling in our EM submitted to you on 26 March. My colleague Tony McNulty also wrote to you in advance of the Council on 16 April to inform you how he intended to handle this agenda item. It was unfortunate that this letter reached you during recess. As well as maintaining our reservation on the document at the Council, we also clearly underlined that we reserved the right to return to the text if necessary. The Presidency accepts this, not least because these Articles will have to be revisited in the light of agreement on
later Articles to ensure consistency. In addition, nothing can be agreed ultimately until the European Parliament has delivered its opinion.

Regarding Article 7, since the Council we have reflected further on the revised language of this provision, which the EM of 26 March explains had been amended by the Presidency in an attempt to reflect our concerns about automatic referrals of conflicts to the Eurojust College. Following further internal consultations with our stakeholders and other Member States, I believe that this drafting is now acceptable to the UK. We are clear that the obligation to consult does not alter the fact that the opinion is non-binding; that non-binding opinions can only have the force of advice and it is a matter for Member States whether that advice is accepted or not; and that experience shows in the majority of cases a conflict will be resolved by the National Members, so minimising any need to resort to the College.

ARTICLES DUE TO BE AGREED AT THE JHA COUNCIL IN JUNE

The most recent negotiations at working group level have focused in particular on Articles 5a, 9a, 12 and 13, and the Presidency will seek agreement on these Articles at the next Council in June. For your information I am attaching the latest drafts of these Articles which have been revised following discussions in the latest working group meeting. These drafts should be read in conjunction with the last text deposited on 26 March (document 7254/08), in which these articles had been deleted pending revised drafts.

Article 5a has been substantially redrafted and now refers to "on call coordination" rather than an "emergency cell for coordination". I am content that this is simply a way of ensuring that Eurojust is able to respond to urgent requests at all times. Indeed, our UK delegation to Eurojust already ensures such cover. Paragraph 3 seeks to give National Members the power to execute requests themselves, which would require us to give powers to our National Member beyond those held by domestic prosecutors. This, however, will be covered by Article 9f which should, once drafting has been agreed, set out that National Members need only be granted powers equal to those available domestically.

Article 9a concerning the powers granted to National Members has now been broken down into Articles 9a to 9g in an attempt to make the drafting clearer. We are still examining the new Article 9f to establish whether it adequately covers the UK case, so as to clarify that National Members may only be granted powers in accordance with national law. This provision is important and we are taking care to ensure drafting safeguards us in respect of the other provisions that seek to extend the powers of National Members.

Article 12 concerns the establishment of a Eurojust national coordination system. Discussions are ongoing, with most Member States – the UK included – trying to ensure that this Article does not introduce added bureaucracy at no real benefit. It should be noted that paragraph 5(d) and other similar provisions regarding Eurojust’s relations with Europol will probably be removed from this Decision. Arrangements between the two bodies may be the subject of a separate Council Declaration instead.

Article 13 concerns exchange of information between Member States and National Members. The latest draft has been quite substantially simplified and represents an improvement as compared to the original draft.

REMAINING ARTICLES

Finally, I would like to come back to you regarding the data protection provisions of the draft Decision. Both the European Data Protection Supervisor (EDPS) and the Joint Supervisory Body (JSB) have now issued opinions on the document. The JSB’s suggested revisions to Article 23 have already been incorporated into the latest draft, and we expect the comments of the European Data Protection Supervisor (EDPS), just received, to be incorporated into the next draft.

Negotiations on the draft Decision are continuing at a fast pace in the Council working group on Cooperation in Criminal Matters. It is highly possible that the French Presidency will seek agreement on the remaining articles at the JHA Council in July so as to complete negotiations on the entire instrument.

12 May 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 12 May 2008 which was considered by Sub-Committee E at its meeting of 21 May 2008.
AGREEMENT OF PARTIAL GENERAL APPROACH

In our letter of 1 May, we asked why we were not advised in advance of the Presidency’s intention to seek a general approach on certain aspects of the proposal at the JHA Council on 18 April. You respond that we were advised of this timetable in your EM of 26 March and in Mr McNulty’s letter of 16 April. As you acknowledge, the 16 April letter did not provide advance explanation, given that this House was in recess and the letter was in any event dated two days prior to the JHA Council’s meeting, which does not provide adequate time for examination. The EM, dated 26 March, was, in the absence of any request for expedition, sifted on 1 April and was therefore not able to be considered by this Committee prior to recess, which began on 3 April.

In any event, your EM simply states that “The Slovenian Presidency intends to present Articles 2, 7, 9, 10 and 30 of the draft Eurojust Council Decision to the next JHA Council 18 April”. Given that this proposal is a Presidency initiative, the conclusion that the Slovenian Presidency intended to seek a general approach on these articles at that meeting was far from obvious. We note that your letter of 27 March indicated that “This will involve a fast pace negotiation, possibly aiming for agreement at the June Justice and Home Affairs Council. In the meantime, specific Articles will be presented to the April JHA Council for consideration” (emphasis added). We would be grateful for clear, advance information in future, taking account of the need for early liaison in cases where a Parliamentary recess precedes a JHA Council meeting.

ON-CALL CO-ORDINATION (ARTICLE 5A)

We have previously indicated that we support a requirement that all delegations be contactable at all times and welcome the changes to Article 5a. We note that Article 5a(3) will be covered by Article 9f and it is therefore not intended that the article should require the provision of powers to the national member which are greater than the powers held by those in equivalent roles at domestic level. We discuss Article 9f in further detail below.

POWERS FOR NATIONAL MEMBERS (ARTICLES 9A-9G)

Article 9a now allows for the granting of relatively substantial powers (e.g. to execute requests for judicial cooperation, to order investigative measures, to authorise and coordinate controlled deliveries) to national members. The proviso in Article 9f, upon which the Government intend to rely, allows for Member States to refuse to grant national members such powers, even in emergency situations, where conferring these powers is “precluded because of national constitutional rules or fundamental aspects of its criminal justice system” regarding division of powers between police, prosecutors and judges among other things. We make two observations.

First, it is clear that under this decision some Eurojust national members may have significant powers while operating within their own territories. While such powers may not be available to UK members, the Committee has previously highlighted that the result of granting increased powers to other members may be a change in the general shape of Eurojust. This is significant because new Article 86 TFEU on the European Public Prosecutor (EPP) provides a power to establish the office of EPP “from” Eurojust. It is not clear how any future proposals in this field would look, but the possibility of Eurojust developing into an EPP cannot, as far as we are aware, be ruled out – indeed, the European Data Protection Supervisor appears to envisage (in paragraph 19a of his opinion) exactly such a development. Given that the UK supports the work of Eurojust and values the opportunity it provides for cooperation, and that the UK is unlikely to participate in any future EPP, we are concerned at developments which appear to pave the way for the replacement of Eurojust by the EPP and thus the potential exclusion of the UK from judicial cooperation in this field. Are the Government satisfied that any future proposal establishing the EPP, in which it chose not to participate, would not replace Eurojust with the EPP and result in UK ejection? Is there anything in the present proposal which makes such a development more, or less, likely?

Second, while the Government are confident that an adequately worded Article 9f will protect the UK position, we have concerns about the approach taken in the current Article 9f wording. If the Eurojust decision is agreed before the end of the year, and the Lisbon Treaty enters into force in 2009 as currently envisaged, the decision will be excluded from the jurisdiction of the ECJ for five years following the Treaty’s entry into force, at which stage the UK can decide whether to stay in or opt out. If the decision is not agreed until after the Lisbon Treaty enters into force, it will be immediately subject to the ECJ’s jurisdiction and Article 9f will be justiciable. It is difficult to predict at this stage how deferential the Court is likely to be to national arrangements in such cases as these. Thus the need for unambiguous language is clear. In short, we think it important that a substantial revision to Article 9f makes it clear that the powers in Articles 9c and 9d are optional and are to be made available at Member States’ discretion or that they are available to national members only
where domestic equivalents are also permitted to exercise such powers. We would welcome your views, and in any event would expect to see revised wording before the June JHA Council.

**EUROJUST NATIONAL COORDINATION SYSTEM (ARTICLE 12)**

We support the Government’s objective of ensuring that the provisions on the Eurojust national coordination system do not introduce excessive bureaucracy with little benefits.

As regards reference to Europol, while we do not object to the deletion of Article 12(5)(d), we would be grateful for clarification of what is meant by “other similar provisions regarding Eurojust’s relations with Europol”. Is Article 26(1) likely to be deleted? We note that the Europol decision contains an obligation on Europol to conclude agreements on working arrangements with Eurojust. We are of the view that a similar obligation on Eurojust should be included in this decision.

**EXCHANGES OF INFORMATION WITH THE MEMBER STATES AND BETWEEN NATIONAL MEMBERS (ARTICLE 13)**

We welcome the simplification of these provisions and trust that they will be reviewed prior to agreement for compliance with the opinion of the European Data Protection Supervisor.

**DATA PROTECTION**

We note that despite our recommendation on 7 March that the European Data Protection Supervisor (EDPS) be consulted, Member States failed to do so. This is unfortunate and we see that the EDPS, in his own-initiative opinion on this decision, also regretted the failure of Member States to seek his opinion (paragraph 3). We reiterate the need for an opinion from the EDPS to be sought on all measures which involve the processing of personal data in the field of freedom, security and justice.

We trust the comments of the EDPS will be reflected in the next revision of the proposed Decision, and that articles on which a general approach has already been reached will be reviewed in light of his opinion.

Finally, is it the Government’s view that, if the Treaty of Lisbon enters into force, the First Pillar Data Protection Directive 95/46/EC and Regulation (EC) 45/2001 will apply to data processing and to Union institutions and bodies in the context of the current Third Pillar?

The proposals are retained under scrutiny. Provided that we receive the information requested regarding the wording of Article 9f by Friday 30 May, we will re-examine this matter on 4 June and may be in a position to agree at that time that a general approach on Articles 5a, 9a-9f, 12 and 13 would not constitute a scrutiny override.

We look forward to hearing from you in due course in respect of outstanding matters.

22 May 2008

**Letter from Vernon Coaker MP Parliamentary Under-Secretary of State, Home Office, to the Chairman**

I am writing in reply to the questions you raise in your letter dated 22 May 2008 regarding the draft Council Decision on the strengthening of Eurojust (72541/08).

You will recall that the Presidency intends to seek a general approach on Articles 5a, 9a-g, 12 and 13 at the next JHA Council on 5-6 June. I attach an edited version of the latest draft of these articles for your consideration.

**ARTICLE 9F**

The Committee raised two observations regarding Article 9f. First, the Committee is concerned that the increase in powers of some Eurojust National Members could pave the way for the replacement of Eurojust by a European Public Prosecutor (EPP), potentially resulting in the exclusion of the UK from judicial cooperation in this field given the likelihood that the UK would not participate in such a proposal. The Committee consequently seeks reassurance about what may be proposed upon ratification of the Lisbon Treaty.

I would start by explaining that it is already the case that some National Members already have significantly more powers than others in Eurojust, including powers to order action at a national level in their own Member State. This has not caused Eurojust’s role to shift in the direction suggested by the Committee. Equally, we do not believe that any increase in the powers of some National Members as a result of this proposal would necessarily set us on a path to the creation of an EPP.
Rather, the driving force behind the proposals in Articles 9a-g has been to ensure that when National Members are appointed to Eurojust they do not, as a result, lose the powers they held at a national level as police officers, prosecutors or judges. The Government sees merit in National Members having some minimum powers in order for Eurojust to function effectively.

However, Article 86 of the Lisbon Treaty does provide a legal basis for the future establishment of an EPP subject to unanimity and the UK opt-in. As your letter suggests, it is difficult to predict the form of any such proposal. It is possible that a proposal could be made to repeal and replace Eurojust in its entirety. Equally, we believe that if an EPP office were to be set up from Eurojust through an amendment to this Council Decision, Eurojust could continue to exercise its non-EPP functions vis-à-vis a Member State which chose not to opt in to that amendment. You will be aware that the threshold for ejecting the UK from the existing cooperation arrangements in such a case is very high, requiring that the underlying measure be rendered inoperable. It has also been clear from negotiations on the draft Council Decision that there are many Member States who share our concerns about the creation of an EPP and who, like the UK, see value in Eurojust continuing in its current format.

Second, the Committee is concerned that the wording of Article 9f is not yet clear enough, in particular in stating that the powers set out in Articles 9c and 9d are optional and are made available at the discretion of Member States or that they are to be made available to National Members only where domestic equivalents are also permitted to exercise such powers. Articles 9a-f have been the subject of lengthy negotiations and the Government has fought hard to secure drafting amendments to the text to ensure that it is clear that Eurojust National Members will be required to have only those powers that would be available to them as domestic prosecutor, police officer or judge. The Government is now satisfied that Article 9f constitutes a satisfactory safeguard clause to this effect.

We have successfully secured a drafting amendment this week that in our opinion now protects the UK position, setting out that Member States do not have to confer powers on their National Member when doing so "is contrary to constitutional rules or fundamental aspects of the criminal justice system regarding the division of powers between police, prosecutors and judges (...)". The Government is of the opinion that if the situation were reversed and we were proposing to give the UK Eurojust National Member powers greater than those of the Director of Public Prosecutions and exercisable by the police only under the jurisdiction of a British court, it would be extremely difficult to mount a credible argument that this was not contrary to a fundamental aspect of our criminal justice system.

To further bolster our position, the Government has been successful in securing a clearer reference to Articles 9c and 9d in the chapeau provided by 9a paragraph 2. This reiterates that the National Member acts in accordance with his or her role as police officer, prosecutor or judge at national level. In addition, I would like to draw your attention to Article 5a and to the fact that the Government has also been successful in securing an addition to paragraph 3. This now expressly states that National Members may only act in urgent cases in accordance with the powers conferred on them in Articles 6 and 9a-f.

Regarding timing, the Government fully expects the Eurojust Council Decision will be agreed and adopted before the end of this year. The incoming French Presidency has indicated that they will use all possible Council working group time available to complete negotiations, probably with a view to seeking agreement on the entire instrument at the 24-5 July JHA Council, allowing sufficient time for adoption before the entry into force of the Lisbon Treaty. This means, as the Committee points out, that as with all JHA measures the Decision will become subject to full ECJ jurisdiction five years after the entry into force of the Lisbon Treaty, assuming it is not repealed and replaced or amended in the intervening period. Six months before this deadline the UK will be able to choose whether to remain in the Council Decision subject to ECJ jurisdiction or opt out of this and other unamended third pillar measures.

RELATIONS WITH EUROPOL

In the context of Article 12, the Committee asks for clarification regarding the provisions that deal with Eurojust’s relations with Europol. Next week’s JHA Council is expected to adopt Conclusions that will urge Eurojust and Europol to review their cooperation agreement before the end of the year, including in particular the mutual exchange of information necessary for the achievement of their tasks and in keeping with their respective legal frameworks. This arrangement between the two bodies will be the subject of a separate Council Declaration. The Government therefore expects references to relations with Europol to remain in Article 26(1) of the Eurojust Council Decision.
DATA PROTECTION

Finally, the Committee asks the Government’s view regarding whether the First Pillar Data Protection Directive 95/46/EC and Regulation (EC) 45/2001 will apply to the current Third Pillar with the entry into force of the Treaty of Lisbon. In the Government’s view, if the Eurojust Council Decision is adopted before the date on which the Treaty of Lisbon enters into force its legal effects will be preserved after that date in accordance with the Protocol on Transitional Provisions until it is replaced or amended under the new treaty arrangements. The way to apply Regulation 45/2001 to Eurojust after the Treaty of Lisbon comes into force would be to amend the Regulation under the new treaty arrangements by expressly providing that it applies to Eurojust and at the same time to delete the data protection provisions in the Eurojust Council Decision. Prior to such action, in our view the position of Eurojust will continue to be regulated by the data protection provisions in the Eurojust Council Decision. Similarly, it is the Government’s view that the Data Protection Directive 95/46 will continue to apply solely within its current scope (i.e. ‘the activities of the State in the areas of criminal law’ would be excluded by the explicit wording of Article 3(2) of Directive 95/46/EC), until the Directive is either amended accordingly or is at some point in the future replaced by a new post-Lisbon directive.

I trust this answers your queries and look forward to hearing whether the Committee is in a position to agree that the Government participates in a general approach on these articles on 6 June.

30 May 2008

Letter from the Chairman to Vernon Coaker MP

Thank you for your letter of 30 May 2008 which was considered by Sub-Committee E at its meeting of 4 June 2008.

POWERS FOR NATIONAL MEMBERS (ARTICLES 9A-9G)

We are grateful for your reassurances as to the role and direction of Eurojust and trust that the Government will seek to ensure that nothing in the present Decision would undermine the UK’s role in Eurojust in the future.

It appears that the wording of Article 9f has not changed since we last saw the draft article and we note your interpretation of the provision. It is regrettable that, given the apparent absence of any opposition in principle to the right of Member States to limit their national members’ powers to those which are accorded to domestic equivalents, clearer wording could not be found. It remains to be seen whether the European Court of Justice will share the Government’s view as to the extent of the derogation in Article 9f.

EUROJUST NATIONAL COORDINATION SYSTEM (ARTICLE 12)

We are pleased to see that provisions regarding relations with Europol will remain in Article 26(1). We understand that a statement on cooperation between the two bodies is to be adopted at the June JHA Council and would be interested to hear details of the general content of that statement.

DATA PROTECTION

We note what you say as regards the application of First Pillar data protection provisions to current Third Pillar measures if the Treaty of Lisbon enters into force. While Directive 95/46/EC excludes “activities of the State in areas of criminal law”, it is not clear what “areas of criminal law” would cover. Although arguably the exclusion would apply to data processing in the context of Eurojust, the case is less straightforward in the context of Europol and policing – currently also Third Pillar matters. Further, Regulation (EC) 45/2001 contains no express exclusion for institutions operating in the field of criminal law. We are not persuaded that Article 9 adequately resolves the issue and intend to give this matter further consideration. We note with interest that the European Data Protection Supervisor, in paragraph 21 of his opinion, also suggests that Regulation (EC) 45/2001 may be applicable to Eurojust following the merging of the Pillars.

Finally, we reiterate the need to ensure that the European Data Protection Supervisor’s comments are fully reflected in the final draft of the provisions of the proposal.

The proposals are retained under scrutiny. However, we would not consider the agreement of a partial general approach in relation to Articles 5a, 9a-9f, 12 and 13 on the basis of document DS 577/08 to constitute a scrutiny override.

5 June 2008
Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 5 June 2008 which was considered by Sub-Committee E at its meeting of 18 June 2008.

We welcome the progress made in the negotiations, and in particular the compromise solution found to ensure that EJN contact points are involved in training but are not over-burdened.

It is, however, not clear to us why Article 11(1)(b) is superfluous in light of the reporting obligations in Article 13 of the Eurojust Decision, given that the latter article makes no express reference to the EJN but deals instead with exchanges of information between Member States and national members of Eurojust. Would EJN contact points be “competent authorities” under Article 13 of the Eurojust Decision? In any case, we consider that it would be desirable to have obligations imposed on EJN contact points set out clearly in the EJN Decision itself, all the more so since both instruments are being recast in the present negotiations. Given that one of the Committee’s concerns is the relationship between Eurojust and the EJN, and clarification of the EJN’s role, we would be grateful for further details of your concerns and of the disadvantages in agreeing an express role for EJN contact points here. In your EM of 28 January 2008, you recognised the importance of identifying appropriate cases to Eurojust but indicated a need to consider the “practicality and anticipated consequences” of contact points providing this information to Eurojust. What is the result of your reflections?

The proposal is retained under scrutiny.

18 June 2008

Letter from the Chairman to Meg Hillier MP

This proposal was considered by Sub-Committee E at its meeting of 2 July 2008.

We welcome changes to the data protection articles to reflect the key recommendations of the European Data Protection Supervisor and note that you are now satisfied with these provisions as drafted.

As regards the articles of the proposal on which a general approach has not yet been reached, you say that they will “not change significantly from how they appear in the original Eurojust Council Decision of 2002”. We are surprised to hear this given that the proposed changes to existing Article 26 which are set out in the present draft of the proposal appear to be substantial. We would welcome your views on the content of Articles 25a, 26 and 26a. As we have highlighted in the context of our scrutiny of the EJN Decision, it is not clear to us why obligations to be imposed on EJN contact points are to be contained in the Eurojust Decision, instead of the EJN Decision. It seems to us to make sense to move the relevant provisions of Article 25a of the Eurojust Decision into the EJN Decision. We have not yet received a response to our letter of 18 June on the EJN Decision and look forward to hearing your views.

We would also be grateful for your assurances that the remaining articles are, as you say in your EM, in similar terms to the provisions of the 2002 Council Decision.

Finally, on a matter which does not arise in the context of the present amendments, we understand that although the current national member is Welsh, arrangements are in place to ensure that all of the UK’s legal systems are properly represented in Eurojust. We would be grateful for further information on the appointment system and on coordination between the national member and the different UK jurisdictions.

Document 10663/08 is retained under scrutiny, but documents 5037/08 and 7254/08 are cleared as superseded.

3 July 2008

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 3 July. I am writing to update you on developments regarding the draft Council Decision on the strengthening of Eurojust and the draft Council Decision on the European Judicial Network (EJN).

Further negotiations on the two draft Council Decisions took place on 26-27 June and 1-3 July. Regarding Eurojust, these focused primarily on finalising the data protection provisions, as well as those dealing with other bodies and third countries. As the Committee is aware, the Government is now satisfied with the set of Articles on data protection. Those Articles on relations with other bodies and third countries are dealt with below.
We have successfully secured an amendment to Article 8, which was the last provision causing us difficulties. This provision deals with refusals to comply with requests from Eurojust. We argued that we should not have to comply with a request when to do so could harm essential national security interests, nor should we have to explicitly state that the reason for not complying was due to national security, in line with current arrangements. An addition has now been made to Article 8 as follows:

"Where it is not possible to give the reasons for refusing to comply with a request because to do so would harm essential national security interests or would jeopardise the safety of individuals, the competent authorities of the Member States may cite operational reasons."

**ARTICLE 25A EUROJUST AND ARTICLE 11 EJN**

The Committee asks for the Government’s views on the content of Article 25a. This provision evolved from the original Article 26 but has been separated out so that it now focuses solely on relations with the EJN. Following working group meetings last week, the appropriate provisions are now found in Article 25a Eurojust and Article 11 EJN respectively. Provisions regarding EJN contact points have been moved to Article 11 EJN. Moreover, we succeeded in deleting some of the obligations to be imposed on EJN contact points, such as informing Eurojust of cases where conflicts of jurisdiction were likely to arise, which we thought were unnecessary and more the role of national competent authorities. Article 11 now asks only that EJN contact points inform their own National Member of cases with which they deem Eurojust is in a better position to deal, and Article 25a asks the same of Eurojust National Members. The two Articles also call for Eurojust and the EJN to share information with one another and allow them to attend each other’s meetings. We find this sensible.

**ARTICLES 26 AND 26A**

The Committee asks for the Government’s views on the content of Articles 26 and 26a. These provisions have evolved from the original Articles 26 and 27. They provide for Eurojust to cooperate, exchange information and conclude agreements with other bodies and third states. This is in accordance with current practice, and we are satisfied that the newly worded Articles better regulate Eurojust’s work, for example by explicitly stating the need to ensure data protection.

**REMAINING ARTICLES**

The remaining Articles are in similar terms to the provisions of the 2002 Council Decision, except for a small number of new Articles which have been added. The Committee will be aware of these from previous Explanatory Memoranda. They include Article 27a on Liaison Magistrates posted to third states, Article 27b on requests for cooperation from third states and Article 27c on liability. These provisions do not cause the Government any problems.

**APPOINTMENT SYSTEM REGARDING THE NATIONAL MEMBER**

Further to previous correspondence, I can confirm that Aled Williams has now been appointed as the Eurojust National Member for the UK, succeeding Mike Kennedy who left Eurojust to take up a new post late last year. The Committee asks for further information on the appointment system of the UK delegation at Eurojust. Posts are advertised through open competition, candidates are interviewed and, after selection, appointment is notified to the Council Secretariat in Brussels by the UK Permanent Representative which then informs all Member States.†

**COORDINATION BETWEEN THE NATIONAL MEMBER AND THE DIFFERENT UK JURISDICTIONS**

Finally, the Committee asks for further information on coordination between the National Member and the different UK jurisdictions.

*England and Wales*

The UK National Member and acting deputy have both qualified and practiced in the jurisdiction, and maintained contacts there.

*Scotland*

The Crown Office in Edinburgh (COPFS) has had a prosecutor at the UK desk of Eurojust since 2002. The system works on a split week, so that the procurator fiscal depute from Edinburgh works three days a week at Eurojust and two days in Crown Office. Because of the split week, the fiscal can be consulted about issues such as European Arrest Warrant cases at Eurojust and subsequently take the same case before the court in Edinburgh. The fiscal is able to deal with queries regarding Scots law. Crown Office also sends trainee solicitors to Eurojust for three month placements twice a year.
Northern Ireland

There is no similar NI presence at Eurojust, but there is email and phone contact with the PPSNI.

Co-ordination with UK prosecuting agencies generally The UK desk of Eurojust has prosecutors from a mix of departments, and can draw on the experience and contacts from that mix. The present National Member is from the Crown Prosecution Service, the acting deputy National member is from HMRC, and one of the assistants is from COPFS.

The UK National Members have introduced a system of inviting prosecutors to Eurojust as Seconded National Experts (SNEs) (the home department pays salary; Eurojust pays accommodation and living expenses). The idea is that the prosecutor has practical EU criminal justice experience and then shares it with his home department.

Eurojust operates a system whereby every six weeks the College does not meet in formal session. This is to allow prosecutors to return to their Member States and maintain contacts within the home jurisdiction.

There are frequent co-ordination meetings at Eurojust. At these meetings, UK prosecutors and investigators attend The Hague to discuss specific crossborder cases and topics. This ensures that practical operational contact is maintained. There have been 28 such meetings involving UK prosecutors and investigators in the first six months of this year. Additionally, in late November the UK delegation to Eurojust is holding a marketing seminar in York to which representatives of all UK prosecuting agencies will be invited.

I trust this answers your queries and look forward to hearing whether the Committee is in a position to clear both the draft Council Decision on Eurojust and the draft Council Decision on the EJN from scrutiny before planned agreement of both instruments at the JHA Council on 24-25 July.

7 July 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your EM on the European Judicial Network and your letter of 7 July 2008, which were considered by Sub-Committee E at its meeting of 16 July 2008.

We note the changes to Article 8 EUROJUST to allow Member States to decline to give reasons in cases where to do so would harm essential security interests or jeopardise the safety of individuals; we would welcome your assurances that the phrase “operational reasons” is intended to cover only these two cases. The exception to the duty to give reasons seems, on balance, justified although we are not satisfied that it is appropriate to cloak essential security interests and safety of individuals, which are very different matters, with an ambiguous reference to “operational reasons” and would be grateful for your explanation of why this approach has been adopted. In any case, given that there can be no oversight of Member States’ use of this provision, we trust that the Government will ensure that a decision not to provide reasons is taken only after careful consideration of whether national security or the safety of individuals is genuinely at risk.

We welcome the changes to Articles 25a EUROJUST and 11 EJN, which in our view provide helpful clarification of the obligations of each of the two bodies in the appropriate instrument.

We are also grateful to you for setting out the arrangements for recruitment as the Eurojust national member and arrangements for coordination between the national member and the different UK jurisdictions. We found the information you provided most helpful.

Finally, although probably too late for the present negotiations, we comment that the name “European Judicial Network” is misleading in implying that it is a judicial cooperation body when in fact, as its UK membership reveals, it is principally composed of authorities responsible for investigating and/or prosecuting offences and could therefore be more accurately described as a prosecutorial tool. We hope that Member States will turn their minds to selecting a more appropriate name for the network in future discussions on this subject.

We have decided to clear the proposals from scrutiny.

18 July 2008

Letter from Meg Hillier MP to the Chairman

I am writing in reply to the issues you raised in your letter dated 18 July 2008 regarding document 10663/08 on the strengthening of Eurojust and documents 5039/08 and 10221/1/08 on the European Judicial Network (EJN).
First, the Committee asked whether the phrase "operational reasons" in Article 8 is intended to cover only those situations when Member States decline to give the reasons for not complying with a request from Eurojust where to do so would harm essential security interests or jeopardise the safety of individuals. The Government is satisfied the phrase "operational reasons" is intended to cover only these two cases. We requested the additional wording because there are times when Member States may not be able to follow requests, and in the case of national security sometimes even to reveal that the reason was national security would in itself be damaging.

Second, the Committee commented that the name "European Judicial Network" is misleading in implying that it is a judicial cooperation body and could more accurately be described as a prosecutorial tool. Although the majority of EJN contact points in the UK are prosecutors, they are not exclusively so. For example, two are Home Office civil servants from the UK Central Authority for Mutual Assistance in Criminal Matters and one is part of HM Revenue and Customs. The term "judicial" in the EJN's name refers to the fact that in most civil law jurisdictions mutual assistance in criminal matters is carried out by investigating magistrates rather than investigating and prosecuting authorities as in the UK and is therefore referred to by most of these states as "judicial cooperation" as opposed to "mutual legal assistance".

The principle behind the network is to identify and promote people in every Member State who play a fundamental role in practice in the area of judicial cooperation in criminal matters, with the purpose of creating a network of experts to ensure the proper execution of mutual legal assistance requests. With this in mind, EJN contact points in the UK have been selected to reflect the authorities responsible for international judicial cooperation and the competent authorities with specific responsibilities within the context of international cooperation.

This is not the only international instrument which uses such a definition of the term "judicial". Another example is the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters. By a declaration under Article 24 for the purposes of the Convention, the Government deems the following to be judicial authorities for the purposes of that Convention:

- Magistrates' courts;
- the Crown Court and the High Court;
- the Attorney General for England and Wales;
- the Director of Public Prosecutions and any Crown Prosecutor;
- the Director and any designated member of the Serious Fraud Office;
- the Secretary of State for Trade and Industry in respect of his function of investigating and prosecuting offences;
- the Director of the Revenue and Customs Prosecutions Office and anyone within that Office authorised by him;
- District Courts and Sheriff Courts and the High Court of Justiciary;
- the Lord Advocate;
- any Procurator Fiscal;
- the Attorney General for Northern Ireland;
- the Director of Public Prosecutions in Northern Ireland;
- the Commissioners of the Inland Revenue; and
- the Financial Services Authority.

The name "European Judicial Network" is therefore not, in the Government's view, misleading when taken in the wider context.

The Government is grateful to the Committee for its consideration of the most recent Explanatory Memoranda and correspondence on these subjects. I trust this clarifies all outstanding issues.

30 July 2008

**Letter from the Chairman to Meg Hillier MP**

Thank you for your letter of 30 July 2008, which was considered by Sub-Committee E at its meeting of 8 October 2008.

We are grateful to you for confirming that "operational reasons" covers only the two cases of harm to essential security interest and jeopardy of the safety of individuals.
We were also interested to hear your views on the name of the European Judicial Network. While we agree that in the wider context which you set out, the adoption of the name “European Judicial Network” is not surprising, we continue to support a more appropriate name which is as readily understood in the UK as it appears to be in civil law systems across the EU.

9 October 2008

INSTITUTIONS: EUROJUST AND OLAF (9346/08)

Letter from the Chairman to Meg Hillier MP, Parliamentary Under Secretary of State, Home Office

This draft agreement was considered by Sub-Committee E at its meeting of 9 July 2008.

As you know, we strongly support coordination between bodies operating in similar fields, in order to improve their effectiveness and to avoid duplication. We therefore welcome this agreement to enhance cooperation between Eurojust and OLAF in areas where their activities overlap.

We note that the agreement will have data protection implications. In this regard, the prior consultation of the European Data Protection Supervisor is to be commended and we are pleased that his suggestions have been incorporated into the draft agreement.

We have decided to clear the draft agreement from scrutiny.

10 July 2008

INSTITUTIONS: EUROPEAN AGENCIES: THE WAY FORWARD (7972/08)

Letter from the Chairman to Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office

Thank you for your letter of 24 April 2008 \(^\text{17}\) which was considered by Sub-Committee E. The Committee decided to keep the Commission’s Communication under scrutiny.

The Committee notes that the Commission intend to withdraw its proposal, made in 2005, for an Inter-Institutional Agreement (IIA). This seems a realistic response to the absence of progress on the IIA.

The Committee agrees that the proposed evaluation of the regulatory agencies is welcome. But could the proposed moratorium on setting up such agencies pending the completion of that evaluation unduly restrict sound operational management of EU business?

More generally, do you think it will be possible, in practice, to have the kind of common framework which the Commission seems to have in mind and also the degree of flexibility which the Government favours? Is the proposed inter-institutional working group likely to be any more successful than the discussion of the now defunct IIA?

15 May 2008

Letter from Jim Murphy MP to the Chairman

I am writing in response to your letter of 15 May about the Commission’s Communication on ‘European Agencies – the way forward’.

The Government does not believe that the Commission’s proposed moratorium would unduly restrict the sound operational management of EU business. As the Commission’s Communication makes clear, proposals for new regulatory agencies already under inter-institutional discussion (i.e. notably on energy and telecoms) will not be affected. Moreover, the proposal does not affect executive agencies at all. Given the forthcoming European Parliament elections and appointment of a new Commission in 2009, it seems reasonable to expect there would in any case have been a hiatus in any new regulatory agencies being proposed by the Commission.

The Commission’s Communication does not in any way circumscribe the Council or European Council’s ability to call on the Commission to make a proposal for new action in a specific field if Member States deemed this necessary. If conducted correctly, the Government believes that the

\(^{17}\) Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 217
Commission's proposed review itself should boost the sound operational management of EU regulatory agencies in the future. The Government will be working to shape the outcome of this review accordingly.

The Government is confident that it is both possible and indeed essential to maintain the flexibility we support on the management of regulatory agencies, while looking for ways to improve the sharing of best practice. Overall guiding principles for agencies could be useful, especially with regards to better reporting. This would highlight under-performing agencies, improve focus on the better regulation agenda and budget transparency. The present lack of evidence regarding the performance of agencies prevents us from making proper informed decisions on their resource requirements.

However, the Government remains unconvinced of a need for a horizontal framework. We continue to stress that decision-making must reflect agencies’ diversity and allow flexibility to ensure each agency is fit for purpose. An overly prescriptive horizontal approach could duplicate or undermine the existing guiding principles in Better Regulation. It is essential that an inter-institutional dialogue reflects this approach. The Government will work with our EU partners to achieve this.

We are not able at present to predict how successful the proposed inter-institutional Working Group is likely to be. The Presidency has not yet indicated how, if at all, it wishes to take forward discussions on the Commission’s Communication. The relevant Council working group has not yet been asked to examine the proposal. Nevertheless, we welcome the Commission’s withdrawal of its proposed Inter-Institutional Agreement, which the Government and other partners regarded as legally unsound. We also welcome the proposals to review and evaluate present agencies. The Government will continue to keep Parliament informed of developments on this dossier.

30 May 2008

Letter from the Chairman to Jim Murphy MP

Thank you for your letter of 30 May which was considered by Sub-Committee E at its meeting on 18 June. The Committee is grateful for your responses to the questions it posed and for your offer to keep it informed of developments. In the meantime, we have decided to keep the dossier under scrutiny.

18 June 2008

INSTITUTIONS: EUROPEAN AGENCIES: SPECIAL REPORT NO.5/2008 (11888/08)

Letter from the Chairman to the Rt Hon Caroline Flint MP, Minister for Europe, Foreign and Commonwealth Office

The Explanatory Memorandum on this Report dated 14 August 2008 from your predecessor, Jim Murphy MP, was considered by Sub-Committee E at its meeting on 8 October. The Committee decided to clear the document from scrutiny.

We consider this an important report. The Court of Auditors’ thorough analysis of the management systems of the eight agencies selected for examination shows that, while the basic systems are in place, considerable improvement needs to be made in a number of aspects of the agencies’ systems for planning and budgeting, objective-setting, establishing performance indicators, reporting and evaluation. In short, the agencies have some way to go to meet the standards set by the Financial Regulation governing the agencies and by good modern practice. One cannot tell from this investigation whether the same findings would emerge from examination of the other EU regulatory agencies, but it is presumably likely that some or all of the Report’s conclusions will be applicable to other agencies.

We note that the agencies concerned broadly acknowledge the validity of the findings and have begun implementing the recommendations.

The Committee currently retains under scrutiny a Commission Communication – European agencies: The way forward – published in April 2008 (doc. 7972/08), which proposed establishing an inter-institutional working group to consider the place of regulatory agencies in the EU system of governance, and undertaking an evaluation of those agencies, to be completed by the end of 2009. The present Report will provide essential evidence for the proposed evaluation, which will provide an opportunity to review the agencies’ progress in implementing the Court of Auditors’ recommendations.

9 October 2008
INSTITUTIONS: RULES OF PROCEDURE: (13298/08, 13299/08, 13300/08, 13301/08, 14418/08, 14419/08, 14420/08, 14443/08)

Letter from the Chairman to Rt Hon Caroline Flint MP, Minister for Europe, Foreign and Commonwealth Office

These proposed amendments to the rules of procedure were considered by Sub-Committee E. The amendments seem sensible and we are content to clear them from scrutiny.
12 November 2008

INSTITUTIONS: JURISDICTION OF THE ECJ IN TITLE IV MATTERS (11356/06)

Letter from Meg Hillier MP, Parliamentary Under Secretary of State, Home Office to the Chairman

Further to my letter to you of 18 December 2007 and your reply of 17 January 2008 I would like to provide you with an update you on the dossier above. As you will recall this proposal is to amend Article 68 TEC to allow preliminary references in first pillar JHA cases to be made to the ECJ from all national courts, and not just from courts of last instance.

Following the adoption of the Urgent Preliminary Ruling Procedure at the end of the Portuguese Presidency, the Slovenian Presidency returned briefly to this dossier. However, no progress was made on the text as delegations wished to await the outcome of national procedures around ratification of the Lisbon Treaty. As my previous letter indicated, the Lisbon Treaty is expected to supersede this proposal. Notwithstanding, we did take the opportunity to raise your concerns regarding the need for an Impact Assessment.

Upon the UK’s questioning the Commission confirmed that no specific impact assessment had been conducted and explained that it would be extremely difficult to anticipate in advance how many new cases could be generated and what the evolution could be over time. The Commission said that no estimates had been provided and it would be highly artificial to provide any estimates.

If things change I will write again, but for the present I am working on the assumption that work on this proposal will not resume.
16 June 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 16 June which was considered by Sub-Committee E at its meeting on 2 July.

In the light of the Irish referendum on the treaty of Lisbon, we assume that it can no longer necessarily be assumed that work on this dossier will cease. We have decided, therefore, to retain the proposal under scrutiny until it is clear whether it has been abandoned.

We consider it unacceptable that the Commission has not undertaken an impact assessment. At the very least, an assessment should consider the impact of the proposal on the workload of the Court and the implications for citizens and companies whose cases will come before it. We urge the Government to press for an assessment if discussion of this proposal shows signs of being revived.
3 July 2008

Letter from Meg Hillier MP to the Chairman

Further to my letter of 16 June 2008 updating you on the progress of this proposal, and your reply received on 3 July 2008, I am writing to address the concerns you raise regarding the decision of the Commission not to carry out an impact assessment in relation to the proposal, and to acknowledge your intention to hold the dossier under scrutiny until it is confirmed that it has been withdrawn.

As you will be aware from my previous letter, we have already raised with the Commission your concerns surrounding the lack of impact assessment on two separate occasions. Whilst we share your belief that such proposals should be accompanied by impact assessments, the Commission has been

18 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 232
clear that it does not think that it is possible to carry out such an assessment in this case. Since negotiations remain on hold, there are no further opportunities to raise the issue at this time.

I note that it is your intention to hold the dossier under scrutiny. I will update you when the situation regarding the future of the dossier becomes clearer. For the present, no discussions are planned on the proposal within the Council.

9 July 2008

**Letter from the Chairman to Meg Hillier MP**

Thank you for your letter of 3 July which has been considered by Sub-Committee E. We look forward to hearing from you when there is further information on whether discussion of this dossier is likely to be revived.

23 July 2008

**INSTITUTIONS: OMBUDSMAN’S STATUTE**

**Letter from Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office to the Chairman**

I am pleased to submit an Explanatory regarding European Parliament proposals to amend the Statute of the EU Ombudsman [not printed].

I would be grateful for your Committee’s early consideration of this issue, given the unexpectedly very tight timing we now foresee. The Slovenes are pressing hard for agreement under their Presidency. And have already opened informal triilogue negotiations with the European Parliament and Commission.

As the European Parliament adopted its position only in late April, which was later than the Slovenes anticipated, they are now endeavouring to make up for lost time by pushing for rapid progress in the Council working group.

The next Working Group discussion will be on 30 May, after which the issue may move rapidly to COREPER, with the aim of final agreement at the European Parliament’s June plenary. HMG is still considering its position and I will of course keep you informed of our views.

As you may know the Statute of the EU Ombudsman is one of the very few areas under the Treaties where the European Parliament, rather than the Commission, has right of initiative.

26 May 2008

**Letter from Jim Murphy MP to the Chairman**

I would like to update you on where we are on the proposals to amend the Statute of the EU Ombudsman, and to address questions raised by the Scrutiny Committees.

As you know, an Explanatory Memorandum on the European Parliament Report was submitted for scrutiny on 27 May. In order to increase time for scrutiny, we deposited the proposal with Parliament in the form of the Report, rather than await the Commission or Council Secretariat document.

However the Slovenian Presidency remains very keen to agree the Statute under their Presidency, so they are pushing for rapid progress. Council Working Group discussions only began in Brussels on 16 May. But the issue is already expected to go to the Council on 12 June for agreement, and then to the European Parliament on 17 June. The timeframe available for this Memorandum to pass Scrutiny is therefore unfortunately very tight. Ministerial Whitehall correspondence on this dossier is also having to be accelerated.

Part of the reason for the Presidency’s haste is that the European Parliament only adopted its position on 22 April, which was several months later than expected.

I can assure you that UK officials have, of course, questioned the need for such haste and stressed very clearly that we have not completed parliamentary scrutiny. Unfortunately this has not led the Presidency to adopt a more normal negotiating pace.

The Council will decide on this proposal by qualified majority voting and, in any event, we expect it to be agreed. Following discussions in Brussels, the Government’s initial concerns regarding this proposal have been addressed. However, given the very fast pace of this dossier, our present intention is to abstain.
On the substance of the proposal, the areas of concern we previously identified related to access to documents, handling information on possible criminal activity, and the Ombudsman’s role regarding co-operation with other bodies in the field of human rights.

On access to documents, the European Parliament’s suggested amendments could change the rights of ED Institutions to withhold documents from the Ombudsman, resulting in two risks: firstly that the Ombudsman may not disclose documents, but may refer to information contained within them in his findings; secondly that it would be left to his office to interpret the obligations under the Access to Documents Regulation. This would risk creating two parallel, potentially contradictory regimes. During the negotiations, the Government has thus secured safeguards to explicitly prevent the public disclosure of sensitive documents and to ensure full compliance by the Ombudsman with existing relevant ED regulations on handling access to documents.

Regarding handling information on possible criminal activity, the proposed amendment originally raised the question of whether “an EU body” would be notified in cases of criminal conduct instead of the relevant national authorities. The Scrutiny Committees questioned this amendment in their response to our Explanatory Memorandum, and enquired whether any existing Community institution or body has such prosecuting powers. I can confirm that there is no existing Community institution or body that has such criminal prosecuting powers, and we of course continue to oppose any future moves to create a European Public Prosecutor. On this issue, we sought amendments to ensure that national bodies should continue to be informed automatically in such cases and that the relevant EU body (i.e. the European Anti-Fraud Office) should also be informed where appropriate. We have now secured these changes.

On human rights, the Government (and many other Member States) raised concerns that the European Parliament’s proposal regarding the role of the Ombudsman in co-operating with other bodies active in the field of human rights could both overlap with existing EU bodies (e.g. the European Union Agency for Fundamental Rights) or lead to competence creep. The Scrutiny Committees shared these concerns. However we were successful in securing changes to ensure any co-operation in human rights is strictly limited to within the scope of the Ombudsman’s existing treaty competence - i.e. tackling maladministration at EU level - and will not duplicate the activities of other bodies or institutions.

I hope this update serves to address the Scrutiny Committees’ concerns.

9 June 2008

Letter from the Chairman to Jim Murphy MP

This proposal was considered by Sub-Committee E at its meeting of 18 June 2008

We welcome the changes to the Ombudsman’s Statute, which we expect will improve access to documents by the Ombudsman and EU citizens. We note that your concerns regarding the proposal have been addressed in the negotiations, although it is regrettable that you were unable to provide us a copy of the amendments in time for us to consider them.

As regards your assessment of fundamental rights in your EM, it is disappointing that you simply indicate that the proposal “does not give rise to fundamental rights issues”. Aside from the broader question of the Ombudsman’s fundamental rights role, several rights – including the right to good administration, the right to complain to the Ombudsman and the right to have access to documents – are engaged by the present proposal. We expect to see an accurate and comprehensive analysis in respect of every legislative proposal and will not always be prepared to consider an EM where such an analysis is absent.

We have decided to clear the draft decision from scrutiny and would be grateful if you would provide us with a copy of the agreed decision in due course.

18 June 2008

INSTITUTIONS: SIMPLIFYING EU LAW

Letter from Rt Hon John Hutton MP, Secretary of State for Business, Enterprise and Regulatory Reform

I have enclosed for your and your Committee members’ information the report 25 ideas for simplifying EU law which has been published today [not printed]. It presents practical ideas to realise the European Commission’s target to reduce EU administrative burdens by 25 per cent by 2012. It also sets out four examples of good practice in the UK where administrative burdens stemming from EU
law have been reduced as part of our domestic simplification programme by applying better regulation principles to the implementation of EU law.

The aim of the report is therefore twofold: to feed into the Commission’s thinking for its simplification proposals expected later this year; and to share with both the Commission and other Member States what we consider best practice.

I have also laid copies in the libraries of both Houses.

20 July 2008

INSTITUTIONS: EUROPEAN STATISTICS (14094/07)

Letter from Kevin Brennan MP, Minister for the Third Sector, Cabinet Office to the Chairman


The Government is now content with the texts of this proposed Regulation and associated Opinion.

ADEQUATE EXPLANATION OF SCOPE IN THE PROPOSAL

The Government had shared concerns with some other Member States that there was insufficient clarity in the Proposal about the scope of “European Statistics” and thus the Regulation as a whole. It is important to be clear that the arrangements for (for example) pre-release access to national statistics remain a matter for our national authorities and Parliaments. The Government therefore felt it was necessary to seek an amendment to Recital 26 of the Proposal in order to ensure that the scope is without prejudice to roles, modalities and conditions for national statistics. This has now been achieved.

OPINION OF THE EUROPEAN DATA PROTECTION SUPERVISOR AND SAFEGUARDS AGAINST EUROSTAT COLLECTING DATA DIRECTLY IN MEMBER STATES

The European Data Protection Supervisor has formally declared strong support for this proposed Regulation, commending its simplification and transparency. The opinion stated that this proposal would fully protect the personal information of Community citizens.

The European Statistical System (ESS) collaborative network allows ONS and other national authorities to share wholly anonymised files of individual records compiled for European Statistics and to jointly advise the ESS Committee on standards for public use files. Once a public use file is prepared for a European statistics data source, each Member State must give its express consent to the data it provides before it is disseminated in that form.

Regulation 831/2002 is currently used to identify the sources from which public use files will be created, and comitology procedure is used to agree both the sources and the standards employed to protect confidentiality on a case-by-case basis. The Government believes the ESS partnership is sufficiently competent to create such files and govern their proper use.

ISSUES RELATING TO THE OPINION OF THE EUROPEAN CENTRAL BANK

The Government is content that adequate provision is in place to ensure that the flow of confidential data through the European Statistical System to the European Central Bank is sufficiently regulated and protected. Flows of this nature will occur on a case-by-case basis, and only in duly justifiable circumstances. A Recommendation concerning the collection of statistical information by the European Central Bank (14606/08) is currently being considered. An Explanatory Memorandum is soon to be produced for your scrutiny.

ESTABLISHMENT OF AN EXPERT GROUP

The Presidency has taken a particularly active role in communicating views between Member States, the Commission, and the European Parliament, negating the need to establish an Expert Group to consider this dossier.
The Proposed Regulation on European Statistics was last discussed at the Council Working Party on Statistics on 1 October 2008. It was voted on at COREPER on 29 October 2008 at which UK abstained, registering a parliamentary scrutiny reserve. While there were some issues raised by other delegations, no changes were made to the text as agreed in the Working Party, a qualified majority having been reached. The Presidency has been negotiating closely with the European Parliament on this dossier with a view to achieving first reading agreement. The European Parliament's Economic Affairs Committee voted through its report on the legislation on 15 September, and this report (in amended form) is likely to reach plenary during week commencing 17 November. The next occasion on which the UK will be asked to vote on the dossier is COREPER after the plenary session, probably on 26 November. The Presidency hope to pass the legislation at ECOFIN at the beginning of December.

10 November 2008

INSTITUTIONS: TRANSPARENCY INITIATIVE FOR LOBBYISTS (10255/08)

Letter from the Chairman to Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office

This Communication and your accompanying Explanatory Memorandum were considered by Subcommittee E at its meeting on 9 July. We decided to keep the matter under scrutiny.

We welcome the Commission's introduction of a register of lobbying organisations and the other plans set out in the Communication as useful steps towards greater transparency in lobbying practice in the EU. We note that the European Parliament's arrangements for regulating lobbying which are, de facto, mandatory appear further advanced than those introduced by the Commission, and we endorse the calls by both the Commission and the European Parliament for consideration of the development of a common system of regulation for the Commission and the Parliament.

The Commission's plans leave a number of fairly obvious questions and, given the range of views on those plans reported in the press, we were disappointed that you did not discuss at least some of these in your EM. We should be grateful for your views on the system of registration and the Code of Conduct established by the Commission, and on the following particular issues:

— We were unclear as to the scope of the term “interest representatives”. Does it include organisations that lobby solely in their own interest (such as a company making representations about legislation that would affect it) or is it limited to those who represent other persons or organisations?

— The register and Code are non-binding. Does this not mean that there will still be an incomplete picture of the extent of lobbying?

— Organisations have to register but not individuals, so the members of lobbying firms will not appear in the register. Will this not mean a lack of transparency where, for example, officials leave the Commission and join lobbying firms?

— What would be the practical effect of suspension or exclusion from the register?

— Do you consider that the seven Rules in the Code of Conduct are sufficient to regulate the practice of lobbying?

— How will financial transparency be achieved? This is particularly important in relation to organisations that receive funding from the EU budget, about which we heard in the course of our recent inquiry into the Initiation of EU Legislation.

10 July 2008

Letter from Jim Murphy MP to the Chairman

Thank you for your letter of 10 July on the Commission's Code of Conduct and Register for Interest Representatives in which you sought my views on some of the issues raised by the Committee. For ease of reference, I will respond to your questions in order.
The definition of “interest representatives” would include bodies representing their own interests (“in-house” lobby groups). An interest representative is defined by the Code as any organisation whose activities are “carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions” – there is no differentiation between organisations lobbying on their own behalf or those lobbying on the behalf of others.

Regarding the Committee’s concerns over a lack of transparency and the extent of lobbying, the Commission is clear that it considers that “revolving doors” issues (and conflicts of interest generally) are already covered by a number of existing rules which provide appropriate safeguards, such as the Treaties, the Staff Regulations, the Code of Conduct for Commissioners and the Code of good administrative behaviour. These texts apply to Commissioners and staff not only during their time in office, but also once their occupation at the European Commission ends. As I touched on in my evidence to your recent inquiry into the Initiation of EU legislation, Commission officials will inevitably get to a stage where they question why they are meeting someone who is not on the register, and covered by the code. And of course there is leeway to review after the first year.

Suspension or exclusion for the register would deny a lobby group the privileges enjoyed by those on the register. Registered bodies receive automatic alerts when consultations are launched for areas in which they have registered an interest. However, it is clear that this alone would not amount to a substantial punitive measure, and the Commission itself has acknowledged this. The Commission has therefore outlined a second sanction, that being that the contributions from unregistered contributors to consultations will be listed as if they were the contributions of an individual. It could be said that such contributions will then effectively carry far less weight, and that the influence of any interest representative that has been suspended or excluded from the register would be limited.

The Code and the seven rules therein, builds on existing earlier standards (in particular, the Minimum Requirements adopted in 1992). Before adopting the Code, the Commission consulted widely, and took into account existing professional codes of conduct, such as those developed by public affairs practitioners and the European Parliament. For the purpose of its concrete enforcement, the Code is deliberately limited to seven clear and specific rules. And of course, with review of the register and Code after one year, this is not the end of the process, and there will be scope to expand or tighten the rules as appropriate.

Finally, on the issue of financial transparency, registrants will be requested to declare relevant budget figures, namely the funds they devote to lobbying the Commission, and give a breakdown of major clients and/or funding sources. For the organisations that receive EU funding, primarily NGOs and think-tanks, budget and breakdown would include for amounts and sources of public funding being declared.

29 July 2008

Letter from the Chairman to Rt Hon Caroline Flint MP, Minister for Europe, Foreign and Commonwealth Office

Your predecessor, Jim Murphy’s, letter of 29 July was considered by Sub-Committee E at its meeting on 15 October. We are grateful for the further explanations concerning the Commission’s registration scheme. We decided to clear this document from scrutiny but trust that the Commission’s Staff Regulations, their Codes of Conduct and Good Administrative Behaviour as well as the kinds of informal sanctions available where lobbyists fail to register or to abide by the Code, are applied rigorously. We hope that the Government will take steps to ensure that the review after a year covers these aspects. We ourselves remain doubtful that the present voluntary arrangements will prove adequate and look forward therefore to seeing the outcome of the promised review.

16 October 2008

INTELLECTUAL PROPERTY: COPYRIGHT: COPYRIGHT IN THE KNOWLEDGE ECONOMY (12089/08)

Letter from the Chairman to David Lammy MP, Minister of State for Higher Education and Intellectual Property

The Commission’s Green Paper was considered by Sub-Committee E at its meeting of 5 November. We decided to retain the proposal under scrutiny.

The Committee welcomed the Commission initiative in seeking views on the need to adjust intellectual property rights to advancing technology.
We would, however, like to know the Government’s view on the issues raised by the Green Paper (including any formal response to the Commission if that has been prepared) in time for our meeting on 19 November so as to be able to comment before the Commission’s deadline for responses.

In particular we would be interested whether the operation of Directive 2001/09 in any of the areas looked at by the Green Paper requires the further harmonisation which would be the consequence of clarifying or making mandatory any existing or proposed new exception to the rights conferred by the Directive.

6 November 2008

INTELLECTUAL PROPERTY: COPYRIGHT: PROTECTION OF COPYRIGHT AND CERTAIN RELATED RIGHTS (12217/08)

Letter from the Chairman to David Lammy MP, Minister of State for Higher Education and Intellectual Property, Department of Innovation, University and Skills

Your Explanatory Memorandum concerning this proposal was considered by Sub-Committee E at its meeting on 19 November. We decided to retain the proposal under scrutiny.

We should be grateful for further information, particularly on the results of the consultations now being undertaken. We look forward to receiving the Impact Assessment which will be prepared in the light of the results of consultation.

We noted that Government policy is that any extension of a performer’s rights must be justified. We would be interested to know whether the Government considers that the present rights of performers and producers strike the proper balance between their interests and those of consumers and the public in general; and if so, whether the measures included in this proposal are appropriate and effective in order to achieve that balance. Our impression on present information is that this proposal may bring a marginal benefit at most, which must be weighed against the restrictive effect of the very considerable increase in the length of copyright.

We would also be interested to know the rationale behind the current periods of protection.

The Committee noted your concerns that the proposal for a single term of protection for works comprising music and words would add complexity. We would be grateful for your assessment of the extent to which the harmonisation proposed by the Commission is justified by the level of cross-border transactions and the difficulties such transactions presently face.

24 November 2008

JUSTICE: ANTI-CORRUPTION NETWORK (15629/05, 11231/07)

Letter from Meg Hillier MP, Parliamentary Under Secretary of State, Home Office to the Chairman

I am writing in response to a letter from the Clerk to the European Union Committee dated 29 May [not printed] which sought an update on negotiations on a proposal for a European Anti-Corruption Network. I should start by apologising for the fact that the Home Office has not done all it should in this case to keep the Committees informed of progress and indeed it has been brought to my attention that a document which should have been deposited in 2007, was not. This would have provided an update on developments following your request in your letter of 30 November 2006 to Gerry Sutcliffe to be updated when negotiations on the initiative resumed.

As you are aware, over the last six months this Department has worked strenuously to address the scrutiny problems that were plaguing us in 2007 in ensuring that the Committees have a full opportunity to scrutinise all JHA legislation. It is therefore particularly disappointing that this failure, which relates to the handling of negotiations in the spring of 2007, has now come to light. I am however grateful to the Clerk for bringing this to our attention.

The most recent text of the proposal now been deposited with your Committee and an EM is being sent in parallel with this letter providing information on the changes made to the text and addressing the issues raised by your Committee when the instrument was first proposed. In summary, the original proposal has been substantially re-written to remove much of the content that gave the Committees cause for concern and it now simply proposes that Member States nominate experts in the field of tackling corruption in order to form a “virtual” Network to exchange information and best practice. In particular, the proposal no longer envisages the creation of a new Secretariat with
the result that we expect costs to be limited to travel and subsistence expenses for Member States to attend what are likely to be annual meetings within Europe.

This model for a virtual Network follows similar models used for the European Judicial Network and the Network of contact points on war crimes and genocide. The shift in approach was made after discussions at working group level made clear that unanimity could not be achieved on the original text, but that Member States were prepared to consider something less ambitious. The text we have deposited (11231/07) represents the outcome of those discussions.

This proposal has not yet been submitted to Ministers in the JHA Council for either a general approach or a political agreement. I understand that it will be placed on a JHA Council agenda in the coming months (probably at the end of July) with a view to securing adoption before the end of the year. This will follow further discussion at official level on the basis of amendments expected from the European Parliament. There will therefore be a further opportunity to raise any remaining concerns raised by the Committee on the substance.

Once again, I would apologise for the handling of this dossier. As you know, I take very seriously the obligations set out in the Scrutiny Reserve Resolution and we will continue to work closely with your Clerks to ensure that you are kept informed of new proposals and those which remain under negotiation. I am also writing to you separately to provide an overview of what we expect to be the French Presidency priorities.

9 June 2008

Letter from the Chairman to Meg Hillier MP

This proposal was considered by Sub-Committee E at its meeting of 25 June 2008.

We note the delay in depositing this proposal but welcome your apology and the recent efforts of the Home Office to address deficiencies in its internal scrutiny procedures.

As you point out in your letter and your EM, the amended proposal addresses previous concerns raised by this Committee as regards overlap with EPAC and other organisations, the network’s tasks and its running costs. The network’s focus on sharing of best practice and establishment and maintenance of effective contacts is to be welcome. We support measures to tackle corruption and are now content with the proposed network.

We have decided to clear the proposal from scrutiny.

26 June 2008

JUSTICE: APPLICABLE LAW PROTOCOL

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

I am writing further to the Explanatory Memorandum (EM) I submitted on 23 May 2008.

Since the publication of the last text Presidency text in January and the text which was deposited on 12 May, and the respective EM, the Slovene Presidency put forward a package of proposals to overcome some of the difficulties experienced by various Member States. This was considered at Justice and Home Affairs (JHA) Council on 6 June 2008 which was attended by the Secretary of State for Justice.

The Council indicated that they considered that the proposal on applicable law should be based on a previous Council decision that the EU should ratify the Applicable Law Protocol of the 2007 Hague Convention (paragraph 9(ii)(c) of my Explanatory Memorandum of 23 May). This ratification would not bind the UK because of our Title IV opt in. I believe that this would remove the main obstacle to the UK opting in to the proposed Maintenance Regulation and the Justice Secretary has indicated to the Council that he believes we can move forward on this basis. The Secretary of State also made it clear to the Council that the UK wanted to keep open the option of a non-mandatory transfer rule which took account of situations involving third states where there was non inter-EU connection.

The Civil Law Committee is due to meet on 3, 4 and 11 July. It will consider the exequatur issue which I raised in paragraph 9(iii) of my latest EM and will also be further considering subsidiary jurisdiction and a transfer rule. However, given the imminence of Parliamentary Recess following the Working Group meetings I wanted to take this opportunity of updating the Committee especially as it is expected that the French Presidency will wish to take this dossier back to Council in October.
Letter from Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office to the Chairman

I am now able to reply to your letter of 15 November 2007, which sought further information on the practical proposals being put forward by the Commission.

I can confirm that the UK is participating in the pilot project for the informal resolution of complaints. Our participation not only indicates our support for the proposal, but also provides the opportunity to influence the final outcome.

The Government supports the objective of a more effective implementation of Community law. This is essential if Community law is to be correctly applied and implemented and citizens’ enquiries and complaints are to be dealt with properly. That said, it is vital that any action taken to improve the consistency and effectiveness of the implementation of Community law does not undermine other important principles such as subsidiarity. In this respect, any proposal, for example, to increase the general use in Community legislation of Regulations as opposed to Directives, would have to be considered very carefully.

Directives leave it open to Member States to implement Community law in a way that more closely respects national, legal and administrative traditions. Regulations are directly applicable and so offer advantages in situations where absolute clarity and consistency are required, for example in respect of technical definitions.

We believe that the balance between Regulations and Directives needs to be considered very carefully and each has a distinct role to play. Indeed, they can be used in a complementary way, for example in respect of certain pieces of financial services legislation, with Directives establishing a legal framework and Regulations putting in place implementing measures under the legislative framework the Directive has established.

You also ask about the Commission’s role in improving the quality of transposition of Community law and correlation tables. The Government believes that the Commission has an important role to play in arranging implementation groups so that Member states can share experience during the implementation process. Correlation tables can also be a useful administrative tool in improving the transparency of the implementation process and the Government supports in principle their greater use.

On the question of financial support, at present the Commission’s proposals have not required additional resources. If there is a significant increase in the number of Pilot project cases which necessitate additional resources, it is anticipated that this would be balances by a reduction in the number of cases pursued by the Commission under the formal Article 226 procedure, and possibly the quicker resolution of some cases which do proceed to the Article 226 stage. Deployment of resources into resolving complaints at an earlier informal stage as part of the Pilot project should therefore reduce the demand on resources to deal with formal infractions under Article 226, when the process is more formal, time consuming and expensive. However, the purpose of the Pilot project is to trial the proposal to ascertain the actual costs and benefits; the Pilot project has only been running since April so it is too early to reach any conclusions, but it will be reviewed early next year.

Finally, you ask about whether the Government supports increased transparency for infringement proceedings. Confidential negotiations between the Government and the Commission are often crucial for settling formal infringement proceedings before they are referred to the European Court of Justice. The European Regulation on Access to Documents (Reg 1049/2001) permits the Commission to withhold documents relating to infringement cases. Requests made to the Government for information on an infringement are dealt with under the Freedom of Information Act 2000. The Government’s position on transparency is in line with the approach the Commission adopts under the Access to Documents Regulations, namely disclosure of documents on infringement proceedings, especially on live cases, needs to be assessed to determine whether release may be detrimental to the efforts to reach a settlement in these cases. If so, the request is likely to be refused. The Government believes that the approach followed under the access to Documents Regulations strikes the correct balance by enabling Member States to negotiate in confidence with the

19 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 198
Commission with a view to resolve infringements at an early stage, thereby avoiding a referral to Court.

24 June 2008

Letter from the Chairman to Jim Murphy MP

Thank you for your letter of 24 June which was considered by Sub-Committee E at its meeting on 16 July. We are grateful for your very thorough responses on the various issues we raised and we welcome the strong support you are giving to the Better Regulation agenda generally. We now clear this matter from scrutiny, and would be pleased if you would, in due course, let us know the conclusions (as to the costs and benefits) drawn from the pilot project for resolving complaints.

17 July 2008


Letter from the Chairman to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice

This Communication has been considered by Sub-Committee E

The Committee welcomes practical measures to ensure citizens’ access to justice and other relevant information to facilitate their participation in judicial process outside their home States. In this regard, we strongly support the proposal to create an e-justice portal and encourage Member States and the Commission to ensure that, once it has been developed, citizens are aware of its existence and of the helpful information it contains. It seems to us that this is an area in which EU action can be of clear benefit to citizens but its utility depends on effective communication of its potential. Are there plans to ensure an effective information campaign?

We are also pleased to see that the Commission intends to focus on the use of IT in the justice field, and in particular on availability and interoperability of video-conferencing facilities and on resources for translation/interpretation. Again, we consider it important to ensure that those expected to make use of these facilities – citizens, judges and lawyers – are regularly informed as to the possibilities offered by developments in IT and, where appropriate, fully trained in using IT tools. What action do the Government intend to take in the UK to ensure training of judges and other relevant actors in the justice field?

We would be interested to see more details as regards funding for the proposed measures, and in particular information regarding the level and sources of funding to be allocated to activities linked to the e-justice programme.

As we have pointed out in the past, efforts to improve access to information and procedures online should not come at the expense of more traditional methods of information dissemination (European Small Claims Procedure, 23rd Report of 2005-06, HL Paper 118). We note that the Commission’s Annual Policy Strategy refers to measures to improve access to justice (paragraph 2.4) and would be grateful for details on planned measures intended to assist the less technologically literate, as well as information regarding the funding available for such measures.

The Communication is retained under scrutiny.

23 July 2008

Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for your letter of 23 July in response to the Explanatory Memorandum on the Commission Communication towards a European e-justice strategy.

I agree that the effectiveness of the e-justice portal is dependent on ensuring citizens are aware of its existence. Therefore it will be very important to initiate information campaigns at both a national and EU level. As the portal develops we will need to consider the most effective way to publicise it as a whole and its constituent projects. It is too early to go into detail about the nature of the publicity which will be appropriate but we will ensure we work closely with relevant authorities in the UK as well as the Commission and other Member States to determine what will be most effective.

I agree also that it will be important to ensure that those involved in the use of videoconference facilities, especially when used for the purposes of interpretation, will receive appropriate training.
There is a training element mentioned in the Commission’s Communication, involving work with the European Judicial Training Network and Member States. We will assess the training needs of the non-judicial users as this project develops. As you know, judicial training is a matter for judges to direct themselves. We will liaise with the Judicial Studies Board in due course to keep it informed of developments.

With regard to funding, some of the initial work on individual projects has been taken forward by Member States themselves. Most of the project work envisaged in the Commission’s Communication will be funded by the Commission. This includes the creation of the e-justice portal and development of translation and interpreting tools. Funding for the additional related projects will be covered either through applications for specific EU project funding or by the Member States. The exact projects to be taken forward are not expected to be clarified until the programme of work for e-Justice is formally adopted.

As there is no compulsion on Member States to participate in all projects each will be able to decide if and how they wish to be involved and how they will want to fund that involvement. The decision about whether or not the UK will fund participation in particular projects will be taken by the appropriate budget holding Department. As not all projects will involve all Member States we believe it is correct for the strategy to focus on those areas where the participation of Member States can be maximised.

To help fund projects recourse can be had to the civil and criminal justice financial programmes. However the application for EU project funding for e-Justice has been made more complicated by the present separate funding frameworks for civil and criminal justice. As e-Justice involves cross cutting projects which do not fit well into this framework the Commission is expected to propose a change to cater for such projects. The Government welcomes this development.

Electronic procedures, processes and information provision developed within e-Justice are designed to supplement, and not replace, non-electronic equivalents. There is no intention to withdraw existing non-electronic channels. In certain areas e-Justice work is directed at making electronic resources more accessible to the non-specialist. The bringing together of various electronic justice resources into the e-justice portal, for example, makes them more accessible to the non-specialist without the need for a manual internet search. The provision of better electronic channels also makes information and processes more easily available to third parties, such as advice providers, who will be able to offer a better service through both manual and electronic channels.

In addition there are a number of initiatives at both the EU and Member State level that are designed to improve access to justice. For example the Commission has published a number of practice guides on EU instruments designed to help people to have a better understanding of these instruments. While they are aimed at legal practitioners they are also available to advice providers and can be obtained as booklets. Copies of a Commission leaflet on the European Judicial Network in civil and commercial matters which gives information on matters of interest to those who might be involved in cross-border litigation have been distributed to UK Citizens Advice Bureaux. Her Majesty’s Courts Service is also currently preparing a leaflet on the use of the European Order for Payment and Small Claims procedures which will be available in courts.

8 October 2008

Letter from the Chairman to Lord Bach

We thank you for your letter of 8 October which was considered by Sub-Committee E at its meeting on 19 November.

We are pleased that the Government shares our support for the creation of an e-justice portal for the benefit of citizens and that its development will not come at the expense of more traditional forms of information dissemination.

After inspection of the EU civil justice website we are confident that it can be a useful tool and hope that it can be further developed.

However, given the current economic conditions, the Committee has concerns about the budgetary implications of the Commission’s aspirations. Whilst the Committee thinks that an e-Justice portal, the interconnection of Criminal records and the facilitation of video-conferencing and translation aids are good in principle, the Committee is concerned that the portal is an ambitious IT project and is likely therefore to be expensive, and that the provision of video-conferencing and translation aids will incur significant cost at national level. We should be grateful for such information on costs as is currently available. Is there a risk that expenditure in the e-Justice area might put pressure on other parts of the JHA budget?

We, therefore, retain the Commission’s Communication under scrutiny.
JUSTICE FORUM (6333/08)

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

I am writing following your letter of 13 March 2008, in which you asked, among other things, for a summary of the first meeting of the European Justice Forum. My officials have already informed the Clerk to your Committee that the meeting originally foreseen for 15 April did not in fact take place until 30 May.

An official from the Ministry of Justice attended, together with a colleague from the Scottish Executive. A copy of the programme of the meeting, which includes a list of the principal speakers, is attached.

The meeting lasted a full day. It was introduced by Jacques Barrot, the Commission vice president responsible for justice, liberty and security, who looked forward to the Forum providing a platform for constructive and regular dialogue between the Commission, European Parliament, practitioners and other stakeholders, and the Member States. The chair of the LIBE committee of the European Parliament stressed the importance of the Forum in creating mutual trust among Member States and thereby facilitating mutual recognition. Jonathan Faull, the Director General responsible for justice, liberty and security in the Commission, explained that the participants – which he termed “representatives of representatives” – had been chosen to keep the numbers manageable.

The organisations listed on the programme were then invited to make short presentations. Notable among these was the speaker from the Council of the Bars and Law Societies of the EU (CCBE), Jonathan Goldsmith, who argued for the setting up of a Justice directorate in the Commission separate from the security function. Others echoed this, arguing that security was sometimes the driver of policy at the expense of justice. This provoked a response from the Commission who saw no inconsistency, and some advantage, in justice and security being dealt with under one roof.

The European Commission for Efficiency of Justice (CEPEJ) – a Council of Europe body – highlighted its statistical studies of justice systems in European countries, something in which you expressed interest in your letter.

Various speakers, including intervenors from the floor, regretted the EU’s failure to agree a measure on criminal procedural rights last year. There were also several observations about the need for suitable mechanisms within the Forum for proper debate and transparency.

The afternoon session included presentations from the Commission and the Member States. A senior official from the Slovene presidency stressed that the Commission need to show it was listening, and that the Forum should not become a burden on Member States. Commission representatives covering criminal and civil justice looked forward towards the Forum’s future work: meetings with smaller numbers of participants according to the subject-matter, are foreseen, starting with a meeting in July on mutual recognition. The longer-term programme has not yet been decided, but a number of speakers stressed the need for decisions about the Forum’s future work to be taken in a transparent and accountable manner. The Commission will reflect on these observations.

This was very much an introductory meeting and the usefulness of the Forum will clearly need to be assessed over time. The Commission have made clear that they intend the Forum to be an additional tool, not a substitute for consultations and discussions with the Member States. Accordingly at this stage I see no reason to depart from the general welcome I gave to the setting up of the Forum in the Explanatory Memorandum of 26 February. Moreover I fully agree with your observations about the need for proper co-operation with the Council of Europe and the CEPEJ in particular, the need for the right experts to attend relevant meetings, and for expenditure to be reasonable. We will, of course, continue to participate effectively in the Forum.

19 June 2008

Letter from the Chairman to Bridget Prentice MP

Thank you for your letter of 19 June 2008 which was considered by Sub-Committee E at its meeting of 2 July 2008.

20 Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 232
Your summary of the Forum’s first meeting was interesting, and we were pleased to see that CEPEJ gave a presentation on its statistical studies of European justice systems. The assurances from the Commission that the Forum is to be an additional tool and not a substitute for consultation are also welcome.

However, we understand that some national bodies, such as the Bar Council, are concerned at having been omitted from the participant list in favour of pan-European representative bodies. Given the broad nature of the first Forum meeting, the decision to limit participation in order to manage numbers was probably justified; but we would hope that future meetings on more specific subjects would involve national as well as pan-European players where they wish to participate. Given that the large majority of EU Member States have civil law systems, pan-European bodies will not necessarily be effective at expressing concerns arising in common law jurisdictions. We note that the Communication envisages input from national, professional organisations “on an ad hoc basis if they so wish” (paragraph 36). We trust that you will press the Commission to ensure that national bodies are involved where appropriate and we welcome in this regard your agreement with our view that the right experts should attend the relevant meetings.

We have decided to clear the Communication from scrutiny.

3 July 2008

JUSTICE: FRENCH PRIORITIES FOR EU JUSTICE

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

I am writing to give you an overview of the French Presidency’s priorities for JHA issues in terms of those dossiers covered by the Ministry of Justice. My colleague Meg Hillier wrote to you on 16 June outlining the Home Office’s dossiers.

As you are aware, until recently, it was expected that the Lisbon Treaty would enter into force on 1 January 2009. Therefore the French Presidency had intended to focus on finalising as many of the outstanding dossiers as possible. They are now examining the implications of the recent Irish No vote for their JHA work programme, but we do not expect a significant change of approach.

In civil judicial co-operation agreement on the proposed Maintenance Regulation will be a priority for the French Presidency. Following on from the compromise package agreed at the June JHA Council we expect the Presidency will be looking for final agreement at the October or November Council. The Government hopes that the removal of the applicable law rules from the text will mean that the UK will be able to participate in the Regulation after it has been adopted.

Following the failure to agree Rome III it will fall to the French Presidency to lead consideration of how to take forward work in choice of law in divorce. In particular Member States will need to decide whether they want to enter into enhanced co-operation. The UK does not intend to enter into enhanced co-operation.

The Commission is expected to issue a proposal to amend the Council Decision which established the European Judicial Network in Civil and Commercial Matters soon and we expect that the French Presidency will try and make as much progress as they can in negotiations.

Work on e-justice, the Common Frame of Reference for European Contract Law and the Ship Source Pollution directive will also continue during the French Presidency. Furthermore we expect the French to pursue work on the European Supervision Order in the latter half of their Presidency.

The Presidency will also initiate debates at the Informal Council in Cannes on improving judicial training in European matters and on action to protect vulnerable adults (particularly encouraging Member States to ratify the Hague Convention on the International Protection of Vulnerable Adults).

3 July 2008

JUSTICE FUTURE GROUP (11549/08)

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

The European Union Committee may wish to take note of the final report of the EU’s Future Group on Justice, a copy of which I enclose.
The Future Group on Justice was a Portuguese Presidency initiative. It consisted of current and forthcoming Presidencies – Germany, Portugal, Slovenia, France, Czech Republic, Sweden and Spain – plus the European Commission. In addition several seats were given to observers – the President of the LIBE Committee of the European Parliament, a representative of the General Secretariat of the Council and a representative of the four Common Law countries – the Irish Attorney General. Its mandate was to provide an informal setting for the discussion of ideas for the future direction of EU Justice and Home Affairs policy.

Simultaneously, a group has been meeting to discuss the Home Affairs element of the EU JHA future work programme. The Attorney General had a seat on that group as observer representing the common law states.

The Justice Future Group has now completed its work, which has just been made public to all Member States and which will be discussed at the Informal JHA Council on 7-8 July. I am sending you a copy of the report for your information. The report will be one of several influences on the Commission as it develops its Communication on the future JHA work programme. I understand that the Attorney General will also be sending a copy of the Home Affairs Future Group report for your information. I hope that there will now be scope for all Member States to contribute to the shape that the new work programme takes.

22 July 2008

JUSTICE: JHA COUNCIL 5-6 JUNE 2008

Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman

I am writing to you about the JHA Council on 5 and 6 June, since it is not possible for Lord Hunt to make his usual written statement to the House due to the timing of recess.

The Council will be held in Luxembourg and the Justice Secretary (Jack Straw), the Attorney General (Baroness Scotland of Asthal), the Parliamentary Under Secretary of State for the Home Office (Meg Hillier) and I will represent the UK.

At the Mixed Committee, also attended by Norway, Iceland and Switzerland, the Presidency will present the state of play of the Second Generation Schengen Information System (SIS II). The Commission will then present a detailed schedule on the implementation of SIS II. Subject to Member States resolving their outstanding issues and lifting their scrutiny reservations, the Council will be asked to adopt the Council Regulation and corresponding Decision on the migration from SIS I and SIS I+ to SIS II. The UK supports the Commission in preparing a robust and evidence based timetable.

The draft Directive on returning illegally staying third country nationals, into which the UK has not opted in, could be voted on by the European Parliament at a mini-plenary on 4 June 2008. If approved by the Parliament, the Directive could then be agreed at the JHA Council on 5 June. In the event that there is no agreed text, other ways of taking this forward may be looked at. Progress on the Directive has been linked to access to the return fund, to which the UK does wish to have access.

There will be discussions on two draft Regulations regarding Schengen visas: Biometric Visas and the Visa Information Systems (VIS). On Biometrics, the Council will consider the main outstanding issues such as age limits, status of the diplomatic premises and nature of co-operation with external service providers. The Council is also expected to consider whether the use of the VIS at the external borders should be compulsory. The United Kingdom does not issue Schengen visas or participate in the EU Common Visa Policy, and therefore will not be participating in the adoption and application of these proposals. However, we welcome the efforts of Schengen Member States in ensuring that the Schengen external EU borders are as secure as possible.

The draft Council Conclusions on external borders are in response to the Commission’s recent triple package of communications on the evaluation and future development of Frontex, the future challenges of EU External Border Management and the creation of a European Border Surveillance System (EUROSUR). Together, these are intended to set the future direction of the work to integrate border management. The UK is generally supportive of the draft Council Conclusions but does, however, have reservations on the aim to secure integrated border management and possible proposals to set up an agency responsible for the long term management of SIS II, VIS and EURODAC. If suitable language can be agreed, the Conclusions may be taken as an A point at the Council.
The original Council Directive for beneficiaries of international protection excluded refugees and beneficiaries of subsidiary protection (known as Humanitarian Protection in the UK) from its provisions. The Commission proposal would extend the scope to include both of these groups. The UK has chosen not to opt-in to the proposed extension as, with the original Directive, we believe it is not in line with our frontiers protocol and wish to determine the status of third country nationals via the Immigration Rules.

Before the last JHA Council, German Ministers signalled an intention to resettle refugees from Iraq, with a particular focus on Christians. There may be a follow-up discussion at this Council, although at this stage Germany has not circulated any firm proposals on this issue to other EU Member States.

The Presidency will be seeking to endorse the general approach concerning the complete Draft Council Decision on the implementation of the Council Decision implementing the Prüm Decision which now includes a Technical Annex. The Government supports adoption of the Prüm Council Decision; the associated implementing Decision and Technical Annex in order to begin the sharing of fingerprint, DNA and vehicle registration data by law enforcement authorities within three years of adoption and publication of the legal texts.

Gilles de Kerchove, the EU counter terrorism coordinator, will present his six-monthly report on implementation of the EU strategy to combat terrorism. The UK warmly welcomes this paper.

The Council will be asked to approve the contents of the EU-Australian Passenger Name Records (PNR) Agreement which will govern the processing and transfer of PNR data held in databases within the EU from air carriers to the Australian Government. The data may only be used by Australia to combat terrorism and serious organised cross-border crime. The UK has lobbied to remove the prohibition in the text on using sensitive personal data but has not received sufficient support to achieve this. We use sensitive personal data under the e-Borders programme and want to be able to use it under the proposed EU PNR legislation too. Helpfully, a Council Declaration has been made which states that the EU-Australia PNR Agreement does not set a precedent for the EU PNR proposal. On this basis, we can agree to the proposed text.

The Presidency will inform the Council about the agreement for a First Reading deal reached with the European Parliament on 21 May on the Directive on the Protection of the Environment through criminal law. The Directive will oblige Member States to criminalise certain infringements of existing Community rules to protect the environment and the Government fully supports it.

The Presidency will provide a state of play report about the proposed Directive on ship source pollution. Discussions on this proposal began in the Criminal Justice Working Group on 3 April.

The Presidency will seek agreement on parts of the Eurojust Decision. Articles 5a (on call co-ordination OCC), 9a-g (powers of the national member conferred to him at national level), 12 (Eurojust national co-ordination system) and 13 (exchanges of information with the Member States and between national members). This set of Articles, particularly Articles 9a-g, is of fundamental importance to the UK and the Government is seeking to ensure that Eurojust national members will continue to have only those powers that would be available to them as domestic prosecutor, police officer or judge.

The Presidency is expected to seek agreement on the draft Framework Decision on enforcement of in absentia judgements. The aim of the Framework Decision is to ensure that citizens who deliberately avoid legal proceedings should not escape the consequences if they move to another Member State. The UK is a co-sponsor of this dossier. The text has improved considerably since it was introduced in January, and we consequently intend to support the Presidency.

There may be a substantial discussion on the proposed Regulation on family maintenance obligations. The Presidency is expected to table a compromise package to seek agreement on specific provisions including the way applicable rules are handled. The UK has not opted-in to this proposal largely because of the implications of such rules.

There will also be a discussion on Rome III (choice of law in divorce). The UK has also not opted-in to the negotiations on this. Following opposition to this proposal from a few Member States it is likely that this proposal, which is subject to unanimity, will be rejected in its present form.

There is also due to be a state of play report on e-justice and a discussion of future work.

The Presidency will raise the implementation of the external strategy in JHA matters. Reports are published every 18 months. The most recent report dated 20 November 2006 concluded that there was no need to review priorities and Member State efforts should focus on delivery of results with a particular emphasis on operational cooperation. The next implementation report is now due.

The eighth meeting of the EU-Russia Permanent partnership Council (JHA) took place on 24-25 April in St Petersburg and a Justice, Freedom and Security Ministerial meeting between Ukraine and the
Troika of the EU will take place 28-29 May in Kiev. A draft agenda has been circulated for this meeting. At the Council, the Presidency will present the conclusions drawn from these meetings.

22 May 2008

JUSTICE: JHA EXTERNAL RELATIONS MULTI-PRESIDENCY WORK PROGRAMME
(10546/08)

Letter from the Chairman to Meg Hillier MP, Parliamentary Under Secretary of State, Home Office

Your Explanatory Memorandum on this Work Programme was considered by Sub-Committee E at its meeting on 8 October. We decided to clear this document from scrutiny.

I should say that we did not find the Programme very helpful; it seems simply to gather together all the ideas currently under consideration at EU level without suggesting any real priorities. However, we thought two points noted on page 14 of the document worth noting: the proposal to develop cooperation with third countries is important, and the encouragement given to the possibility of agreements between Member States and third countries, when the EU does not intend to exercise its competences, is helpful.

14 October 2008

LEGISLATION: INITIATION OF EU LEGISLATION

Letter from Jim Murphy MP, Minister for Europe to Chairman to Sub-Committee E

Following my evidence session to your Committee on 4 June, I promised to write to you with further details on the Government’s position on the current arrangements for initiation of EU legislation, and the changes likely to ensue after implementation of the Lisbon Treaty.

The Committee was interested in exploring some of the reasoning behind the plan to change the right of sole initiative by Member States on JHA issues to require at least a quarter of Member States to put forward proposals, and asked why this was not being extended to other First Pillar issues. The decision to change the current provisions underline the sensitivity of the issues (police and judicial cooperation in criminal matters) concerned, but also reflect the reality of putting together workable proposals from the outset. As I mentioned in my evidence, the best proposals in this field have often been the ones that have been sponsored by a group of Member States. JHA is very much a special case, and will remain so after Lisbon. As far as existing First Pillar policy areas are concerned sole right of initiation rests with the Commission, and the UK supports continuation of this.

I undertook to provide examples of instances where an individual Member State has put forward Justice and Home Affairs initiatives that have not found support from the other Member States. In 2003, a Greek Presidency initiative for a Framework Decision on the application of the principle “ne bis in idem” (double jeopardy) did make some progress, but after lengthy discussions it became clear that unanimity could not be achieved.

A 2004 Belgian initiative for a Framework Decision on recognition and enforcement of prohibitions arising from convictions for sexual offences committed against children suffered from a lack of proper preparation and co-sponsors. The proposal was eventually dropped when it became clear that unanimity could not be achieved (though some elements were incorporated into a related Commission proposal on the exchange of criminal records).

The Committee explored the issue of how far Commission initiatives could come as a surprise to the Government. The UK works closely with Member States and the Commission on forward work programmes, and we make our views on policy and proposals known through the UK Representation to the European Union and other channels. Moreover, the general timescales on initiatives make it hard for the Commission to bounce the Council on specific issues. But it is sometimes the case that internal Commission discussions can lead to formal proposals that differ from Member State expectations. Ultimately, it is up to the Commission, the Council and, in many cases, the European Parliament to work out reasonable compromises.

The Committee asked me about the level of influence of the House of Lords on European legislation. Through the scrutiny process in particular, the Government takes Parliament’s views fully into account when deciding on our stance in European negotiation. The reports of the EU Select Committee can help influence legislation. As well as the success of the Committee’s influence on
mobile phone telephony, I can also point to the Lords Report on the EU strategy on biofuels ‘From Field to Fuel’ (20 November 2006), which advocated the development of a European wide system of evaluation and certification of the lifecycle environmental performance of both imported and domestically produced biofuels. Shortly after the report’s publication the European Commission started to work on such a system, which has now been incorporated into the draft Renewable Energy Directive.

The Committee was interested in exploring the scope for the UK to influence further the Commission’s multi-annual work programme. The Government is proactive in working with the Commission and Member States to ensure a coherent work plan, both at the 5-year and annual levels (the Commission publishes an annual policy strategy that is the subject of scrutiny by the main Committee), and would welcome further interest in this strategic policy work from the Committee.

At the evidence session, the Committee asked me about Commission and EP proposals on regulating the activities of lobbyists. I should like to draw the Committee’s attention to the fact that I have just signed an Explanatory Memorandum on the Commission’s recent Communication on the Voluntary Register and Code of Conduct for Interest Representatives. The document will, of course, be subject to Parliamentary scrutiny.

The Committee asked me for my views on whether the quality of drafting of legislative proposals in Brussels is improving. There has been a great deal of reflection over the years on how to improve quality of drafting of Brussels legislation and valuable work has already been done in elaborating common guidelines on the quality of drafting of EU legislation – underpinned by Interinstitutional Agreements. But there is certainly room for improvement here and the Government will continue to make suggestions to the Commission about how to improve policy development and legislation.

During the evidence session, I mentioned that I had recently visited the Czech Republic for a seminar on better regulation. During my visit, I signed a declaration with representatives of the Czech, Swedish, Danish, Estonian, Dutch and German Governments.

28 June 2008