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 18 May to 24 November 2010.

HOME AFFAIRS
(SUB-COMMITTEE F)

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ASYLUM: LIECHTENSTEIN AND SWITZERLAND (6242)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 30 June 2010.

The Committee has only one issue to raise. Because this revised Decision on conclusion of the Protocol is merely a recasting under the TFEU of the earlier Decision which had the TEC as its Treaty base, and because there is no fresh Commission proposal, we agree that there is no need for a fresh opt-in by the UK if – but only if – it opted in to the earlier proposal for a Decision on conclusion of the Protocol. Paragraph 9 of your Explanatory Memorandum suggests that because “the UK participated in the earlier Council Decision to sign [my emphasis] the Protocol … no further opt-in decision arises ...” The Decisions on signature and on conclusion are separate instruments, each of them requiring a UK opt-in. The UK participation in the Decision to sign the Protocol is in our view irrelevant. We would be grateful for your confirmation that the UK opted in to the earlier Decision on conclusion of the Protocol. Meanwhile we will continue to keep the document under scrutiny.

We would be grateful for your reply within the standard deadline of ten working days.

30 June 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter of 30 June on the above Council Decision. You raised one issue; that of the UK’s Title V opt-in.

In the case of the 2006 proposals for Council Decisions on the Protocol seeking to extend the Dublin Regulation to Liechtenstein, the previous Government considered that there was no discretion as to whether the UK could exercise its opt-in and that it was bound to participate in the proposals. The basis for this view was that the Title V Protocol (then the Title IV Protocol) does not apply to external agreements in respect of which the Union has exclusive competence by virtue of internal instruments, adopted under Title V, into which the UK has already opted. Rather, in this kind of situation the original opt-in precludes any subsequent opt-in and the former decision binds the UK in relation to the legal consequences of the instrument in question.

This practice has been applied in relation to many external agreements since the Title V Protocol was introduced and is also the view held by Ireland.

14 July 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter of 14 July 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 21 July 2010.
We note your view that no UK opt-in to this Decision on the conclusion of the Protocol with Liechtenstein is needed because this is an external agreement in an area in respect of which the Union has exclusive competence by virtue of internal instruments. This is a view held by a number of Government departments – and, you say, by Ireland – though it is not a view this Committee has accepted in the past.

Paragraph 9 of your explanatory memorandum reads (in part):

“The Council Decision to conclude contains a recital (No (5)) which states that the UK is taking part in the adoption and application of the Decision. This reflects that the UK participated in the earlier Council Decision to sign the Protocol on Liechtenstein’s participation adopted on 28 February 2008.”

If the implication is that the United Kingdom is taking part in the Decision on conclusion of the Protocol simply because it took part in the earlier Decision on signature of the Protocol, this is not our understanding of recital (5), which reads in full:

“In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, these Member States are taking part in the adoption and application of this Decision.”

In other words, the view of the Commission and Council is that the United Kingdom is taking part in the adoption and application of the Decision because, and only because, it has opted in under Article 3 of Protocol 21 – or will have done so by the time the Decision is adopted.

Paragraph 9 of your EM continues: “No further opt-in decision arises as a result of this amended proposal.” Does the word “further” imply that there was an opt-in to the earlier Decision on signature? If so, would this not be at variance with your view that no opt-in is needed to Decisions taken in exercise of the Union’s exclusive competence to enter into an agreement with a third country?

We would be grateful for your comments on these points within the standard deadline of ten working days. Meanwhile, we will continue to keep the document under scrutiny.

22 July 2010

Letter from Damien Green MP to the Chairman

Thank you for your letter of 22 July on the above Council Decision in which you returned to the issue of the UK’s Title V opt-in.

You indicate that the Committee does not share the view that when the proposal was first presented in late 2006 there was no discretion as to whether the UK could exercise its opt-in and that it was bound to participate in the proposal. In that regard, to you refer to the terms of the fifth recital to the Council Decision on conclusion of the Protocol. In addition, the Committee questions the reference in paragraph 9 of the EM that “No further opt-in arises as a result of this amended proposal”.

Turning to the terms of the fifth recital to the Council Decision on conclusion of the Protocol, we do not agree with the suggestion that the language used indicates that the Commission and Council’s view is that the UK is only participating because of an opt-in to the proposal for a Council Decision on signature. Indeed we think that the drafting approach taken by the Commission supports our interpretation. In the original proposal, the subject of EM 16406/06, the fifth recital clearly indicates from the outset that the UK and Ireland are taking part. This is consistent with the position that the Union has exclusive competence and is in contrast with the approach taken in the proposal to recast the Dublin Regulation, published in December 2008 (the subject of EM 16929/08), where the recitals do not reflect the UK’s participation, indicating the fresh application of the Title V Protocol (then the Title IV Protocol).

5 August 2010

Letter from the Chairman to Damien Green MP

Thank you for your further letter of 5 August 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 6 October 2010. We are
grateful to you for clarifying that there was not in fact an opt-in to the Council Decision on signature of the Protocol.

We remain of the view that the 5th recital of the draft Decision implies that the UK has in fact opted in. It seems to us that if the Decision automatically extends to the UK, there is no need for a reference to Protocol 21 at all, let alone a reference to Article 3, the provision which allows the UK to opt in. However we note that you differ on this point.

We clear this document from scrutiny. No reply to this letter is needed.

6 October 2010

ATTACKS AGAINST INFORMATION SYSTEMS (14436/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 27 October 2010. We are grateful for the very full Explanatory Memorandum.

Where this draft Directive would require an extension to the criminal law of the United Kingdom jurisdictions, or the addition of an extra-territorial jurisdiction, we believe that these changes are desirable, and that the United Kingdom should opt in to this measure.

We share your view of the undesirability of the final words of Articles 3-5: “at least for cases which are not minor”. These are not words which should have any place in legislation, in particular legislation creating criminal offences. They could, as you say, be implemented by precise provisions of national law, but we believe they would be better removed, and support your intention of doing so during negotiations.

We clear this document from scrutiny. We do not expect an immediate reply to this letter, but would be glad to be informed in due course of the Government’s decision on whether or not to opt in to the Directive. We hope that, if you decide to opt in, you will ensure that the references in recital (17) to Articles 1, 2 and 4 of Protocol 21 are deleted, since it is only under Article 3 that the United Kingdom notifies the President of its wish to participate in the Directive.

27 October 2010

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 27th October 2010, in which you advised me that your Committee had cleared the Explanatory Memorandum on the draft Directive on attacks against information systems.

Subsequent to that letter, the House of Commons European Scrutiny Committee has written to me to ask for clarification on a point of concern on Article 13 of the draft Directive, and I would like to inform your Committee of my response to this concern.

The point of concern relates to Article 13(1)(b) and the potential impact of that Article on UK jurisdiction. I believe that this is a concern, as the Computer Misuse Act (CMA) 1990 legislation requires that the offender or the offence has a link to the UK which is greater than that envisaged in the draft Directive. I also believe that this is the case for Article 13(1)(c). I would not seek to change our existing legislation because I do not believe that the UK would want a reduction to this link. I will ensure that during negotiations the UK seeks further clarity on the meaning of this Article, and in particular what the Article is seeking to achieve, and that we influence the development of the Article in accordance with the needs of the UK.

17 November 2010

Letter from James Brokenshire MP to the Chairman

Further to my letter of 17th November, I write to provide further clarification on three matters of interest to your Committee, following a request from the Clerk to the Committee.

The first point, referring to your response, is concern over the clarity of a phrase used in a number of the Articles in the draft Directive, “at least for cases which are not minor”. Your concern relates to the need for more precise wording in these Articles, as the European Court of Justice will have jurisdiction over them.
I share your concern, and I will ensure that the UK seeks to amend the relevant Articles to remove such imprecise language during negotiation.

Your second point related to whether the UK will opt in to this Directive. We are still considering the Directive, and I will let you know of our decision once we have come to a conclusion.

Finally, in your letter you asked that the references in the Recital to Articles 1, 2 and 4 of Protocol 21 be deleted, as it is only under Article 3 that the UK needs to notify the Presidency of its wish to participate. These references relate to the text to be used in the Recital once the UK has made a decision on whether to opt in. Once the Government has reached a decision on whether to opt in, I will seek to ensure that the relevant text is used.

I am grateful for your comments, and should further issues come to light we will provide an additional Explanatory Memorandum.

24 November 2010

BELGIAN PRESIDENCY PRIORITIES FOR CIVIL PROTECTION

Letter from the Rt. Hon. Baroness Neville-Jones, Minister of State for Security and Counter-Terrorism, Home Office, to the Chairman

I am writing to you as chairman of the House of Lords Select Committee on the European Union to inform the Committee about the Belgian Presidency’s priorities for civil protection. The incoming Presidency envisages 2010 Council Conclusions on: innovative solutions for financing disaster prevention activities; and host nation support for incoming assistance. I append at A for your information a copy of the Belgian Presidency programme for civil protection [not printed].

The work on financial instruments for EU disaster prevention will take a proposal in the European Commission’s 2009 Communication, “A Community Approach on the Prevention of Natural and Man-Made Disasters” and the resulting Council Conclusions and be informed by a European Commission study on integration of existing financial instruments.

Work on host nation support to improve cooperation on in-coming assistance will consider logistics, liabilities and legal and financial issues.

Time permitting, the Belgian Presidency plan to work on consular assistance, building on an EU-funded project “Concept for European Support for Evacuation, Reception and Movement” led by Sweden and Germany.

The Belgian Presidency will also take forward work on guidelines for national risk assessment, the Critical Infrastructure Warning Information Network, and on implementation of the European Programme for Critical Infrastructure Protection Directive.

19 August 2010

ENISA: EUROPEAN NETWORK AND INFORMATION SECURITY AGENCY (14358/10, 14322/10)

Letter from the Chairman to Edward Vaizey MP, Minister for Culture, Communications and Creative Skills, Department for Business, Innovation and Skills

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 3 November 2010.

The Committee welcomes these proposals and notes that a number of the recommendations contained in its report Protecting Europe against large-scale cyber-attacks (5th Report of Session 2009–10, HL Paper 68) have been addressed.

One of our recommendations (paragraph 111 of the report) was that ENISA’s mandate should be extended to matters such as police and judicial cooperation over criminal use of the internet. Article 3(1)(h) of the draft Regulation would extend the mandate to exchanges of good practice on certain aspects of the fight against cybercrime. This goes only a little way towards meeting our recommendation. You will know that, in replying to the debate on this report on 14 October 2010, Baroness Neville-Jones agreed that ENISA “potentially has useful roles in the area of crime prevention and of linking up, in the cyber-area, the role of other agencies such as Europol, and of making them
more powerful and effective.” This goes further towards meeting our point, and we hope that the Government will pursue this strongly during negotiations on the draft Regulation.

As we pointed out in our report, this can only be done if the legal base is extended to cover what previously were third pillar matters. The sole legal base of the proposed Regulation is Article 114 TFEU, the successor of Article 95 TEC which is the legal base of the current Regulation. We would be glad to know your view on this.

We remain concerned about the problems caused by the location of ENISA in Heraklion. We appreciate that nothing can be done to change this, but hope that the Government will press for the facilities in Athens to be improved and used as much as possible.

We clear from scrutiny the draft Regulation extending the duration of ENISA’s current mandate (document 14322/10), but are keeping under scrutiny the draft Regulation extending its mandate (document 14358/10).

We would be grateful for your reply within the standard deadline of ten working days.

3 November 2010

Letter from Edward Vaizey MP to the Chairman

Many thanks for your letter of 3 November. You raised a query regarding the legal basis of ENISA, specifically concerning its validity should the Agency’s mandate be extended to cover cooperation and assisting the Commission on policy areas covering cybercrime.

Undoubtedly ENISA has a potential role in supporting network and information security policy where this can enhance judicial cooperation over criminal use of the internet and the fight against cybercrime, especially in linking up different agencies who have a stake in cyber security, such as Europol – as you originally suggested in your recent report on “Protecting Europe against large-scale cyber-attacks”. This role will need to be clarified during negotiations on the new Regulation.

I am now also more convinced that the most important question in the negotiations will be establishing the case for increased resources and how that connects to our wider interests in the EU budget as a whole. I am hopeful that the Telecoms Council may present an opportunity to press Greece on how to ensure that a more focused Agency can overcome the drawbacks of the current seat.

As a consequence of extending the Agency’s tasks to cover the fight against cybercrime you have rightly drawn attention to the fact that the legal base of the Agency may need to be extended in order to cover what were previously third pillar matters. Following advice from lawyers, I believe this not to be the case. This is because, although coordinating policy on cybercrime will be a new and important task for ENISA, it is incidental to the main objective of the Agency – which remains the overall enhancement of network and information security. Therefore only the legal base for ENISA’s main objective is required for the new Regulation, which is Article 114 TFEU (the successor to Article 95 TEC).

I would like to thank the Committee for their ongoing interest and thoughtful input into the future of the Agency – for one so small it has certainly generated a lot of interest, and rightly so.

24 November 2010

EUROPEAN REFUGEE FUND (9906/10)

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

I am writing to update the Committee on developments on the Commission Proposal for a Joint European Resettlement Programme and its funding under the European Refugee Fund.


The aim of the proposal is to establish a European resettlement programme for the period 2008-2013 which will provide additional financial support to Member States resettling persons in accordance with annually identified common EU-level priorities building on the existing ERF decision 573/2007/EC. The envisaged EU resettlement programme is intended to encourage more Member States to participate
The European Parliament's position at first reading is that the categories of individuals for resettlement funding should be set in the legislative act; and that the delegated acts procedure set out in Article 290 TFEU should be used for the priority setting exercise (see European Parliament amendments 1, 3 and 5-11). The categories specified by the European Parliament also differ from the four categories already established in the ERF and include “survivors of violence and torture”, and “persons in need of emergency or urgent resettlement for legal and protection needs”, but do not include the category of individuals from Regional Protection Programmes.

Under the delegated acts procedure the European Parliament or the Council are able to revoke the delegation of powers to the Commission or object to the delegation, which would mean that it would not enter into force (the effect of which would be that annual priorities, and the associated funding for Member States which would flow from that, would not be established for the coming year).

The European Parliament supports this as a means to encourage wider participation by Member States in resettlement, provided that it does not decrease the amount available to Member States that already resettle (including the UK) or increase in the overall financial envelope of ERF beyond current projections.
Neither the European Parliament nor the Council has been willing to move on this issue given the precedent that would be set. The incoming Belgian Presidency has indicated that they do not expect to make progress on this dossier during their Presidency.

I will keep the Scrutiny Committees informed of any further substantive developments in this area. This will include the outcome of the feasibility study and any legislative proposal.

28 June 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter of 7 January 2010. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 21 July 2010.

We are grateful to you for informing us of the state of play of negotiations in the Parliament regarding the proposal and note the details of the disagreement between the Council and Parliament regarding the preferred mechanisms for the operation of the annual priority-setting exercise.

The Committee hopes that a satisfactory outcome can be achieved as soon as possible in relation to this situation and is confident that the Government will work towards this objective in the Council. In the meantime, the Committee will look forward to receiving further updates on any subsequent developments concerning this matter.

No reply to this letter is expected.

22 July 2010

EU COUNTER TERRORISM: MAIN ACHIEVEMENTS AND FUTURE CHALLENGES

(12653/10)

Letter from the Chairman to the Rt. Hon. Baroness Neville-Jones, Minister of State for Security and Counter-Terrorism, Home Office

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 13 October 2010.

The Committee notes the content of the above document and is grateful for the comprehensive Explanatory Memorandum which has been provided. The document is particularly useful in advance of the Committee’s forthcoming inquiry into the EU Internal Security Strategy and we will take into account the Government’s concerns about specific proposals during that inquiry.

Significant elements of the document have already been, or are, subject to scrutiny by the Committee. However, we will also look forward to considering the new proposals as and when they are brought forward by the Commission and deposited for scrutiny.

In the meantime, the Committee is content to clear this document from scrutiny.

No reply to this letter is expected.

13 October 2010

EURODAC: COMPARISON OF FINGERPRINTS (14919/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 3 November 2010. We are grateful for the full and prompt EM.

In my letter to your predecessor of 29 October 2009 I explained how unhappy the Committee were with the Commission’s proposal that the data in EURODAC, collected for the particular purpose of determining jurisdiction for hearing asylum applications, should be used for the wholly different purpose of general law enforcement. We are therefore more than happy to see that the Commission have dropped this proposal – albeit because of the delays in negotiations rather than for reasons of principle – and are reverting to something closer to their first draft of December 2008.

I stated in my letter of 29 October 2009 that we thought there was no need for the United Kingdom, having opted in to the December 2008 draft, to opt in again to the draft of September 2009; its title stated that it was an amendment of the first draft, it was drafted as such, and its provisions were in
substance the same. However your predecessor (and the Commission, and the Council Legal Service) took a different view, and the Government opted in a second time. In paragraph 9 of your EM you suggest that a new decision is needed on whether to opt in a third time, despite the fact that the third draft is (apart from the legal base) very similar to the first. This is the opposite of the line you have taken on the draft Regulation establishing an IT Management Agency, where you (again with the Commission, and the Council Legal Service) have argued that an earlier opt-in continues to be valid for a later draft of the Regulation even though it is very substantially different from the first draft. We would be glad to have an explanation of these apparent contradictions.

Since EURODAC is an integral part of the Dublin system, in which the United Kingdom has always played an active part, we assume that the United Kingdom will wish to continue to be bound by the EURODAC Regulation as amended. If you are of the view that this requires a UK opt-in, we assume that you will be opting in. We would be glad of your confirmation that this is so.

We would be grateful for your reply within the standard deadline of ten working days. In the meantime we will keep this document under scrutiny. However we clear from scrutiny the second draft of the Regulation (document 13262/09) and the Decision (document 13322/09) which are now both superseded.

03 November 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter of 3 November regarding the above proposal. You raise the issue of the applicability of the opt-in and suggest that there is an inconsistency between our view that it applies in this case, but not in the case of the draft Regulation establishing an IT Management Agency (document 8151/10).

Our view is that although the IT Management Agency proposal presented in March 2010 included extra elements, these were not elements within Title V of the Treaty on the Functioning of the European Union (TFEU) to which the UK’s opt-in Protocol applied; rather they were Schengen elements and as such fell outside the scope of the Title V TFEU opt-in Protocol. In contrast the changes to the proposed EURODAC Regulation compared to the earlier version presented in September 2009 (document 13263/09) are wholly within the scope of Title V TFEU, meaning the opt-in was triggered. Neither the European Commission nor the Council Legal Service have expressed a view that our opt-in does not apply to this, the third recast of the EURODAC proposal.

I will, of course, write to inform the Committee of the Government’s decision whether or not to opt in to the proposal within the appropriate time limit.

19 November 2010

EUROPEAN DISASTER RESPONSE: THE ROLE OF CIVIL PROTECTION AND HUMANITARIAN ASSISTANCE

Letter from the Rt. Hon. Baroness Neville-Jones, Minister of State for Security and Counter-Terrorism, Home Office, to the Chairman

The European Commission has issued a Communication making proposals to strengthen European disaster response arrangements in the fields of both civil protection and humanitarian assistance.

I enclose a draft Explanatory Memorandum on the Communication’s proposals. This has been prepared in consultation with Government Departments and the Devolved Administrations.

The Belgian Presidency envisages Council Conclusions for December 2010. The Government will press the Presidency for Conclusions which are purely procedural at this stage so as to ensure that Council Working Parties have the chance fully to deliberate on the Commission’s substantive proposals.

This approach may enable Parliamentary Scrutiny of the Communication to inform the Government’s approach to the Commission’s detailed ideas and to any resulting Council Conclusions.

16 November 2010
EU – US DATA PROTECTION

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

I am writing to inform the Committee that the European Commission has published a draft negotiating mandate for the proposed agreement (named above) between the European Union and the United States of America. Unfortunately, I am unable to share the draft negotiating mandate with the Committee as it is a confidential document restricted to the Council.

Both the European Council and the European Parliament had asked the Commission to produce a recommendation for an EU-US data protection Agreement. In the Stockholm Programme the European Council invited the Commission to propose a “recommendation for the negotiation of a data protection and, where necessary, data sharing agreement for law enforcements purposes with the US, building on the work carried out by the EU-US High-Level Contact Group on data protection.” The European Parliament has called for an EU-US agreement ensuring adequate protection of civil liberties and personal data: most recently in the recommendation of the Committee on Civil Liberties, Justice and Home Affairs of 5 February 2010.

The Commission has brought forward the proposed Agreement under Articles 16 and 216 of the Treaty of the Functioning of the European Union (TFEU), which means that the UK’s opt in Protocol will not apply to it. This Agreement itself will not impose any substantive obligations to exchange data for law enforcement purposes: its effect will be that where data transfers take place under some other subsequent relevant agreement falling within Title V of the TFEU, the data protection requirements in this Agreement will govern those transfers. The UK’s opt-in will apply to any such Title V instrument.

The Government strongly supports the proposed Agreement and shares the Commission’s goal of ensuring a high level of protection of the personal information that is transferred as part of transatlantic cooperation in criminal matters. However, we will want to ensure that the terms of the Agreement do not go beyond the EU’s competence. In particular the Agreement should not attempt to define national security or apply to existing bilateral arrangements.

The intention of the agreement is to bridge the gaps and remove uncertainties between the EU and US data protection laws and practices through enforceable data protection standards and establish mechanisms for implementing them effectively. This would imply placing some limitations or restrictions on the rights of data subjects, which due to the specific characteristics of the matter, should be limited to criminal and judicial proceedings. The agreement also aims to provide a clear and coherent legally binding framework of personal data protection standards that must be met when personal data is transferred between the EU and US for these purposes.

The agreement would not remove the requirement for a specific legal basis for transfers of personal data between the EU and the US.

The Commission hope that the Justice and Home Affairs Council will agree the mandate in October. I will write to update you once that happens.

22 July 2010

Letter from the Chairman to the Rt Hon Kenneth Clarke MP

Thank you for your letter of 22 July 2010. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 6 October 2010.

We are most grateful to you keeping us informed on the progress of the proposed EU-US agreement on data protection, and for providing us with an overview of its scope. We note that the Justice and Home Affairs Council will be considering the draft negotiating mandate this week.

We quite understand that this mandate is confidential, and that you are unable to share it with us. At the same time I am sure you will agree that it is unsatisfactory that this Committee should only get sight of an agreement of this importance once it has been agreed between the parties. The European Parliament take the same view, and you will remember that in the case of the EU-US TFTP agreement they declined to give it their consent, so that the agreement had to be renegotiated. We hope the Government may be able to help achieve a greater degree of transparency in the negotiation of such agreements.

For the present, we look forward to considering the terms of this agreement once it is finalised and appended to a draft Council Decision on its signature.

No reply to this letter is expected.
Letter from the Chairman to James Brokenshire MP, Parliamentary Under-Secretary of State, Home Office

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 30 June 2010.

We agree that the proposed IT management agency would be a useful development, and that the United Kingdom should play a part in it. We believe however that the proposal put forward by the Commission will not have the effect it seeks to have in the United Kingdom. We further doubt whether the manner in which the Government has exercised the United Kingdom’s opt-in will have the result which the Government and the Commission intend.

The proposed management agency would manage three IT systems. Of these one (EURODAC) is already operational and applies to the UK for all purposes, one (SIS II) will apply for law enforcement purposes but not for immigration and asylum purposes, and one (VIS) will not apply at all. We are faced again with a proposal which attempts to treat in a single measure different matters, some of which affect the United Kingdom and some of which do not. You may remember that in December 2008 the Commission put forward a proposal for the codification of three measures, one of which applied to the United Kingdom in its entirety, one in part, and one not at all. We explained in our report The United Kingdom opt-in: problems with amendment and codification (24 March 2009, 7th Report, Session 2008-09, HL Paper 55) that such a measure was not possible, and the Commission did not attempt to proceed with it. We believe that situation has many parallels with the one now facing us.

As you know, the proposed Regulation now under scrutiny replaces two earlier proposals. The earlier Regulation, proposed by the Commission in June 2009, covered only EURODAC, the first pillar aspects of SIS II in which the UK does not participate, and the first pillar aspects of VIS in which the UK likewise does not participate. This was the proposed Regulation which the Government opted in to by the Permanent Representative’s letter of 23 September 2009. The other earlier proposal was for a third pillar Decision covering those law enforcement aspects of SIS II in which the United Kingdom does participate, and the law enforcement aspects of VIS in which the United Kingdom does not however participate. In the case of the Decision the question of opting in did not of course arise since, if it had been adopted at all, this would have been by unanimity.

The Permanent Representative’s letter dealt with a proposal dated June 2009 made under Treaty provisions which have since been repealed and replaced. The letter did not deal with the matters contained in the Commission’s proposed third pillar Decision because the Decision applied to the United Kingdom automatically, and was not subject to the opt-in.

Article 3 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice is in our view unequivocal. It deals with specific proposals, and allows the United Kingdom “to take part in the adoption and application of any such proposed measure.” The implication is that it takes part in the adoption and application of the measure as a whole, or not at all. This is the view expressed by Vice-President Wallström in a letter to me of 28 October 2009, responding to our report of March 2009, where she said:

“The Commission considers that by opting into a measure, UK accepts the measure as a whole. The opt-in system has never, and should never be seen as giving the Member States that are within that system the possibility of ”cherry picking”. Therefore, the UK will be bound by all the provisions of the amended version of the Dublin Regulation.”

In our view the converse of this is that it is not possible for the Commission to treat an opt-in made by the United Kingdom to a whole measure as valid for some purposes but not others, as it attempts to do in recital (24) of the proposal. Nor do we see in this provision any suggestion that an opt-in to one proposal can be treated by the EU institutions as an opt in to a subsequent proposal containing different legal provisions.

We understand from your officials that the United Kingdom did not exercise its right to opt in to the proposed Regulation, because you, like the Commission, believed that the opt-in exercised by the letter of 23 September 2009 sufficed as an opt-in to the new proposal. We are not persuaded by this view. The proposal made by the Commission on 19 March 2010, though described as an “amended proposal”, deals with matters specifically excluded from the earlier proposed Regulation, and should in our view have been treated as a fresh proposal requiring a fresh opt-in if the United Kingdom
wished to take part in its adoption and be bound by it. We believe that your not having exercised the United Kingdom’s opt-in afresh has the result that none of the provisions of the new proposal will apply to the United Kingdom. The unfortunate consequence, in our view, is that the United Kingdom can play no part in the setting up or running of the proposed IT management agency.

There is in addition the question of legal certainty. People should be able to see from the text of the Regulation which provisions apply to them and which do not, and should not have to attempt to deduce this from a long and complex recital. By way of example, someone reading Article 25 of the proposed Regulation may be gratified to know that information processed by the agency is subject to EU data protection law, until he begins to wonder whether his personal data recorded on the visa information system are protected in the United Kingdom, where (according to recital (24) of the Commission proposal) the Regulation does not apply in relation to VIS.

It is clear that the Commission and the Member States, including the United Kingdom, would like the United Kingdom to be involved in some aspects at least of the setting up and running of the management agency. We agree that this is desirable. We believe it could be achieved by the Commission bringing forward a fresh proposal which applied to the United Kingdom in its entirety (once it had opted in). Where there are aspects of the running of the agency which the Member States believe the United Kingdom should not take part in, the articles of the Regulation dealing with those matters would simply say so. This would be no more than an extension of provisions like the current Article 11(3) which provides (rightly or wrongly) that the United Kingdom member of the Management Board cannot be its Chairman.

Because this suggestion could only be taken forward by the Commission, I am copying this letter to Commissioner Malmström, in the hope that she may regard it as a constructive suggestion for overcoming these difficulties.

There is a further issue arising on the United Kingdom opt-in: the date by which it needs to be exercised. The Protocol states that this must be “within three months after a proposal or initiative has been presented to the Council”. The proposal from the Commission is dated 19.3.2010, but the document issued by the Council is dated 30 March 2010. It is usual for there to be a gap between the dates of the Commission and Council documents, though it is not often so large. We asked your officials whether they regarded 19 March or 30 March as the date which triggered the start of the three months. They replied that the Council Secretariat treated the proposal as having been presented to them on 21 March, making 21 June the last date for exercising the UK opt-in. We do not know on what basis this date was chosen. We believe that a date from which many important consequences flow, including the parliamentary procedure under the House of Lords Resolution of 30 March 2010 on opt-in scrutiny, should be readily discoverable. This proposal also affects the Ministry of Justice and some other departments. We would be grateful if the Government would agree with the Council Secretariat a method for identifying the relevant date which will apply in all future cases where the United Kingdom can exercise an opt-in. This date should appear on the face of the document.

The Committee is keeping this document under scrutiny. We clear from scrutiny the earlier draft Regulation and Decision, and the accompanying Communication (documents 11709/09, 11722/09 and 11726/09), which are superseded.

We would be glad to receive a reply to this letter within the standard deadline of ten working days.

30 June 2010

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 30 June regarding the UK’s participation in the above proposal. I agree that the creation of this agency (“the IT Agency”) would be a useful development and that the UK should play a full part in it. I am therefore pleased to confirm that the Government has decided to participate fully and I will explain in this letter how we will achieve this.

As your letter acknowledges, both the original proposals for a Regulation and a Council Decision in 2009, and the amended proposal for a Regulation in 2010, raised complex legal and practical issues as a result of the variable degree of the UK’s participation in the IT systems to be managed by the IT Agency. As a result, and following presentation of the amended proposal, UK officials met with Council officials to discuss the issue of the UK’s participation. The outcome of these discussions was an agreement that:

— The UK remained bound by its opt-in to the earlier proposal for a Regulation in respect of EURODAC and any future systems the UK chooses to participate in;
The UK was bound by the elements of the proposal relating to the police and judicial cooperation aspects of the second generation of the Schengen Information System ("the SIS II"), but, under Article 5(2) of the Schengen Protocol, had the right to opt out of these if it decided to do so and conveyed this by 21 June 2010.

The UK was not able to participate in the elements of the proposal relating to the Visa Information System ("the VIS") and the parts of the SIS II which build upon the part of the Schengen acquis in which the UK does not participate (i.e. the non-police and judicial cooperation part), as per recital 25 of the original proposed Regulation (Com (2009) 293).

To overcome the legal and practical complexities, it was suggested creating a Council Decision based on Article 4 of the Schengen Protocol. Article 4 provides that the UK (and Ireland) may at any time request to take part in some or all of the provisions of the Schengen Acquis. The proposed Council Decision would treat the IT Agency Regulation as already part of the Schengen Acquis and provide that the UK was taking part in it. Whilst this would represent a nominal extension of our involvement in Schengen – in that we would participate in the IT Agency and its functioning – it would not mean that we were participating in other aspects of the Schengen Acquis in which we do not wish to participate (e.g. on visas or on external border controls). This mechanism achieves the outcome we want and allows flexibility in the use of the Schengen and Title V opt-ins which is in the UK interest. We also believe this solution will provide legal certainty and transparency, two issues which you raise in your letter.

In order to implement this solution, the Council Decision would need to be agreed by the Council in a unanimous decision. The upcoming Belgian Presidency indicated that it supports this approach and Member States in the Council are not expected to oppose it.

The Government has decided that it would be in the UK’s best interests to seek to participate on these terms to ensure the UK is a full participant in the IT Agency and its activities. The reasons for this are the same as those for which the UK decided to opt in to the original proposal: by doing so we would be protecting the UK’s position vis-à-vis the European IT systems we participate in currently and in the future; and we would also be supporting more effective management of European IT systems.

We have also indicated to the Belgian Presidency and the Commission that we wish to pursue the solution set out above to create a Council Decision allowing the UK to participate, for the purposes of this proposal, in the non-police and judicial cooperation aspects of the Schengen acquis. The UK’s Permanent Representative to the EU will be writing to the President of the Council of the European Union to this effect. It will be deposited for scrutiny as soon as it is published and we anticipate that it will be presented for adoption in parallel with adoption of the Regulation, which is scheduled to be considered by the October JHA Council. The Presidency has indicated that it wishes to secure a Council common position on the text of the Regulation in October.

Your letter specifically raises a concern about the fact that the UK did not exercise its right to opt in to the amended Regulation presented in March 2010. That is because it was determined that the proposal was not a new proposal (which required a fresh opt-in decision), but simply a recasting of the previous proposal. That is clear from the terms of the proposal, the recitals of which record the UK’s opt-in to the original proposal and make clear that the UK remains bound by that opt-in decision. Furthermore, and in any event, the amendments to the proposal fall out with the scope of the Title V opt-in, relating as they do to the provisions of the Schengen acquis.

Finally, your letter raises a question about the relevant date for the purpose of triggering the three month period during which the UK may decide to opt in to a proposal under Protocol 21. That is obviously also relevant for the purposes of the eight week period provided for scrutiny. I will write separately on that point, which is not specific to the IT Agency, and which you acknowledge in your letter is a matter of interest to other Government Departments.

21 July 2010

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 21 July 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 6 October 2010.

Your letter was in reply to mine of 30 June. If, as I requested, your reply had been received within the standard deadline of ten working days, the Committee could have considered it at its meeting on 21 July, the last before the summer recess. I appreciate that the issues are complex, but it is unfortunate that the Committee has had to wait a further eleven weeks.
You will recall that I sent a copy of my letter to Cecilia Malmström, the Commissioner for home affairs. I enclose a copy of the reply she sent me, which you may find of interest.

We note your view that the United Kingdom opt-in to one of the two previous proposals on 23 September 2009 constitutes a valid opt-in to the amended proposal, despite the major differences between the two. We remain of the view that this is highly doubtful, but since it appears that the Commission and Council legal services are both satisfied, we do not intend to pursue this point.

In your letter you say that you will write separately on the issue of the relevant date triggering the three months within which the United Kingdom must opt in to a proposal. I have not so far received a letter from you on this. As you say, it is a general issue affecting other proposals and other departments. I know that the Clerk to the Sub-Committee has been discussing this with your officials and those of the Ministry of Justice so that we can agree a draft Code of Practice which I can put to the Select Committee for their agreement. Perhaps this is the best forum in which to pursue this issue.

We have considered carefully the course suggested by Council officials for dealing with the problems we have raised. You say that this is designed "to overcome the legal and practical complexities". We have not of course yet seen a draft of the proposed Council Decision, but we think that, on the contrary, this course will do little to deal with the practical complexities, and will make the legal issues even more complex than they already are. The idea that the United Kingdom should for the first time take part in what previously were first pillar parts of the Schengen acquis, even if only for these limited purposes, seems to us to be very artificial.

The European Parliament, though it would play no part in the adoption of a Council Decision under the Schengen Protocol, will of course have to consent to the Regulation. You will be aware of the views of Carlos Coelho MEP, the rapporteur of the LIBE Committee. The first of his proposed options is to reject the Commission proposal altogether and replace it by separate but interrelated measures setting up the management agency and then allocating to the agency the powers to deal respectively with the running of EURODAC, SIS II and VIS. It would then be easy to make clear which of these measures applied to the United Kingdom and to what extent, and what powers it should have in relation to each. It seems to us that this proposal, which is very much on the lines suggested in my last letter to you, has considerable merit and would indeed provide the legal certainty and transparency which in our view the Council proposal conspicuously lacks. We would be glad to have your views on this.

We are continuing to keep this document under scrutiny. We would be glad to receive a reply to this letter within the standard deadline of ten working days.

6 October 2010

Letter from the Chairman to James Brokenshire MP

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 3 November 2010. The Committee also considered your letter of 18 October 2010 which, though relating to the Regulation, explains the interaction between the two instruments, for which I am grateful. We are also glad to have seen the letter of 5 October from Sir Kim Darroch to the Presidency requesting the United Kingdom’s participation in provisions of the Schengen acquis.

As you rightly say in your letter, we thought that the proposed solution would do little to deal with the legal complexities; the idea that the United Kingdom should take part in what were previously first pillar parts of the Schengen acquis for these limited purposes seemed to us artificial. Now that we have had an opportunity of seeing the text of the draft Decision we accept that it is a viable solution to the problem, and no more complex than is inevitable in the current situation. We do not yet know what view is taken by the Commission or, more importantly, by the European Parliament, but we are satisfied that it is probably as good a solution as can be found. It is certainly greatly preferable to what was proposed by the Commission in March 2010.

If this solution is adopted, there will have to be corresponding amendments to the Regulation. The current recital (24) will, we assume, be deleted, but we would like to know what will be substituted for it, and what cross-references will be made to the Decision to clarify the purposes for which and the extent to which the Regulation will apply to the United Kingdom. We know that it is hoped that both the Regulation and the Decision will be agreed, at least in outline, at the JHA Council on 2-3 December. We are aware that these are matters which have been discussed by the Working Party for Schengen Matters (Acquis), and elsewhere. Before clearing these documents from scrutiny it would be helpful to see what amendments it is intended to make to the Regulation, and to have your comments on them.
We would be interested to know whether Ireland which, so far as we are aware, did not opt-in to the Regulation, has made a similar request for a Council Decision, and whether it is satisfied with the current recital (25).

We agree with you about the importance of maximising the United Kingdom’s participation in the Agency, and support you in your attempt to clarify Article 13(3).

Paragraph 18 of your EM gives your reasons for believing that the proposal complies with the principle of subsidiarity. These reasons seem to us to relate to the Regulation and are largely taken from your EM on the Regulation. It is clear from Article 3 of Protocol 2 on the Principle of Subsidiarity that the draft legislative acts to which the Protocol applies do not include a Council Decision under the Schengen Protocol.

We have already agreed that we must differ from you on whether the United Kingdom’s opt-in in September 2009 to the former proposal for a Regulation continued to be valid in relation to the very different proposal put forward in March 2010. But I wonder how this can be reconciled with your view, apparently concurred in by the Council and Commission, that three successive opt-ins were needed in the case of the draft Regulations on EURODAC even though those proposals were very similar (especially in the case of the first and the last). I have made the same point in my letter on those proposals. We look forward to hearing your views.

We would be glad to receive a reply to this letter within the standard deadline of ten working days.

3 November 2010

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 3 November regarding the above proposal. You raise several additional points to which I would like to respond.

I am pleased that having had the opportunity to consider the proposed Council Decision which will enable full UK participation in this proposal your Committee has agreed that this is a viable solution to what is a complex problem. You are right to say that Recital 24 of the Regulation will need to be changed if this solution is adopted. Indeed, subsequent to my last letter to you, on 25 October the Commission produced an amended text of Recital 24 which I am happy to share with you. I am content that this new text describes accurately the nature of the UK’s participation in the proposed Regulation and that the Regulation is now consistent and compatible with the Council Decision. The new text follows:

“Insofar as its provisions relate to SIS II as governed by Council Decision 2007/533/JHA, the United Kingdom is taking part in this Regulation in accordance with Article 5(1) of the Protocol No 19 on the Schengen acquis integrated into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000, concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

Insofar as its provisions relate to SIS II as governed by Regulation (EC) No 1987/2006 and to VIS, which constitute developments of provisions of the Schengen acquis in which the United Kingdom does not take part in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, the United Kingdom requested, by letter of 5 October 2010 to the President of the Council, to be authorised to take part in the adoption of this Regulation, in accordance with Article 4 of the Protocol on the Schengen acquis integrated into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. By virtue of Article 1 of Council Decision XXX, concerning that request of the United Kingdom of Great Britain and Northern Ireland, the United Kingdom has been authorised to take part in this Regulation.

Furthermore, insofar as its provisions relate to the provisions of Eurodac, by letter of 23 September 2009 to the President of the Council, the United Kingdom has notified its wish to take part in the adoption and application of this Regulation, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. The United Kingdom therefore takes part in the adoption of this Regulation, is bound by it and subject to its application.”

You ask in your letter about the position of Ireland in relation to this proposal. My understanding is that because Ireland did not opt-in to the Title V elements of either the pre or post-Lisbon Regulation, it cannot participate in the proposal at the stage of adoption. I do not know whether Ireland will seek to participate post- adoption, and if so, by what means.
I am grateful for your statement of support regarding our attempts to maximise the UK’s participation in the Agency and in particular to seek clarification of the UK’s voting rights in the Agency’s management board. I am pleased to be able to tell you that following further negotiation by UK officials, the Commission has now agreed that a recital should be included to support and clarify the text in Article 13 (3) of the Regulation clearly setting out the extent of these rights. As well as extending to us the right to vote on the systems in which we already participate (EURODAC and the Schengen Information System), this will include the right to vote on any new system we decide to participate in, even if we do so after the instrument creating it has been adopted. The text of this recital follows:

Member States not participating fully in the provisions of Schengen acquis concerning the IT systems should have voting rights in the Management Board of the Agency if they are bound by at least one legislative instrument setting up the IT system, notably Council Decision 2007/533/JHA for SIS II, and Council Decision 2004/512/EC and Regulation 767/2008 for VIS. As regards Eurodac and other future IT systems to be set up in application of the provisions of Title V TFEU, Member States should have voting rights concerning the relevant system if they are bound by one of the legislative instruments setting up that system.

You ask about the differences, or similarities, between the opt-in to the IT Agency proposal and the opt-in to the proposed EURODAC Regulations. Our view is that although the March 2010 IT Agency proposal included extra elements, these were not Title V elements to which the UK’s opt-in protocol applied; rather they were Schengen elements and as such fell outside the scope of the Title V opt-in protocol. Conversely, the changes to the proposed EURODAC Regulations were to the Title V elements, meaning an opt-in was triggered.

Finally, an updated version of the Regulation has not yet been produced. The version of the Regulation I attached to my letter to you of 18 October therefore remains the most up to date. I will ensure that once an updated version is produced, you receive it as soon as possible.

10 November 2010

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 10 November 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 24 November 2010.

We are particularly glad to see the revised recital (24) which takes account of the changes made by the Council Decision. The effect of the Commission’s draft had been that the United Kingdom was opting in to the Regulation for some purposes but not others, something which in our view was impossible under Article 3 of Protocol 21 and was also incompatible with the Commission’s own view as previously given to us in Vice-President Wallström’s letter of 28 October 2009 replying to our report of March 2009. The revised text as set out in your letter in our view accurately explains the situation, making it clear that the United Kingdom is opting in to the whole Regulation.

We are also glad to see the recital which you have negotiated to clarify Article 13(3) and the voting rights of the United Kingdom in the Management Board.

As to the differences between your policy on opting in to this Regulation and opting in to the proposed EURODAC Regulations, we note your arguments. We are not persuaded by them, but believe further debate on this is not necessary.

It seems to us that the failure by Ireland to opt in or to seek a Decision similar to that sought by the United Kingdom will mean that they have no formal involvement in the management of these databases, and that this may cause them problems.

These documents, and the earlier drafts, have raised important issues on the United Kingdom’s opt-in, and in particular the relationship between Protocols 19 and 21. We are grateful to you, your predecessor and your officials for having dealt with the many questions we have raised over the last 18 months. We now clear both documents from scrutiny. We would be grateful to receive in due course future texts of the Regulation, and to be informed of the progress of negotiations.

24 November 2010
GEORGIA: READMISSION OF PERSONS RESIDING WITHOUT AUTHORISATION
(9464/10, 9465/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered these documents at a meeting on 30 June 2010. The Committee believes that the United Kingdom should have the benefit of the agreement, and hence should opt in to both Decisions.

In the case of previous readmission agreements, the recitals in the Decision on conclusion of the agreement have stated that the United Kingdom has opted in but that Ireland has not. However this has not always been reflected in the text of the agreement itself. In both of these draft Decisions the recitals are drafted on the assumption that the United Kingdom will opt in, but that Ireland will not. However Article 1(d) of the agreement provides:

“'Member State' shall mean any Member State of the European Union, with the exception of the United Kingdom, Ireland and the Kingdom of Denmark”,

and Article 21(2) provides:

“This Agreement shall not apply to the territory of the United Kingdom, Ireland and the Kingdom of Denmark.”

Plainly this will not be correct if and when the United Kingdom opts in. We would be grateful for your confirmation that these provisions will be amended before the Agreement is signed. Meanwhile we are keeping these documents under scrutiny. We would be glad to receive a reply to this letter within the standard deadline of ten working days. We would also be glad to know in due course whether the United Kingdom will be opting in.

30 June 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter of 30 June concerning EU proposals to sign and conclude a Readmission Agreement with Georgia. I apologise for the delay in my reply. However, I am pleased that your Committee sees the benefit in UK participation in the Agreement with Georgia and considers that the UK should opt in to it.

You asked in your letter for confirmation that recital text in the agreement at Article 1 (d) and Article 21 (2) which currently states that the UK has not opted into the agreement will be correctly amended to reflect UK participation if and when the UK decides to opt in to the Agreement.

I can confirm that my officials have already had discussions with Legal Advisers Branch and the European Council Legal Service on the recital text around the UK opt-in and agreed the necessary form of wording to reflect UK participation. For Article 1(d) the text would read as follows:

“'Member State' shall mean any Member State of the European Union bound by this Agreement.”

For Article 21(2) the text would read:

“The Agreement shall apply to the territory of the United Kingdom and Ireland only pursuant to a notification of the European Union to Georgia to that effect.”

I hope this information addresses Committee concerns about the text and assures the Committee that the recitals will be amended to reflect any decision to opt in. You may also wish to be aware that on 12 July, I wrote to the European Affairs Cabinet Committee seeking clearance for UK participation in the Readmission Agreement with Georgia. I expect that I will receive a response from that committee in the next week or so.

20 July 2010

GRANTING AND WITHDRAWING REFUGEE STATUS (13404/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 27 October 2010.
We note that, while a number of the comments by the Commission on the UK’s implementation of the original Directive are positive, the Government has responded to the specific criticisms of their implementation and application of the Asylum Procedure Directive. We also share the Government’s concerns that the Commission only published this report almost exactly a year after the related proposal to amend the Directive, when the reverse approach would have been logical and furthermore was required by Article 42 of the original Directive.

We have already expressed our view about the legal complications which may arise from the Government’s decision not to opt in to the proposed recast version of this Directive in our report: Asylum Directives: Scrutiny of the Opt-in Decisions, 1st Report of Session 2009-10, HL Paper 6.

We also note the Government’s position on what they see as the Commission’s apparent lack of understanding of how the UK’s asylum system operates and would be grateful for the Government’s view on how this problem can be avoided in relation to any future evaluations of the similar Directives which the UK is subject to.

In the meantime, the Committee will keep this document under scrutiny.

We would be grateful for your reply within the standard deadline of ten working days.

27 October 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter dated 27 October 2010. I apologise for the delayed reply.

I am writing in response to the Committee’s concerns on the European Commission's evaluation report on the implementation of the Asylum Procedures Directive. The Committee has asked for the Government’s views on how we can ensure the European Commission takes full account of our asylum processes for any future evaluations.

As you are aware, I share your concerns about the feasibility of the Commission’s reporting methods and the inaccuracies in their report and have responded to those criticisms in the accompanying Explanatory Memorandum to the report. In my view some of the shortcomings of this report can be attributed to the lack of evidence to substantiate the assertions that have been made and I am somewhat concerned that the Commission has not produced any data to verify its point about Member States’ implementation of the Directive. In accordance with Article 43 of the Directive, the UK produced a transposition table setting out how the Directive was put into practice in domestic legislation. This in my view should have been a starting point for the Commission’s evaluation; however it does not seem to have aided the report’s findings. We have also completed questionnaires for the Commission’s benefit; nevertheless it is apparent from their report that their analysis of them has painted what in many respects is a distorted picture of our asylum processes.

The Government believes that the evaluation of EU legislation on asylum should be a co-ordinated effort between Member States, the Commission and the UNHCR. This should be done with as much consultation as possible and early engagement is vital. Similarly, I think it would clearly benefit Member States to have access to the draft report and to be able to propose amendments before the final evaluation is published. This would give an opportunity for Member States to make observations on the evaluation and would make the final version more accurate.

19 November 2010

IMMIGRATION AND ASYLUM: FIRST ANNUAL REPORT (9273/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 7 July 2010.

The Committee notes the content of the above document and will continue to monitor the various measures referred to in the European Pact on Immigration and Asylum as they develop accordingly. The Committee will also look forward to being kept informed about the progress of the broad areas contained in the Pact, in particular the further development of the Global Approach to Migration and the effects of the economic crisis.

In the meantime, the Committee is content to clear this document from scrutiny.

No reply to this letter is expected.
INFORMATION MANAGEMENT: FREEDOM, SECURITY AND JUSTICE (12579/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 13 October 2010.

The Committee notes the content of the above document and is grateful for the comprehensive Explanatory Memorandum which has been provided.

Significant elements of the document have already been, or are, subject to scrutiny by the Committee. However, we will also look forward to considering the new proposals as and when they are brought forward by the Commission and deposited for scrutiny.

In the meantime, the Committee is content to clear this document from scrutiny.

No reply to this letter is expected.

13 October 2010

JUSTICE AND HOME AFFAIRS: BELGIAN PRESIDENCY PRIORITIES

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

I am writing to give you an overview of the Belgian Presidency’s priorities for Justice and Home Affairs (JHA) over the next six months in terms of those dossiers that are covered by the Home Office. Belgium will hold the six-month rotating Council of the European Union Presidency from 1 July 2010, until 31 December 2010.

I hope that this letter will assist in the planning of your scrutiny of dossiers heading to the JHA Council during this period. The current timetable for consideration of dossiers at JHA Councils under the Belgian Presidency is:

— 15-16 July (Informal, Brussels)
— 7-8 October (Luxembourg)
— 8-9 November (Brussels)
— 2-3 December (Brussels)

Belgium will inherit the rotating Presidency from Spain, who has held the responsibility since January 2010. Spain has presided over the Council during an institutionally-challenging time, especially within the context of JHA, given the recent introduction of the Lisbon Treaty. Since December 2009, the majority of JHA dossiers have moved from an institutional framework of consultation and unanimity in the Council to co-decision with the European Parliament and qualified majority voting. This has had a significant impact on the way that JHA business is undertaken at the European level.

The Belgians will continue to work on dossiers inherited from the Spanish Presidency, such as the EU Internal Security Strategy. In addition, Belgium will bring forward new initiatives in the areas of combating organised crime, counter-terrorism, judicial cooperation and will seek progress on asylum measures. At the informal Council they are seeking debates on:

— the way forward for Europe on Asylum. The Presidency will be seeking a reaffirmation from Ministers that completing the Common European Asylum System by 2012 remains a priority, with a view to unblocking negotiations on individual asylum instruments. At the JHA Council in June the Government made clear that it does not support a Common European Asylum policy based on harmonised legislation but is keen to support practical cooperation to strengthen our borders, reduce intake, increase returns and help countries to build up effective asylum systems;
— crime prevention; and
On the home affairs agenda for the next 6 months, one of the top priorities for the Belgians will be to take forward the EU Internal Security Strategy (ISS). Following the Council’s agreement to the ISS in February, the European Commission is expected to publish this Autumn a Communication on how to take forwards its principles. The Commission are likely to highlight four essential topics: organised crime, counter-terrorism, immigration and civil contingencies. The Belgian government has indicated their intention to push for road traffic accidents to be included in the strategy as well.

In terms of bilateral agreements with third countries, we expect to see a revised EU-US Passenger Name Records (PNR) Agreement. This dossier is likely to include stricter data protection safeguards than the current 2007 EU-US PNR Agreement, following the European Parliament’s request to the Commission to create a single approach to third country agreements on data sharing. It is expected that the Commission will also publish revised EU-Australia and EU-Canada PNR Agreements, although an EU PNR Directive is not anticipated until 2011. The UK has opted-in to the current third country PNR agreements on the basis that they gave legal certainty to carriers and provided key security benefits.

The Council Decision to conclude the EU-US Agreement on the Terrorist Finance Tracking Programme (TFTP, also known as the “SWIFT Agreement”) is expected to be adopted during the Belgian Presidency, subject to the consent of the European Parliament. Following their rejection of an interim agreement in February, which would have allowed the exchange of SWIFT financial transactions data to the US government, negotiations on a new permanent agreement began in May, with the text initialled in June. The new permanent agreement has stronger data protection provisions as a response to the earlier EP vote. If adopted, Member States will receive redacted leads from the US to help take action against suspected terrorists.

Following the successful completion of the first milestone test, which took place in January 2010, work will continue on the development of the second generation Schengen Information System (SIS II). We expect the Commission to propose a new Global Schedule for the entry into operation of SIS II before the October JHA Council. This issue, which has suffered from technical setbacks, will need to be carefully managed by the Belgian Presidency.

A proposal to establish an IT Agency for the operational management of large-scale systems in the area of freedom, security and justice was published during the Spanish Presidency, but is likely to be agreed during Belgium’s term. If confirmed, the Agency will be responsible for the day-to-day management of Eurodac, the Visa Information System (VIS) and SIS II. It will also be responsible for undertaking pilot projects for other IT systems. A decision will also need to be taken on where to locate the headquarters of the Agency. Bids have been placed by France (Strasbourg) and Estonia (Tallinn). I will be writing separately informing you of the government’s decision regarding UK participation in this.

A key priority for the Belgian Presidency will be combating organised crime. To aid in this task, Belgium will publish proposals on Project Harmony, which is a Belgian-led initiative funded and supported by the European Commission’s Framework Partnership Agreement on “Prevention of and fight against Crime”. It aims to streamline and synchronise EU strategies, plans and operational activities in order to support delivery against EU and national objectives, by targeting prioritised threats caused by organised crime. The UK has supported this initiative, which builds on the European Criminal Intelligence Model (ECIM) developed during the 2005 UK Presidency. The key benefits to the UK include: greater opportunity to influence the EU agenda on organised crime; the potential alignment of EU funds to support operational delivery; and, as a result, greater commitment of Member States to work collaboratively to tackle prioritised threats. The Belgian Presidency is currently producing a plan to implement the recommendations of Project Harmony, which will be presented at the November/December JHA Council for endorsement.

The UK Government is currently considering whether to participate in the European Investigation Order (EIO), an EU legislative proposal aimed at streamlining the current system of Mutual Legal Assistance (MLA) between EU Member States. The main objective of the EIO is to provide a simplified, comprehensive MLA system and ensure evidence is returned in a timely fashion. The EIO proposal was brought forward as a Member State initiative led by Belgium and we expect them to give it considerable negotiating time over the next six months. An opt-in decision on this proposal will need to be made by 28 July.
The Commission is expected in July to table a new proposal for a Directive on attacks against information systems, on which we would expect negotiations to commence under the Belgian Presidency. The UK will have to consider whether to opt into the proposal.

Asylum is likely to make up a significant part of the JHA agenda, and will be the Belgian Presidency’s main focus in the area of migration. They will be pushing for progress on Directives currently under negotiation with a view to making progress on the second phase of the Common European Asylum System. This includes the revised Reception Conditions, Qualification and Procedures Directives which the UK did not opt in to, and also the revised Dublin and Eurodac Regulations which the UK did opt in to. We will work with the Belgian Presidency to move forward the agenda based on practical cooperation as already indicated.

The Belgians have said that legal migration will also be a priority during their Presidency. They will aim to get agreement on the Long Term Residence for Beneficiaries of International Protection Directive. The UK has decided not to opt into this measure. Their Presidency will also see publication by the Commission of proposals for new EU rules on legal migration in the upcoming Single Permit, Seasonal Workers and Intra-Corporate Transferees Directives. The UK opt in will apply.

Finally, on Counter-Terrorism the Belgians have indicated that they will give priority to work on discussions of explosives, CBRN and recruitment and radicalisation. Any agreements reached are likely to be presented and noted by JHA Council. In September, the Belgians are also likely to lead on an EU Emergency and Crisis Coordination Arrangements Exercise.

30 June 2010

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 30 June 2010 telling us about the priorities of the Belgian Presidency for justice and home affairs issues. This will shortly be seen by the Justice and Institutions Sub-Committee for the matters within their remit. It has already been seen by the Home Affairs Sub-Committee, who are responsible for most of these matters, and they are most grateful for your full explanation of forthcoming business.

8 July 2010

JUSTICE AND HOME AFFAIRS COUNCILS (8157/10)

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

Further to the Explanatory Memorandum (EM) on this Directive deposited on 25 May (8157/10), I am writing to update the Committee on the position the Government intends to take at the Justice and Home Affairs Committee on 3-4 June.

As noted in the EM, the Presidency hopes to agree a general approach on the text at the Council as a basis for formal negotiations with the European Parliament. We believe that they will secure this outcome since all Member States have now lifted their substantive reservations on the text (Parliamentary scrutiny reserves remain).

The Government recognises the importance of enabling Parliament to have adequate time to scrutinise the text and the UK’s participation under the JHA Opt-In Protocol. Any agreement at the Council will not fetter our ability to make an opt in decision on this particular instrument as the text is not being adopted. The deadline for that decision is 29 June. The text may also be subject to further amendments in order to secure a first reading deal with the European Parliament. However, in order to protect the UK position, the Government intends to make an intervention at the Council recalling that the matter remains under Parliamentary scrutiny and as such, whilst we are content that the Directive proceed for negotiations with the European Parliament, the UK must reserve its final position.

The outcome of the Council will be reported as usual through a Written Ministerial Statement.

4 June 2010
**Letter from David Lidington MP, Minister of State for Europe and NATO, Foreign and Commonwealth Office, to the Chairman**

I am writing to let your Committee know of plans to conclude a Security Agreement between Liechtenstein and the EU in respect of the exchange of classified information.

I regret that the Committee will not be formed in time to allow the Government to consider your views on this proposal before it comes to the Council for agreement which is expected to be on 3/4 June. However, I have taken the view that this is a routine agreement which is similar in scope to many that have been concluded with third countries that have previously been submitted for scrutiny and which you have supported. This agreement does not in my view raise any policy concerns for the Government and against that background I hope the Committee will understand if I agree to the signing and conclusion of the Agreement before scrutiny has been completed. I attach an Explanatory Memorandum for your consideration, together with a copy of the proposed decision which is being shared with the Committee following the recent arrangements agreed for the handling of limited documents.

3 June 2010

**MEPHEDRON Control Measures (15330/10)**

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 24 November 2010.

We are content with the intention to submit mephedrone to EU control measures, and note that this will require no further action in this country since mephedrone is already classified as a Class B drug.

We wonder why the legal base for the draft decision is given as Article 8(1) of the 2005 Council Decision. This is the provision requiring the Commission to present its initiative to the Council. It seems to us that Article 8(3) should be the legal base for the Council’s own Decision.

At the bottom of page 2 of document 15330/10, the end of the Commission’s explanatory memorandum reads:

“The Commission is requested:
— to adopt the attached proposal for a Council Decision and
— to transmit it to the European Parliament, to the Council and to the National Parliaments, for information.”

This is what one would expect to find in a paper submitted within the Commission asking the Commission as a collegiate body to approve the recommendation of the Commissioner responsible. One would not expect to find these words in a document being submitted by the Commission to the Council. We wonder whether you can explain this.

Your own explanatory memorandum, though numbered 15330/10, gives the draft Decision a different title to the one in document 15330/10.

We are satisfied that this draft Decision complies with the principle of subsidiarity, but stress the importance of every EM including the department’s own assessment of this, whether or not the Protocol on Subsidiarity applies.

We would welcome your explanation of these matters within the standard deadline of ten working days. Meanwhile we will keep the document under scrutiny.

24 November 2010

**Letter from James Brokenshire MP to the Chairman**

I write in response to your letter of 24 November 2010.

I note the Committee’s concern regarding the legal base for the draft decision and I can confirm that this was a factual error made by the European Commission. The Commission are grateful to have the
opportunity to correct this error and have instructed the European Council’s Secretariat General to amend the legal base to Article 8(3) instead of Article 8(1) before the Council’s consideration on 2nd December. Thank you for raising this.

With regards to the last paragraph of the Commission’s explanatory memorandum, I understand that this was intended for members of the Commission, before adoption of the proposal, and was retained in error. The Commission have agreed to amend the text of the explanatory memorandum to remove this paragraph. Work on doing this has already been started.

I apologise for the omission of an assessment of subsidiarity in our explanatory memorandum and I have asked my officials to ensure that the assessment of subsidiarity will be included in future EMs. I can confirm that my department’s own assessment supports the view of the Select Committee that there are no issues of subsidiarity or proportionality with the draft Decision. I am also grateful to the Committee for highlighting the error in transposition of titles between the draft Decision and the explanatory memorandum.

26 November 2010

PASSENGER NAME RECORDS: BETWEEN THE EU AND AUSTRALIA, CANADA AND THE UNITED STATES

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

I am writing to inform you that on 21 September alongside a Communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries the Commission also published recommendations to the Council to authorise the opening of negotiations for Agreements between the EU and Australia, Canada and the US for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime. These recommendations include a set of negotiating guidelines for each Agreement.

The Commission’s intention is to renegotiate the existing agreements held between the EU and the US and between the EU and Australia and to formalise the existing arrangements for PNR data transfer between the EU and Canada which is agreed by way of a series of letters. The existing Agreements between with the US and Australia are being applied provisionally but the European Parliament has refused to give its final consent to bring them into force, insisting instead on the development of new Agreements. This position was driven by the fact that the previous Agreements were negotiated prior to the entry into force of the Lisbon Treaty when the European Parliament had no role in the development of EU third country agreements.

The negotiating mandates are restricted and cannot therefore be deposited for scrutiny. However, I can tell you that they outline the EU’s position on a number of key issues such as purpose limitation, data protection, the use of sensitive personal data, retention periods, and the right to access and redress. Several of the guidelines are not detailed (for example, they only ask that PNR retention periods are ‘proportionate and limited’, without specifying actual limits in terms of years) and it is expected that most of the key questions will be settled during the negotiation process.

I can confirm that the UK’s opt-in applies to all three negotiating mandates, meaning that we will need to signal our decision to the Council Presidency on 21 December. However, we understand that the Presidency may be seeking to adopt the mandates at the Justice and Home Affairs Council currently scheduled for 2 and 3 December. If the UK decides to opt in to the mandates, we must notify the Presidency of our decision before adoption in order to take part in any vote. We will therefore be working to an expedited timetable in this instance.

In considering whether to opt in the Government will have regard to the fact that these negotiating mandates are the starting point in providing a firm legal basis for the transfer of PNR data from carriers to third countries. This is essential in the case of the US who require PNR data on incoming flights. We also believe that PNR transfer and analysis is an important counter-terrorism and serious crime prevention tool, and is vital to improving aviation security. We would of course welcome the views of the Committee to inform the Government’s position and I will keep the scrutiny committees informed as the process of finalising our decision continues.

I would also like to use this opportunity to advise the Committee that I am today laying an Explanatory Memorandum before Parliament in relation to the Communication on a global approach to transfers of Passenger Name Record (PNR) data to third countries.

7 October 2010
Letter from the Chairman to Damian Green MP, Minister of State for Immigration, Home Office

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 27 October 2010. I am grateful too for your letter of 7 October 2010 on the negotiating mandates for PNR agreements between the EU and Australia, Canada and the United States, which the Committee considered at the same time.

While doubts have been expressed whether the information derived from PNR data is sufficiently useful in countering terrorism and other serious crime to justify the major sacrifices of privacy and data protection involved, and indeed such doubts were expressed by this Committee in our first report on the EU-US Agreement, our doubts were resolved when we received further information from your officials at the time of our second inquiry into the draft Framework Decision. We were therefore interested to see the examples of the utility of PNR data given in the Government’s briefing for MEPs.

The Commission’s goal of a single global approach for the negotiation of all PNR agreements with third countries seems to us in principle laudable, but we wonder whether it will be achievable, giving the very different bargaining powers of the States involved. The EU may be able to impose relatively strict data protection provisions in negotiations with, say, South Korea, but the United States have in the past been able to impose on the EU data protection provisions which they could override almost at will, and we doubt whether this will change.

We clear the Communication from scrutiny. We understand why you will not be depositing for scrutiny the Decisions with the mandates for negotiating agreements between the EU and Australia, Canada and the United States, and are grateful to you for giving us some idea of their nature and coverage. We welcome the decision of principle by the Government to opt in to these Decisions shortly (if it has not done so already). We look forward to scrutinising in due course draft Decisions on the signature and conclusion of these agreements and, next year, a draft of the Directive which is to replace the Framework Decision (though we note from your EM on the Commission Communication on the overview of information management in the area of freedom, security and justice that you would like to see this proposal brought forward earlier).

We do not expect a reply to this letter.

27 October 2010

REFUGEES: MINIMUM STANDARDS FOR QUALIFICATION AND STATUS (11212/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 21 July 2010.

We note the contents of the report, as well as the Government’s response to the specific criticisms of their implementation and application of the Qualification Directive, with interest. We also share the Government’s concerns that the Commission saw fit to publish this report eight months after the related proposal to amend the Directive, when the reverse approach would have been logical and furthermore was required by Article 37 of the original Directive.

We have already expressed our view about the legal complications which may arise from this decision in our report: Asylum Directives: Scrutiny of the Opt-in Decisions, 1st Report of Session 2009-10, HL Paper 6.

When this report was debated in the House of Lords on 12 January 2010 Lord West of Spithead, speaking for the then Government, expressly disagreed with this Committee’s interpretation of the law, but Baroness Neville-Jones, then speaking on behalf of the Conservative opposition, appeared to be agreeing with this Committee (Official report, cols 492-493). We would be glad to know whether this Government does now agree with the Committee’s view, and if so, what action it proposes to take.

In the meantime, the Committee will keep this document under scrutiny.

We would be grateful for your reply within the standard deadline of ten working days.
Letter from the Chairman to James Brokenshire MP, Parliamentary Under Secretary of State, Home Office

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 7 July 2010, and cleared it from scrutiny.

The Committee are grateful for your three Explanatory Memoranda dated 25 May, 17 June and 29 June 2010. As you know, the first of these suggested that the United Kingdom had a right under Article 5(2) of Protocol 19 to opt out of those provisions that build on the police and justice elements of the Schengen acquis, and that this right had to be exercised by 7 July 2010. This surprised us, and we sought clarification. We are glad to see that you now take the view that, in the case of proposals which were made by the Commission on 1 December 2006, the United Kingdom does not have a right to opt out. In our view this is the correct conclusion.

We believe that it is in any case in the interests of the United Kingdom that Liechtenstein should be added to the list of States which participate in the law enforcement provisions of Schengen.

We do not require a reply to this letter.

8 July 2010

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

I am writing further to the Explanatory Memorandum of 25 May which set out the Government’s initial position on this proposal.

Following the completion of negotiations on the text the Presidency has tabled it for adoption on 29 June at the Agriculture Council. I expect that adoption to proceed. Given the measure has not cleared Parliament I therefore wanted to inform you of the position of the UK.

The EM explained that the measure built on part of the Schengen acquis in which the UK participates, meaning that the UK was deemed to have opted in but had the right to opt back out. The deadline for exercising that opt-out was 23 May and we did not seek to exercise it. However, in considering our position at the Council we have now come to the conclusion that the UK will not have a vote on the measure.

The 2000 Council Decision granting the UK application to join elements of the Schengen acquis makes clear that we are deemed to be in all measures which build on those parts of the acquis which we have notified the Council of our intention to participate in (regardless of whether or not we have applied them). The notification included provisions on SIS. This position informed our initial EM to Parliament. However, in discussions with the Presidency regarding our position at the Council our attention was drawn to the detail of the legal base of the measure, which is Article 4(2) of the Bulgaria/Romania Act of Accession. That deals with the accession of those countries to various provisions of the Schengen acquis and says that the Council shall decide whether to allow Bulgaria and Romania to join acting with “the unanimity of its members representing the Governments of the Member States in respect of which the [relevant] provisions … have already been put into effect”. As the Committee may be aware, the UK has not put SIS “into effect”, choosing instead to focus resources on implementation of the second generation of that system (SIS II).

Whilst there are arguments for suggesting that the 2000 Council Decision could prevail between these two measures, we think the better view is that the specific provision in the Act of Accession ought to govern the extension of the relevant provisions to Bulgaria and Romania. We do not believe that this will prejudice the wider application of our Schengen Protocol given the circumstances of this particular dossier are so limited in scope i.e. to the specific accession of Romania and Bulgaria to SIS.

24 June 2010
Letter from the Chairman to James Brokenshire MP, Parliamentary Under-Secretary of State, Home Office

Sub-Committee F (Home Affairs) of the Select Committee on the European Union considered this document at a meeting on 7 July 2010.

The Committee notes from the recent meeting of the Justice and Home Affairs Council on 3-4 June 2010 that the Commission now expects SIS II to become operational during the first quarter of 2013.

In this respect, the Committee would be grateful for an update on what stage the UK has reached with regard to the preparation of its own systems to comply with the transition and what its overall timetable is for its eventual participation in SIS II. Once the ‘milestone’ testing has been completed, the Committee would also be grateful to receive an update on what the implications of the results are for the scheduled operational date of SIS II and the future of the system as a whole.

In the meantime, the Committee is content to clear this document from scrutiny.

We would be grateful to receive a reply to this letter within the standard deadline of ten working days.

8 July 2010

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

I am writing to inform your Committee of the decision taken by the Government not to opt-out of the proposal to conclude the above Arrangement and to update you on the timetable for adoption of the proposal.

In reaching this decision, a number of factors were taken into account, in line with the coalition Government’s agreement on European matters. These were that:

— the UK would continue to maintain its border controls with each of the Associated States, as it already does with all other Schengen states. The Agreement does not impact on the UK’s ability to do so;

— there would be no financial bearing on the UK if it agreed to participate in this Arrangement since contributions to the general budget of the EU are made annually by each State;

— the UK’s civil liberties would not be jeopardised if this proposal were to be put into effect since the involvement of the Associated States would not compromise the work of the already established Schengen committees, but would reinforce their engagement through a more defined and inclusive role; and

— there would be no consequences for the UK’s criminal justice system. Although the proposal would be subject to jurisdiction of the European Court of Justice this would not have any impact on the UK since it does not require the UK to implement any of its provisions.

The General Secretariat of the Council was notified of our decision on 17 June 2010.

The Spanish Presidency is planning to present the proposal for adoption at the General Affairs Council on 12 July 2010.

28 June 2010
Letter from Damian Green MP, Minister of State for Immigration, Home Office to the Chairman

I am writing with reference to your letter of 1 April 2009 in which you asked us to update you if and when negotiations on this dossier resumed. At the time of your letter, the dossier was dormant. Your Committee cleared it from scrutiny on 26 February 2009.

The UK has not opted into this proposal and it therefore has no implications for UK immigration control. The UK has nevertheless been following the discussions, the last of which took place during the French Presidency in the second half of 2008. At that time it became clear that there was no prospect of securing the unanimity amongst Member States that would have been required for its adoption under the Treaty provisions then in force.

Under the Lisbon Treaty, this instrument is now subject to the “ordinary legislative procedure”- that is, to agreement in Council by Qualified Majority Voting rather than unanimity, and to co-decision with the European Parliament. The Belgian Presidency has therefore decided to revive the discussions in Council with a view to negotiations with the European Parliament leading towards agreement. Most Member States have indicated that they can accept the compromise text, but some concerns remain about the scope of the proposal, the duration of the period before a permit holder can transfer residency to another Member State and whether a transitional period is required.

29 July 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter of 29 July 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 6 October 2010. We are grateful to your officials for having remembered the Committee’s interest in the progress of negotiations on this amendment to the Long-term Residence Directive.

We would be glad to be informed in due course of any progress in the negotiations, but for the present no reply to this letter is needed.

6 October 2010

STOCKHOLM PROGRAMME: AREA OF FREEDOM, SECURITY AND JUSTICE FOR EUROPE’S CITIZENS (8895/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered the home affairs aspects of the Communication at a meeting on 30 June 2010. We decided to clear these parts of the Communication from scrutiny. The other aspects of the Communication have been cleared by the Select Committee’s Justice and Institutions Sub-Committee, and are the subject of a separate letter.

The Committee would like to express its agreement with the Government’s view, as echoed by the Council, that the Commission has not focused on the remit given it by the Stockholm Programme itself and in some instances clearly exceeds it.

Significant elements of the Action Plan have also already been, or are, subject to scrutiny by us. Where this is not the case we look forward to considering the individual actions as and when they are brought forward by the Commission.

Given the importance of this Action Plan, and in particular the conflict between the Commission and the Council, the Sub-Committee are considering inviting you, and Cecilia Malmström, the Commissioner for Home Affairs, to give oral evidence to them in October.

No reply to this letter is expected.

30 June 2010
THE EU AND GEORGIA: VISAS (9468/10, 9471/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered these documents at a meeting on 30 June 2010. The arguments against the United Kingdom being bound by this agreement seem persuasive to the Committee, which has therefore cleared both documents from scrutiny.

30 June 2010

THIRD COUNTRY NATIONALS: CONDITIONS OF ENTRY AND RESIDENCE IN THE FRAMEWORK OF AN INTRA-CORPORATE TRANSFER (12211/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 6 October 2010. We are sorry that the Parliamentary recess has prevented us from considering the proposed Directive and your helpful EM until very shortly before the expiry of the three-month period for opting in.

The Committee notes that the UKBA’s consultation on the proposed limit on non-EU economic migration closed on 17 September 2010 and that the Government expected that their decision on whether or not they would opt in to the proposal would be influenced, to some extent, by the responses received. Therefore, considering that the deadline for opting in to this measure expires on 14 October 2010, the Committee would appreciate confirmation of the Government’s decision, as well as their reasons, in good time so that the terms of the scrutiny reserve and opt in scrutiny resolutions can be respected.

In the meantime, the Committee will retain this document under scrutiny.

6 October 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter of 6 October.

I am writing to inform you that the Government has decided that the United Kingdom should not opt into this proposal. The basis for that decision is that the Government is concerned that participation in the measure may impact on the United Kingdom’s ability to determine who is admitted onto its territory and reduce its flexibility to adjust the criteria for the admission of third country workers in the light of the United Kingdom’s needs.

We will establish a suitable intra-corporate transfers regime for the UK, working closely with our European partners, that will ensure we remain among the best places in the world for companies to invest and do business. Our arrangements will address concerns regarding the overall level of migration to the UK while maximising the economic benefits that flow from international trade and investment.

I note that the proposal remains under scrutiny. I look forward to hearing from you on the outcome of that scrutiny in due course. In the meantime, I will keep you informed of any significant developments in connection with the proposal.

I can also confirm that the Government has decided not to opt into the draft Directive on the conditions of entry and residence of third country nationals for the purpose of seasonal employment. Again, the Government believes it is sensible not to participate in a measure which reduces its flexibility to design and manage its own immigration system in the interest of the United Kingdom.

20 October 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter of 20 October 2010. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 3 November 2010.
We note that the Government has decided not to opt in to the above proposal or to the proposal for a Seasonal Workers Directive. We also note your reasons for reaching such a decision in each instance.

While the Committee is content to clear this document from scrutiny it will continue to retain the draft Seasonal Workers Directive under scrutiny, pending the outcome of the reasoned opinion procedure in Brussels.

No reply to this letter is expected.

03 November 2010

Letter from the Chairman to Damian Green MP

On 3 November 2010 I wrote to thank you for your letter of 20 October 2010, which the Home Affairs Sub-Committee of the Select Committee on the European Union had considered at a meeting earlier that day. I am sorry to say that the letter put to me for signature was an earlier draft which did not reflect the Committee's views after discussion of your letter. The points which the letter should have made were as follows.

The Committee noted that the Government had decided not to opt in to this proposal, but were not entirely convinced by your arguments for not doing so. You said in your letter that you intended to establish a suitable UK regime for intra-corporate transfers, but the Committee were still concerned that not being part of the EU scheme might put UK businesses at a disadvantage. They appreciated that, now that the 3-month period for opting in under Article 3 of the Protocol had passed, it was no longer possible for the United Kingdom to opt in at this stage, but hoped that the Government would consider the possibility of opting in under Article 4 once the Directive had been adopted.

In my earlier letter I told you that we were clearing the proposal from scrutiny. In fact it was our intention to keep it under scrutiny until we had received your reply on these points. I apologise for this, and for any problems it may cause to you or your officials.

17 November 2010

UNACCOMPANIED MINORS: ACTION PLAN (9604/10)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 7 July 2010.

The Committee notes the content of the above document and will look forward to considering any legislative proposals which may result from the Action Plan at a later date.

With regard to the Explanatory Memorandum, there are a number of points that the Committee would like to explore further. Firstly, with reference to the 2,990 asylum applications made by minors in 2009 and referred to in paragraph 1, the Committee would be grateful for further information about how this number is split between minors who arrive in the UK unaccompanied and minors who are left unaccompanied after their arrival.

Secondly, with reference to the use of the terms 'direct' and 'specific' in paragraphs 10, 11, 16 and 17, the Committee would be grateful if these terms were defined more precisely. For example, does the “limited direct applicability” to Gibraltar (paragraph 11) mean that there is some direct applicability? And, if so, what?

Lastly, with reference to paragraph 15 and, more specifically, the Government’s reported intention to return 16 and 17 year old unaccompanied asylum seekers to a proposed hostel in Afghanistan, the Committee would be grateful to know what steps the Government is taking to ensure that they will satisfy their obligations under the United Nations Convention on the Rights of the Child in this respect, and whether they sought advice from the United Nations High Commissioner for Refugees.

In the meantime, the Committee is content to clear this document from scrutiny.

We would be grateful to receive a reply to this letter within the standard deadline of ten working days.

8 July 2010
Letter from Damian Green MP, to the Chairman

Thank you for your letter of 8 July 2010 concerning the explanatory memorandum for the action plan on unaccompanied minors (2010 – 2014) (document number 9604/10) in which you asked for clarification on a number of points.

Firstly, you requested a further breakdown of statistical information on asylum applications from unaccompanied minors. Unfortunately, we are unable to provide this; the number of applications received from unaccompanied minors in 2009 is a published national statistic and we do not hold further information to demonstrate the split between minors who arrived in the UK unaccompanied and minors who were left unaccompanied after their arrival.

You asked if the terms ‘direct’ and ‘specific’ used in the explanatory memorandum could be clarified. My apologies for any confusion caused, but the word ‘specific’ at paragraphs 10 and 12 was included unnecessarily as there are no legislative proposals at this stage. There is also no ‘direct’ applicability arising as part of the communication or any ‘direct’ financial implications. In the future, individual measures may be proposed as a result of the action plan which may have financial consequences and these will be fully assessed by the UK.

Finally, turning to your question concerning the return of 16 and 17 year old unaccompanied asylum seekers to a hostel in Afghanistan. We are currently involved in a tender process to identify a suitable care provider. Once suitable arrangements are in place, we will consider returns of small numbers of 16 and 17 year old Afghan males on a case by case basis. What is in the young person’s best interests will form a primary consideration in the decision making process. Adherence to our obligations under the United Nations Convention Rights of the Child (UNCRC) will be clearly reflected in revised guidance that will be published and used by caseowners to make decisions. The United Nations High Commission for Refugees (UNHCR) are fully aware of our proposals and colleagues in the UK Border Agency are involved in a detailed dialogue with them on the progress of these proposed returns. UNHCR have been invited to comment on important revisions in the decision-making guidance and UK Border Agency staff have recently met them to discuss their feedback.

22 July 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter of 22 July 2010. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 6 October 2010.

The Committee regrets that more detailed statistical information is not available in relation to the numbers of unaccompanied minors making asylum applications in the UK and would like to suggest that more precise data should be collected in the future. The distinction between the two categories—minors who arrive unaccompanied and those who are left unaccompanied on their arrival—is surely an important one, which we should be in a position to appreciate.

However, we are grateful for your clarification of the terms used in the EM as well as the reassurances provided about the Government’s approach to the return of unaccompanied minors to Afghanistan. We would welcome a further report from you once a suitable care provider has been selected under the tender process.

6 October 2010

USE OF EXPLOSIVES PRECURSORS (14376/10)

Letter from the Chairman to the Rt. Hon. Baroness Neville-Jones, Minister of State for Security and Counter-Terrorism, Home Office

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 3 November 2010.

We note the Government’s support for this proposal and are grateful for the comprehensive Explanatory Memorandum which has been provided. We support the aims of this proposal; we agree that this is something which must be done at EU level, so that this complies with the principle of subsidiarity.

We do however have concerns about the potential regulatory and financial implications for UK businesses, which the Government correctly acknowledges. We believe that the wide range of figures given in the Commission’s impact assessment and cited in the EM are so vague that they are of very
little assistance. We would welcome further and more accurate information about the potential costs once the UK impact assessment has been completed.

The recent attempted terrorist attacks seem to us to emphasise the importance of being able to act quickly to amend the lists of chemicals in the Annexes, and we are glad to see the procedure proposed in Articles 9 and 13.

We do not require an immediate reply to this letter, but look forward to hearing from you once the UK impact assessment has been completed. In the longer term, the Committee would also like to receive updates about any significant developments in relation to the proposal’s progress.

03 November 2010

US TERRORIST FINANCE TRACKING PROGRAM
(11048/10, 11172/10, 11173/10)

Letter from Lord Sassoon, Commercial Secretary, Her Majesty’s Treasury, to the Chairman

I am writing to alert you to the fact that negotiations between the European Commission and the United States on the above matter were concluded on Friday 11th June 2010. The text agreed between the parties has been given to Member States for consideration, and the Government is urgently examining it to ensure that it is consistent with UK policy objectives as set out in the Coalition Agreement. I have also arranged for a copy to be deposited in Parliament.

I will, of course, provide your committee with a full Explanatory Memorandum outlining the Government’s views as soon as possible, including on whether or not the UK should opt in to the agreement. However, I wanted to ensure that your committee has as much opportunity as possible to engage with the substance of the text as the timetable may move rapidly from now on. The process to be followed from this point onwards is that:

— The Council will be asked to reach a Decision to sign the agreement with the US.
— The European Parliament will then be asked for its consent to conclude the agreement.
— The Council will then be asked to reach a Decision to conclude the agreement and allow it to enter into force. It is at this point that the terms of the agreement will be binding on both sides.

Although the timetable may move quickly, the text of the agreement is unlikely to change. The document deposited in the House should therefore be the basis for scrutiny.

I will write again in the near future.

21 June 2010

Letter from Lord Sassoon, Commercial Secretary, Her Majesty’s Treasury, to the Chairman

Further to the Explanatory Memorandum mentioned above, I am writing to inform you that the Council Decision to sign the agreement is likely to be adopted next week. If this happens, the Government has decided that it will opt in to the Decision.

I am aware that Parliament has not yet had the opportunity to provide its opinion to the Government on this. However, there are compelling reasons behind this decision, which I would like to explain.

As you are aware, under the Treaty on the Functioning of the European Union the UK is usually entitled to a three-month period to consider whether it wishes to opt-in to a Justice and Home Affairs Measure. However, in this case the Presidency has indicated that it will present the Council Decision for adoption on 28th June. As a result of the very real security gap created by the TFTP’s lack of access to data, the Government has decided that it would not be appropriate to insist on the full three-month period being granted.

The Government was therefore required to make a rapid decision on whether to opt in to the Council Decision to sign the Agreement or not. As set out in the Explanatory Memorandum, the Government strongly supports the Agreement itself. The TFTP has brought significant benefits to the UK and the EU and this Agreement will further increase its effectiveness by further imposing a binding requirement on the US Treasury to search financial data carried on the “SWIFT” payment system on
request from the EU Member States that comply with the terms of the agreement. Not opting in prior to the decision to sign, would put this Agreement at risk, as the vote will be taken on a Qualified Majority basis. The Government did not feel that it was appropriate to run such a risk, in view of the significant benefits this agreement will bring to the UK.

All Treasury Ministers take issues of Parliamentary scrutiny very seriously and I regret that, on this occasion, it has not been possible to complete Parliamentary scrutiny through the appropriate mechanism. I hope you will agree that under the circumstances, the decision that has been taken by the Government was the most appropriate one. I stand ready to answer any further questions you and your committee may have on this important issue.

24 June 2010

Letter from the Chairman to Lord Sassoon

The Home Affairs Sub-Committee of the Select Committee on the European Union considered these documents at a meeting on 30 June 2010. The Committee are grateful for the full Explanatory Memorandum, and appreciate that it was supplied at very short notice. They have also seen, and are grateful for, the letters from the former Exchequer Secretary to the Treasury of 21 April and 5 May, and your own letters of 21 and 24 June.

Additionally, the Committee have considered points made by the European Data Protection Supervisor in his Opinion of 22 June 2010.

The Committee, though conscious of these data protection issues, believe that they are outweighed by the importance of this Agreement in the fight against terrorism. They therefore agree that the Government is right to have opted in to the Decision on signature and to have taken part in its adoption, notwithstanding that this constitutes an override in the case of documents 11048/10 and 11173/10. The Committee clear from scrutiny the Decision on conclusion of the Agreement (document 11172/10).

The Committee note that Article 11 of the Agreement requires the Commission to carry out a study into the possible introduction of an equivalent EU system. They attach importance to the possibility of these exchanges of data being carried out on a reciprocal basis, and urge the Government to support the setting up of an equivalent EU system.

The Committee do not require a response to this letter, but would be glad to be kept informed in due course of the proceedings in the European Parliament on the Decision on conclusion, of the adoption of that Decision, and of the entry into force of the Agreement.

30 June 2010

Letter from Lord Sassoon to the Chairman

Thank you for your letter of 30 June 2010. I am very grateful to you and your Committee for prioritising this important issue, and for your support of the Government’s position. I am writing to inform you of the latest developments and of the timetable for finalising the agreement.

As you know, on Friday 25 June the UK opted into the Council Decision to Sign the agreement. The final agreement contained one minor change to the text. This is to give the European Commission the right to appoint a person to be part of the team of independent overseers to monitor the implementation of the safeguards. The Government believes that this is a further strengthening of the data protection safeguards, and therefore welcomes it.

The agreement was signed between the EU and the US on Monday 28th June. On the same date, a revised Council Decision to conclude the Agreement was published (document number 11222/10, which is attached to this letter). This differs from the previous version to reflect the change noted above. The text of the Decision also invites the European Commission to submit a proposal for establishing an EU system to extract financial data on EU territory. In an accompanying declaration, the Commission commits to developing a proposal in the near future. This builds on an existing provision in the agreement. I note that your Committee would support such a proposal, and agree that there is real merit in this scoping exercise, and as such supports the provision. However, the details of the Commission proposal will of course require careful scrutiny.

In addition to the publication of the revised Council Decision, the Council issued two declarations. The first commits to reviewing the agreement once an EU-US agreement on data protection has been finalised, and the second – a joint declaration with the European Commission – commits to establishing the technical basis for Europol to verify US requests before the agreement comes into force. The Government supports both objectives.
The European Parliament has now voted on the agreement at its plenary meeting and gave consent to conclusion. The Council is likely to adopt the Decision to Conclude the Agreement at a forthcoming Council meeting. As you are aware, if the UK wishes to be bound by the agreement, it must opt into the Decision. I will write again on this matter shortly.

8 July 2010

Letter from the Chairman to Lord Sassoon

Thank you for your letter of 8 July 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 21 July 2010. The Committee are grateful to you for keeping them informed of developments. They do not require a response to this letter, but would be glad to be kept informed in due course of any further developments, and of the entry into force of the Agreement.

22 July 2010

Letter from Lord Sassoon to the Chairman

Further to my letter of 8 July, I am writing to inform you that the Council Decision to Conclude the Agreement was adopted at the ECOFIN meeting on 13th July 2010. The Government opted into the decision, and the UK will therefore be bound by the terms of the agreement.

By opting into the Decision, UK law enforcement and counter-terrorism authorities will be able to request targeted searches of the Terrorist Finance Tracking Programme (TFTP) database where have they reason to believe that a person or entity has a nexus to terrorism or its financing. As you know, this will be of great security benefit to the UK.

I am grateful to you and your Committee for your support of the Government’s position on this important issue. I would of course be happy to answer any further questions you may have.

22 July 2010

Letter from the Chairman to Lord Sassoon

Thank you for your further letter of 22 July 2010 which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 6 October 2010. The Committee are grateful to you for keeping them informed of the adoption of the Decision on Conclusion of the Agreement, which therefore entered into force on 1 August. They do not require a response to this letter.

6 October 2010

VISA INFORMATION SYSTEM

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

I am writing to update you on developments in the UK’s challenge to its exclusion from access to VIS for policing purposes.

The European Court of Justice delivered its judgment on 26 October 2010. It found against the UK and confirmed that the UK’s exclusion from participation in the law enforcement access measure stands.

In finding against the UK the Court emphasised that in determining whether or not a particular EU measure develops the Schengen acquis, it was important to take into account not just the aim and content of the individual measure but also the need to maintain the coherence of the Schengen acquis. On the facts of this particular case this meant that, while the Court accepted the UK’s argument that the VIS Decision was concerned with police cooperation, in light of the fact that such cooperation would be based on accessing visa information and UK participation would require special arrangements to be put in place to allow the UK to access the VIS database, the measure was properly classified as a measure building on the common visa policy provisions of the Schengen acquis.

We are disappointed in the Court’s decision. Although the UK retains independent border controls, we saw value in having access to information on visas issued by our European counterparts to assist in criminal investigations and to help clamp down on fraudulent visa applications. However, there is no right of appeal.
I attach a copy of the judgment [not printed].

4 November 2010