

Law and Institutions (Sub-Committee E)

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AREA OF FREEDOM, SECURITY AND JUSTICE SERVING THE CITIZEN:
STOCKHOLM PROGRAMME (11060/09)

Letter from the Chairman to the Rt Hon Alan Johnson MP, Secretary of State, Home Office

Thank you for your Explanatory Memorandum of 30 June. Those parts concerning civil law and general criminal law were considered by Sub-Committee E at its meeting of 15 July. Sub-Committee F is looking at the other aspects of the Commission's Communication. We decided to retain it under scrutiny.

The Committee welcomes the focus of the Communication on well targeted good quality legislation which can be implemented and continuously evaluated. In terms of the substance of the programme suggested by the Commission, we strongly support the emphasis on mutual recognition, mutual trust and improved access to justice through the exploitation of modern technology.

In particular we support the extension of mutual recognition to matters of disqualification and the provisions of minimum guarantees in EU criminal proceedings. Our recent report on this subject includes recommendations as to what those minimum standards should cover. Our forthcoming report on the Green Paper on the operation of the Brussels I Regulation will address the abolition of exequatur in respect of civil and commercial judgments. We intend to undertake an inquiry into the forthcoming proposal on Wills and Succession which is likely to include provision on the mutual recognition of authentic instruments.

We agree that great care should be taken to respect the different legal traditions of Member States and to ensure that legislation is only adopted if it can demonstrably bring real practical benefit. This approach underlies the conclusions in our reports on the Green Paper on Succession and Wills and on the Common Frame of Reference. On this basis we would want to see strong justification before supporting any other extension of core standards in criminal or civil matters. We agree specifically in this respect with what is said in paragraph 26 of the Government's Explanatory Memorandum.

We note what is said on page 11 of the Communication about improvements in evaluation and in the good functioning of judicial systems, and on page 12 about the need for minimum standards and to avoid disparity in practices. While we agree with this and with the Council of Europe's endeavours to assess and assist the improvement of the administration of justice, it may be necessary to be a little cautious about how far this should be achieved by prescriptive intervention at European level.

We should be grateful to be informed of the progress of the discussions on the Communication.

16 July 2009

Letter from Phil Woolas MP, Minister of State, Home Office, to the Chairman

I am writing to update you on the state of negotiations with regard to the EU's next five year Justice and Home Affairs Work Programme, to be known as the Stockholm Programme.

The European Commission presented a Communication on 10 June which the Home Office deposited together with an Explanatory Memorandum (document 11060/09). Following discussions at the informal JHA Council in July, and meetings between officials and the Presidency, the Swedish Presidency of the Council has now produced a first draft of European Council Conclusions for further negotiation in COREPER between now and the JHA Council on 30 November – 1 December at which we would expect to agree the Programme, with a view to adoption at the European Council on 10 December. I enclose the draft Council Conclusions for your information.

The draft Council Conclusions reflect a number of UK priorities and go some way towards meeting the objectives we set out in the original EM. We believe that there is much we can support in the draft text without the need for further amendment, in particular concerning significant references to the application of better regulation principles, the need for evaluation of measures once implemented and an emphasis on the assessment of need before presenting new initiatives. Specifically, the draft Council Conclusions state that "better regulation and lawmaking principles should be strengthened throughout the decision-making procedure" together with a commitment for "objective and impartial evaluation of the implementation of the policies in the area [of JHA]" and a recommendation to consider whether existing measures are being correctly implemented before advocating new legislation, such as in the Eurojust section (4.3.1).

On specific subject areas, the Presidency has incorporated some of the Government's recommendations on child protection, with welcome references to action to improve employment vetting and barring arrangements and the sharing of information on disqualifications (sections 4.2.3 and 3.1.1). We also welcome the recognition that counter-terrorism (section 4.5) must remain high on the EU's agenda, in the context of the continued threat from international terrorism. We support the reference to continued co-operation working across the four pillars of the EU CT Strategy, which largely mirrors the UK's CT Strategy (CONTEST).

We are pleased to see an acknowledgment of the need for a need for "coherence and consolidation in development information management and exchange" where an information model would include "a strong data protection regime" (section 4.4.2) reflecting the Government's view that we need a more strategic approach to how we share data in the EU. We are also pleased to see included clear recommendations for an evaluation of existing data protection instruments and improving compliance with the principles of data protection (section 2.5) and proposing a recommendation for the negotiation of a data protection and data sharing agreement with the United States of America, based on the work carried out by the EU-US High Level Contact Group on data protection and data sharing.

The Commission's Communication made little reference to JHA external relations, whereas the draft Council Conclusions contain a whole section devoted to Europe in a global world – the external dimension of freedom, security and justice. This is as a direct result of UK lobbying, where we believe that we must tackle the root causes of crime, terrorism and illegal immigration by working with third countries. We were also pleased to note that the section included reference to tackling drugs trafficking in West Africa, which is a Government priority. The section also highlights the need for close working with the European Neighbourhood and there is now specific reference to joint work with several priority countries and regions, such as a call for dialogues with China and India on intellectual property rights and judicial cooperation. We will be working to ensure that the language reflects those regions and issues which we think should involve priority action at EU level.

In the area of justice, the Government supports the continued emphasis on mutual recognition and welcomes the recognition that the judicial systems of the Member States should work together in accordance with their national legal traditions (section 3).

On civil judicial cooperation the Government welcomes the acknowledgement that the abolition of exequatur must be accompanied by appropriate safeguards. It is also pleased that no explicit link has been made between abolition of exequatur and the harmonisation of conflict of law rules. In principle the Government agrees that, where appropriate, practitioners and citizens would benefit from both the streamlining and codification of existing legislation and better consistency among instruments in procedural matters such as rules on service and taking of evidence (sections 3.1.2 and 3.3.2).

The Government welcomes the emphasis placed on protective and enforcement measures and is pleased that the Presidency has confirmed that the common frame of reference for contract law should be a non-binding set of principles, definitions and model rules (section 3.4.2). The Government remains of the view that any work taken forward in the area of recognition of authentic instruments should accord similar treatment to equivalent documents from non-notarial States and that any European procedure is compatible with the legal systems of all Member States (section 3.4.1).

The Government welcomes the emphasis placed on e-justice and supports language on its horizontal importance, in particular the need to provide appropriate funding streams for projects that cover civil and criminal justice (sections 3 and 3.4.1).

On criminal justice matters, the Government welcomes the approach in the Council Conclusions to focus future instruments on problems that are occurring in police and judicial co-operation matters (section 3.1.1). We are pleased to see the inclusion of the Roadmap on the rights of suspected or accused persons in criminal proceedings (2.4) in the Stockholm Programme. This significant development will ensure that the individual measures outlined in the roadmap will be brought forward as part of the multi-annual programme.

We are also pleased to see that the draft Council Conclusions reflect the importance of the Migration Pact and the Global Approach to Migration, and ensure a broad approach to solidarity between Member States which encompasses close working with source and transit countries, a stronger external border and measures to support Member States under pressure through a range of practical support measures. We will continue to push to ensure that this focus remains in the final draft. On Asylum, the draft Council Conclusions reflect the UK's emphasis on reducing disparity in Member States' asylum systems, the importance of practical co-operation and improving the quality of asylum decision-making.

We are continuing to study the detail of the conclusions and we do expect to be seeking some drafting changes when the text is considered in COREPER. There are a number of areas in which we will be looking to negotiate substantive changes. In particular, we think we need a commitment to a more strategic approach to EU action on organised crime, possibly within the auspice of the proposed EU Internal Security Strategy, which we understand is intended to encompass border management, counter terrorism and organised crime issues (what we might consider the wider public protection agenda). We will look to remove the reference to the mutual recognition of asylum decisions, although any future Directive on this issue would be subject to the UK opt-in.

The Presidency states that existing legal aid measures need to be 'strengthened'(section 3.4.1). We have made it clear that we cannot contemplate any measure that extends our legal aid obligations, and we will press for language in the final draft of the Stockholm Programme to accommodate this position.

We will be seeking to amend the language on criminal law to ensure approximation of the criminal law is only considered where it is essential to deal with serious offences of a cross-border nature where required and place greater emphasis on the need for joint action and developing best practice rather than legislation.

We will want to ensure that the Programme deals with judicial training in a way that is explicitly consistent with judicial independence and the principle that training the judiciary is a matter that must remain in the hands of the judiciary.

The Government supports the notion that Member States should explore measures to improve voter turn out. However, we will be seeking to retain the flexibility of holding European Parliament elections within a window.

22 October 2009

Letter from the Chairman to Phil Woolas MP

Thank you for your letter of 22 October. Those parts of your letter and the draft Council Conclusions enclosed with it which concern civil law and general criminal law were considered by Sub-Committee E at its meeting of 4 November.

We consider the draft Council Conclusions enclosed with your letter to be an improvement on the Commission Communication which preceded them. Generally, we welcome the emphasis on mutual recognition, mutual trust and improved access to justice through the exploitation of modern technology. We also welcome constraint in calling for immediate new legislative proposals, and underline the imperative need for further legislation in this field to be of good quality and firmly based on evidence that it is capable of providing concrete benefits to EU citizens. We consider that considerable benefit can be gained by taking practical, non legislative, measures and welcome the recognition of this in the draft conclusions.

We welcome the specific positive developments identified in your letter. We have, of course, recently cleared the Roadmap on the rights of suspected or accused persons in criminal proceedings; and have supported a limited role for the Community in contract law and protective measures to accompany the abolition of *exequatur* in our recent reports.¹

We support your further efforts to ensure that harmonisation of criminal law is only considered when it becomes essential to deal with serious offences of a cross-border nature. A restrictive approach should also be taken to harmonisation of civil law.

These principles will guide our approach to scrutiny on proposed legislation in this area. We shall have an early opportunity to scrutinise the recognition of authentic instruments as part of our inquiry into the recent proposal from the Commission for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.

Pending completion by Sub-Committee F of their consideration of the home affairs aspects of the Stockholm Programme, upon which a report will be published shortly, the Commission Communication remains under scrutiny.

5 November 2009

BRUSSELS I REGULATION

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

Thank you for your letter dated 5 November.

I am grateful to you for confirming that the House of Lords EU Scrutiny Committee has noted the Government's clear conclusions on the operation of the Regulation in the wider international legal order, on arbitration, and intellectual property matters.

In your letter, you have said that the Committee would be interested to know whether, as stated in my letter to of 12 September, the Presidency had been successful in their attempt to secure a political consensus at the Justice and Home Affairs Council on 23 October. I can confirm that a consensus was reached at the Council.

For your information I attach a copy of the Presidency's paper. You will see that the agreement that was reached was general and, indeed, states that the positions adopted by the delegations in Council Working Group discussions are without prejudice to their future positions during negotiations. However, there was one very helpful conclusion in the paper and that is that the principle of party

¹ European Contract Law: the Draft Common Frame of Reference, 12th Report of Session 2008-9, and Green Paper on the Brussels I Regulation, 21st Report of Session 2008-9.

autonomy is important and that choice-of-court agreements should be given adequate protection. You will be aware that the reversal of the *Gasser* decision is one of the United Kingdom's priorities in the review of Brussels I. Therefore the Government is very pleased with this outcome.

15 November 2009

**CAPE TOWN CONVENTION: INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT AND ITS PROTOCOL ON MATTERS SPECIFIC TO RAILWAY
ROLLING STOCK (7115/09)**

Letter from the Chairman to Lord Davies of Abersoch

Thank you for your letter of 7 May which was considered by Sub-Committee E at its meeting on 3 June. We thank you for explaining the Government's view on the applicability of the opt-in arrangements in the case of external agreements.

We acknowledge that there are respectable cases to be made on both sides of the argument. While it might be difficult now to upset long-standing practice, we find it a little surprising that the Government did not establish a cautious line, insisting that an opt-in is required, even if it would have opted in to every proposed agreement on its merits. However, having agreed that UK participation in this agreement is justifiable, we do not pursue the question further.

5 June 2009

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

Thank you for your letter of 23 April to Lord Adonis confirming that the Committee had decided to keep this matter under scrutiny. You asked that the Government provide the Committee with a more detailed assessment of its views and intentions; why the proposal has the potential to conflict with or restrict the current workings of the UK system, and an explanation of the divergence in legal base. You also asked whether the Government agreed with the Commission's assessment that the Protocol is likely to be of great benefit to the European rail industry, banks etc and whether the Government is satisfied that the draft declaration of competence properly delineates the relevant areas of competence. I am sorry that due to detailed consideration of the points raised by the Committee the Government has not responded before now.

The Secretary of State has a duty, under section 30 of the Railways Act 1993, to ensure that franchised passenger rail services continue to run when a rail franchise terminates and there is no successor franchisee. The Government's previous reservations over this proposal concerned the UK's system of "direct agreements", which are designed to ensure compliance with section 30. A direct agreement is a contract by which the Secretary of State ensures that he has rolling stock with which he can deliver passenger rail services if there is no franchise in place. A direct agreement will give the Secretary of State the right to use rolling stock owned by rolling stock leasing companies operating in the UK if a rail franchise terminates.

The Government is now satisfied that, should the UK accede to the Luxembourg Protocol, it would be able to make a series of Declarations which would adequately protect its interests under these direct agreements. Once the Community has acceded to the Protocol, the Government intends to formally consult the rail industry as to whether the UK should accede to the Protocol.

You asked whether the Government agrees with the assessment made by the European Commission in their Explanatory Memorandum that the Rail Protocol is likely to be of great benefit to the European rail industry, banks, and Governments by encouraging capital investment in the rail sector. I can confirm that we do agree with this assessment. The purpose of the Rail Protocol is to provide an international mechanism whereby financial interests in railway rolling stock may be registered in a central database. Where an interest is registered a rule of priority would operate in favour of that interest, so protecting the investment where the operator of the rolling stock defaults on his obligations. The financial interest is protected and recoverable except when those financial interests rest in public service rolling stock in respect of which an appropriate declaration has been made. By protecting an investment in this way, thereby increasing the confidence of leasing companies, the Protocol could lead to a reduction in costs for industry.

The Government can see therefore that the Protocol would be clearly advantageous to the European rail industry, would provide greater security for the leasing companies of rolling stock, and would be beneficial both to borrowers, by stimulating increased flows of capital at lower cost, and to equipment suppliers.

On the issue of the legal base for the Protocol, I should clarify that this is Article 61(c) of the Treaty and not Article 71(1) as stated in the Government's Explanatory Memorandum. I apologise for this unfortunate error, and any confusion this may have caused the Committee.

We are further satisfied that the draft declaration properly identifies the relevant areas of Community competence. The Community has competence in relation to the processes and procedures by which actions related to contractual rights may be taken, in relation to the rules concerning the subsequent recognition and enforcement of judgments and in relation to the determination of the governing law of a contract. The Community also has competence in relation to rules that determine the jurisdiction in which insolvency proceedings may be initiated and the recognition of related judgments. In the rail sphere, the Community has competence in relation to technically oriented measures that are designed to bring out a greater degree of technical harmonisation and interoperability.

You asked whether the Government has consulted or sought the views of the European Railway Agency (ERA). We have not done so, as we do not consider that this falls within their remit, because the Protocol is an international agreement which goes wider than the Community.

As noted above, the Protocol does, however, recognise the Community's competence in the interoperability of the Community's railways and also the role of the European Railway Agency as provided for in Regulation 881/2004. The Protocol also foresees the adoption of the numbering system provided for in the Technical Specification for Interoperability relating to Traffic Operations and Management (TOM TSI) which will ensure that Community rolling stock is not subject to two differing identification procedures.

I hope that this information is helpful in addressing the Committee's concerns and clarifying the Government's views on it. Discussions of the proposal at recent working groups have indicated that any earlier issues raised by Member States have now been resolved, and we understand that the Presidency therefore intends to seek agreement to this Decision at the Justice and Home Affairs Council on 30 November.

16 November 2009

Letter from the Chairman to Chris Mole MP

Thank you for your letter dated 16 November 2009 which was considered by Sub-Committee E at its meeting of November 25.

We have decided to clear this matter from scrutiny.

The Committee is grateful for the detailed answers you have provided to our questions. We welcome the Government's clarification of their view of this proposal and your explanation of the Secretary of State's responsibilities under the Railways Act 1993 to ensure the continued provision of rail services on the termination of rail franchise agreements.

We note the Government's description of the Convention and its Protocol as "clearly advantageous to the European rail industry" and your agreement with the Commission's assessment of them as being of "great benefit to the European rail industry".

26 November 2009

CIVIL JUSTICE: ACCESSION TO THE CAPE TOWN CONVENTION AND ITS PROTOCOL ON AIRCRAFT EQUIPMENT (12135/08)

Letter from Lord Davies of Abersoch, Minister for Trade and Investment, Department for Business, Enterprise and Regulatory Reform, to the Chairman

Thank you for your letter of 5 March 2009² in which you recorded your Committee's understanding of the United Kingdom's Protocol on Title IV measures, namely that the Government was not obliged, but had a discretion, as to whether or not to opt in to this particular measure.

In accordance with its established and consistent practice, the Government considered that in this instance there was no such discretion and that it was bound to participate in this proposal. The basis for this view was that the Title IV Protocol does not apply to external agreements, such as the Cape Town Convention and the Aircraft Protocol, in respect of which the Community has exclusive competence by virtue of internal Community instruments, adopted under Title IV, into which the UK has already opted.

² <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

The Government has taken the view that, having once opted into an internal Community instrument, it is not possible for the UK to opt in separately to any external agreement that the Community enters into by virtue of the exclusive competence which flows from that instrument. In other words, 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 Community instrument in question. This practice is also shared by Ireland, the other Member State which is entitled to use the Title IV Protocol.

The Government acknowledges that respectable legal arguments can be advanced against this position and that the issue is not an easy one. Nevertheless the present practice has been applied in relation to many external agreements since the Title IV Protocol was introduced under the Treaty of Amsterdam.

7 May 2009

CIVIL JUSTICE: COMMON FRAME OF REFERENCE FOR CONTRACT LAW

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

I am writing to inform you of recent developments on the Common Frame of Reference (CFR) on European contract law. The Justice and Home Affairs (JHA) Council met on 5 June and considered a report on some further broad conclusions on the CFR, which enlarge on and clarify those adopted in April and November 2008. A copy of the report to the JHA Council is attached (not printed)³. The conclusions focus on:

- fundamental principles: the CFR should set out common fundamental principles of contract law, possibly accompanied by guidelines to cover cases where exceptions to those principles are required;
- definitions – the CFR should cover definitions of key concepts in contract law;
- model rules – the CFR should contain model rules that should be general in nature so that they can apply to all contracts. They should be drafted in sufficiently broad terms to be easily adaptable to all contractual situations;
- relationship with the proposed Directive on Consumer Rights – in developing the CFR, account should be taken of the development and negotiation of the proposed Directive (although they are separate projects whose objectives may not always coincide); and
- form of the CFR – the CFR should be a non-binding instrument, comprising a set of guidelines for use by Community legislators.

You are aware that the Government has been in support of a future CFR on the basis that it is a non-binding source of guidance and reference for Community lawmakers when drafting or reviewing legislation in the area of contract law. This guidance should help to improve the quality and coherence of European legislation in the area of contract law.

The Government remains of the view that any concept which is in any way binding upon Community lawmakers, even to the extent that it creates a presumption that the CFR should be used more often than not, is unacceptable. A future CFR should only operate as a set of voluntary guidelines to lawmakers.

Finally, I would like to thank you for your report on the Draft CFR. I will write to you again about this when we have had time fully to consider it.

19 June 2009

Letter from the Chairman to Lord Bach

Thank you for your letter of 19 June. This was considered by Sub-Committee E at its meeting on 15 July.

The Committee was grateful for your update and drew the conclusion that little progress has been made in developing the CFR since the Council last discussed this project. We welcome the Council's agreed guidelines and endorse the Government's continued policy opposing binding status for the proposed CFR.

³ <http://www.consilium.europa.eu/uedocs/NewsWord/en/jha/108340.doc>

May we take this opportunity to clarify one aspect of our recent Report on the CFR, *European Contract Law: the Draft Common Frame of Reference*. Paragraph 3 of our Report states that the Committee's inquiry was based on the Interim Outline Edition of the draft CFR, and your evidence and that of Professor Vogenauer was given when only that edition had been published. But Chapter 3 comments on certain examples drawn from the draft CFR without distinguishing between the interim edition and the final edition which was published after you had given evidence. We continue to believe that whichever edition is consulted, the policy issues we identified still merit consideration. We thought it right, however, to acknowledge that Chapter 3 could have been clearer as to which particular edition was under focus.

We look forward to the Government's formal response to our Report in due course.

17 July 2009

CIVIL JUSTICE: MAINTENANCE OBLIGATIONS (6996/09)

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

Thank you for your letter of 2 April⁴ confirming that your Committee has cleared this proposal from scrutiny.

You will recall that we did not opt in to this proposal but we wanted to ensure that the text reflected the fact that the Community's exclusive external competence relating to applicable law will extend only to those Member States participating in the Decision. For your information I can confirm that the Commission and all delegations have recently agreed to amend recital 5 to say:

The Community has exclusive competence over all matters governed by the Protocol. This does not affect the positions of the Member States which are not bound by this Decision or subject to its application as referred to in Recitals 9a and 10.

Recital 10 relates to the position of Denmark. Recital 9a says:

In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

I believe that these changes have resolved the matter satisfactorily.

9 July 2009

Letter from the Chairman to Lord Bach

Thank you for your letter of 9 July which was considered by Sub-Committee E at its meeting of 14 October. We welcome the clarity regarding the extent of the Community's exclusive external competence in relation to the law applicable to maintenance obligations brought about by the amendment to the recitals to the proposal.

15 October 2009

CIVIL JUSTICE: PROCEDURE FOR THE NEGOTIATION AND CONCLUSION OF BILATERAL AGREEMENTS (5146/09, 5147/09)

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

Thank you for your letter of 21 April⁵ enclosing the texts agreed at COREPER. These were considered by Sub-Committee E at its meeting of 6 May. We decided to clear these proposals from scrutiny.

In doing so the Committee recognises the benefit of creating a precedent for a mechanism enabling Member States to enter into agreements with third countries in areas where the Community has exclusive external competence. This benefit outweighs the fact that in two areas in particular, as you recognise, the proposals do not achieve the best outcome. These areas are,

⁴ <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

⁵ <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

- the exclusion from the scope of the proposed Regulation on the applicable law in contractual and non-contractual obligation of the recognition and enforcement of judgments in civil and commercial matters; and
- the low level of, and non-standard procedure for, the scrutiny of Commission decisions. The Committee supports the use of the management committee procedure set out in Council Decision 1999/468.

The Committee would support rectification of these deficiencies should an opportunity arise.

8 May 2009

Letter from Lord Bach to the Chairman

I wrote to you on 21 April 2009 about these draft Regulations. I am writing again to inform your Committee about the final outcome which was agreed at COREPER today.

There is one issue which I wanted to draw to your attention. This concerns the Regulation which deals with choice of law issues and in particular the provision which provides for the Commission's review of the operation of that instrument (Article 10). The previous version of that provision provided that the possibility of extending the scope of that instrument to cover the recognition and enforcement of judgments falling within the scope of the Brussels I Regulation (44/2001) should be considered as part of the Commission's assessment of the operation of the new Regulation.

This was not an ideal outcome, but at least it would have ensured that the issue of such an extension would have remained firmly on the agenda for the future. Unfortunately as a result of opposition from the European Commission the current review provision contains no specific reference to such an extension. In place of such a reference are the attached draft statements to be made by the Council and the Commission. In this statement the Council invites the Commission to consider the possibility of such an extension; the Commission agrees to take note of this invitation to examine it carefully in the review process. This is not as strong a form of words as I would have preferred. Nevertheless I have with some reluctance concluded that at this time it is not realistically possible to make further progress on this point. It must be hoped that the Commission's view of the matter in that review will be more flexible and that the UK's reasonable position will attract more support than is currently the case.

20 May 2009

ANNEX

DRAFT STATEMENTS BY THE COUNCIL AND THE COMMISSION ON ARTICLE 10

"The Council invites the Commission to consider carefully, when preparing its report under Article 10, whether, in the light of the experience gathered on the application of the Regulation, the Regulation on its expiry should be replaced by a new one covering the same subject matters or including also other matters covered by other Community instruments. In the context of the report on the application of the Regulation on applicable law, the Commission should consider, in particular, whether a possible new Regulation should cover recognition and enforcement under Regulation (EC) No 44/2001."

"The Commission takes note of this invitation and will examine it carefully in its report on the application of the Regulation, without prejudice to its own competences."

Letter from the Chairman to Lord Bach

Thank you for your letter of 20 May which was considered by Sub-Committee E at its meeting of 10 June. Whilst continuing to support an extension of the scope of the proposed Regulation on the applicable law relating to contractual and non-contractual obligations to the recognition and enforcement of judgments, we accept that this is not, at present, negotiable. We hope that in the future support can be gained for this so that it becomes a realistic possibility when the Regulation comes to be reviewed.

12 June 2009

CIVIL JUSTICE: RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (12265/09)

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

Your Explanatory Memorandum of 4 September was considered by Sub-Committee E at its meeting of 14 October. We decided to retain this matter under scrutiny.

The Committee agrees with you that a new international agreement simplifying and improving the arrangements for the international recovery of maintenance would be beneficial. But in order to reach a firm view on the substantive provisions of the Convention we would be grateful for an update on the outcome of the consultation you are currently undertaking and for further information on the specific changes to United Kingdom law that would be necessary in order to meet the requirements of the Convention.

It would also be grateful for your view on the adequacy of the protection of data of individuals afforded by the Convention, particularly as they appear less stringent than the protection afforded by Regulation 4/2009. As the European Data Protection Supervisor commented on the Regulation, will he be asked to comment on the Convention?

The Committee notes that the Government doubt whether the Community has exclusive competence to enter this agreement. It would be grateful for a further explanation of your view resulting from the further examination being undertaken. If that examination confirms that competence is shared, would the UK seek to accede to the Convention? The Committee would also be grateful for a further explanation of the Government view that the UK opt-in does not apply to this proposal. If the opt in is available would the Government wish to exercise it?

15 October 2009

Letter from Lord Bach to the Chairman

When Sub-Committee E considered this proposal on 14 October 2009 further information was required on a number of issues.

IMPACT OF THE CONVENTION ON UK LAW

I understand that your wish to have further information on the changes to UK law that the 2007 Convention will require stems from a desire to assess the impact of the Convention.

The UK is party to a number of international agreements of different kinds which share the aim of improving the international flow of maintenance for families. These cover a huge number of contracting states and work in different ways. To some extent, they often overlap in that there will often be more than one international instrument governing relationships between the UK and another state. The overall picture is – unavoidably – very complex.

Three other international instruments will be most relevant in terms of the Convention to which the UK is party. Firstly, as between Member States of the European Community, Regulation 4/2009 will govern relationships within the Community as regards maintenance. There is a disconnection clause contained in the Convention at Article 51(4), enabling the Community to apply the Regulation, rather than the Convention, internally. The Convention will, of course, apply between a Member State and any non-Member State which is a Contracting State to the Convention. The Brussels I Regulation currently governs maintenance matters between most Member States (save those which have ratified the 1973 Convention, discussed below) and will be replaced in this regard by the new Regulation.

Secondly, the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (“the 1973 Convention”). The relationship between the Convention and the 1973 Convention is governed by Article 48, which provides that the Convention replaces the 1973 Convention ... *“in so far as [the 1973 Convention’s] scope of application as between [Contracting States] coincides with the scope of application of this Convention”*. There will therefore be a gradual “migration” regarding how UK relationships with States Party to the 1973 Convention are governed as those states ratify or accede to the Convention. Of course, since there is the possibility of the scope of the Convention varying depending on what declarations Contracting States make as to scope (see Article 2 of the Convention and Articles 1 and 26 of the 1973 Convention), there may be situations in which the 1973 Convention will apply for some purposes and the Convention for others as between the UK and other states. In addition, not all 1973 Convention states might choose to ratify the Convention. That said, the scope for additional complexity is probably limited because the benefits of the Convention are such that it is likely that 1973 Convention states will be keen to ratify; and there is very likely to be a corollary

between their chosen scope under the 1973 Convention and the scope they now choose under the Convention.

The 1973 Convention is implemented in the UK by means of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (“the 1972 Act”). This legislation is the vehicle for implementation of several international instruments. By virtue of powers under s.40 and s.45(1) of the 1972 Act, SI 1993/593, the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993 modifies Part 1 of the Act for Contracting states to the 1973 Convention. It provides for orders made by UK courts with jurisdiction to be transmitted to Contracting states for recognition and enforcement, and lays down the procedure for and effects of recognition of an “incoming” order from a Contracting state by means of registration in domestic courts. Once registered, the order can be enforced under the domestic enforcement regime (as modified).

Whilst the focus of both Conventions is reciprocal recognition and enforcement, there are important differences.

Both provide for recognition on the basis that certain jurisdictional requirements are met regarding the proceedings in which the order is made, but the Convention has a simpler procedure for recognition and enforcement and introduces minimum requirements for enforcement.

The Convention also contains a negative rule of jurisdiction at Article 18, which underpins the protection for the creditor by preventing a debtor from bringing proceedings to modify the decision or make a new one in a country other than the habitual residence of the creditor whilst the creditor remains habitually resident in the state where the decision was made.

The Convention requires the provision of free legal aid for children where the application is made through Central Authorities.

Finally, it makes substantial provision for Central Authorities to facilitate the application of the Convention.

These matters are absent in the 1973 Convention.

Without wishing to commit myself at this very early stage, before my officials have been able to consider implementation in detail, it seems likely that implementation will primarily be by way of amendment to the 1972 Act in a similar manner to the method chosen for the 1973 Convention. There are already administrative arrangements in place for a Central Authority by virtue of other instruments which have required such co-operation and these will be extended to cover the obligations under the Convention.

The other instrument to which the UK is a party and which is affected by the Convention is the United Nations Convention on the Recovery Abroad of Maintenance, done at New York on the 20 June 1956 (“the New York Convention”). Article 49 of the Convention deals with the relationship with this instrument in a similar manner to the provisions of Article 48.

The New York Convention is perhaps a much less sophisticated instrument than the 1973 Convention and certainly much less so than the Convention. Primarily, it requires a rudimentary administrative co-operation system, and focuses on facilitating transmission of an application for maintenance from one Contracting state to whichever Contracting state whose jurisdiction the Respondent is subject to. It also allows for transmission of an order for payment of maintenance made by a competent tribunal of any Contracting state to another such state in order to seek enforcement in the latter state. It does not seek to regulate the conditions of jurisdiction, recognition or enforcement.

The New York Convention is implemented in UK law under Part II of the 1972 Act. This makes provision for transmission of applications by persons in the UK to other Contracting states, and provides for “incoming” applications to be treated as if made under specific provisions of domestic law, subject to certain modifications. Once an order is made, it is registered, which then enables it to be enforced in the UK as if it were a domestic order, again with certain modifications of domestic procedure.

The impact of the Convention on UK law will hopefully be, in the long term, to lead to a simplification of international enforcement of maintenance in practice. It will add another instrument to the available international mechanisms for recovery of maintenance, but over time it is expected that this will become the favoured route for a large number of states owing to the advantages and efficiencies it presents as against most of the other international instruments.

One potentially significant advantage in practice for practitioners and courts dealing with international enforcement of maintenance is that the EU Regulation is closely modelled on the Convention. There is therefore likely to be increasing ease of use of both instruments from the fact of their similarities, as experience grows.

ADEQUACY OF THE PROTECTION OF DATA OF INDIVIDUALS AFFORDED BY THE CONVENTION

You also ask about the issue of data protection in the context of the Convention, and contrast the situation to that in Regulation 4/2009.

It is important to understand that the data protection issues in the Regulation are quite different and of a much higher order than those in the Convention. Unlike the Convention, the Regulation contains an extensive regime to enable Central Authorities to require the provision of information. Of course, being contained in a Regulation, those provisions are directly applicable. Articles 61 to 63 of the Regulation contain that regime, and you will note in particular that, under A.61(1), public bodies are required to provide information to the Central Authority on request. These public bodies are those designated by a Member State, or in the absence of designation, any public body. The information which must be provided is listed in A.61(2) and you will see that it is in most cases information that would otherwise be treated in confidence. It will almost certainly have been gathered by the public bodies in question for purposes which did not relate to the recovery of maintenance, and therefore gathered on a quite different understanding as to the use to which it would be put. Most of the information is likely to be information to which the Data Protection Act, and the Directive, would apply.

It is these considerations that led to the scrutiny of the Regulation by the European Data Protection Supervisor, and to the imposition of strict rules about the use to which the information can be put (A.62(2)), the possibility or otherwise of allowing the applicant to see the information (A.62(2)), the storage of the information (A.62(3)) and the requirement to process confidentially, in accordance with national law (A.62(4)). Lastly, the provisions at A.63 deal with notification of the data subject in accordance with law, and allow that to be deferred if there is a risk that notification will otherwise prejudice the recovery of maintenance.

The Convention, by contrast, does not provide directly applicable powers for a Central Authority to require information on debtors held by public bodies. There are certain protections for personal data contained in Articles 38 to 40, but the instrument itself contains no further safeguards because it doesn't directly impose the sort of powers and obligations that the Regulation contains, as described above. Once the Convention is in force, all transfers of information for Convention purposes within, and from, the UK will need to comply with data protection law, in particular as regards transfers of information outside of the European Economic Area, and my officials will look closely at these issues when we implement the Convention in national law.

WHETHER COMMUNITY COMPETENCE IN THIS AREA IS EXCLUSIVE OR SHARED.

As you identify in your letter, the Government has doubts about whether the Community has exclusive competence in this area. If that competence rests solely on the impact that the Convention rules will have on the Community rules contained in Regulation EC 4/2009, then such competence seems doubtful on the basis that any such impact is unlikely to be more than minimal. However the Government accepts that this issue is not clear cut.

When considering the issue of exclusive competence, an analysis must turn principally on the interpretation of the opinion of the European Court of Justice in Opinion 1/03 regarding the Community's competence to conclude the Lugano Convention. Under this opinion, there are essentially two elements to exclusive competence: (a) whether the areas of law in question in the international agreement under consideration are covered to a large extent by Community rules; and (b) whether the rules in the international agreement are capable of undermining the consistent and uniform application of the Community rules and the system they establish.

In the light of the reference in Opinion 1/03 (in paragraph 126) to the future development of Community law, and not merely its current state, the Government acknowledges the possibility that it is the "coverage" part of the Court of Justice's test which predominates over the "effect" element. It considers that, were the matter to return to the Court of Justice, it cannot be guaranteed that a more expansive development of the test (in terms of the extent of exclusive Community competence) would not emerge.

There appears to be little appetite for a reference to the Court of Justice on this matter from other Member States, not only because of the risk that the Court could expand the concept of exclusive Community competence but also because this would result in a significant and unwelcome delay in an area where all Member States are very supportive of early conclusion of the Convention.

Whether the removal of the reference to "exclusive" competence in recital 3 of the draft Council Decision can be agreed will be considered in the Council Working Group next month. The Government hopes that conclusion of the Convention by the Member States in pursuance of their duty of loyal co-operation under Article 10 TEC will be an acceptable and pragmatic way forward. Indeed, specific reference is made to this duty in Opinion 1/03 itself, at paragraph 119.

I can confirm that whatever the final decision on competence the UK wishes to be a party to the Convention.

UK OPT IN

I should clarify that the Government has opted in to this proposal in accordance with our Protocol on Title IV measures. This is in line with our established practice on the exercise of the current opt in – i.e. that it applies to instruments where there is shared competence but not to instruments where the Community's competence is exclusive. We needed to notify the Council of our opt in by 1 November 2009 and so, in order to protect the position of the United Kingdom on this matter, this needed to be exercised before the outcome of the discussions regarding the reference to "exclusive" competence were known. In the event that no agreement is reached to remove this reference, the opt in letter sent will simply have no effect.

CONSULTATION WITH INTERESTED PARTIES

We have consulted with key interests on implementation of the Hague Convention and no issues were raised. Those we consulted have given us positive feedback on implementation of this Convention and were very supportive of it being ratified.

With regard to timing, there was a possibility that this proposal would be taken to the Council later this month. I understand this will not now happen. It is likely, therefore, that this proposal will be considered at a Council early in the New Year.

13 November 2009

COMPANY LAW: REPORTING AND DOCUMENTATION REQUIREMENTS IN THE CASE OF MERGER AND DIVISIONS (13548/08)

Letter from Ian Lucas MP, Minister for Business and Regulatory Reform, Department for Business Innovation and Skills, to the Chairman

I am writing to update you on the outcome of the first reading by the European Parliament of the proposals for a directive to simplify reporting arrangements in respect of Company mergers and divisions. Previously, my predecessor submitted an Explanatory Memorandum that was cleared by a letter from your predecessor Lord Grenfell on 6 November 2008.

At its first reading on 22 April, the European Parliament adopted by 652 votes to 7, with 22 abstentions, a legislative resolution amending, under the first reading of codecision procedure, the proposal for a directive of the European Parliament and of the Council amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of merger and divisions.

The proposals stem from the Commission's simplification programme adopted in 2006 to help reduce the administrative burdens that can hamper the economic activities of European business. They relax some reporting requirements in the case of company mergers and divisions, and align them where this is not already the case with relevant provisions in the 2nd (Capital maintenance) and Cross-Border Mergers Directives.

When the plenary voted on the proposals it adopted 30 amendments. Although large in number they implement the same/similar amendments in respect of four company law directives covering domestic mergers and divisions, cross border mergers and capital maintenance. A number of the amendments are technical in nature clarifying the use of terminology and timing of reports. The changes include:

- a Member State option to designate internet sites (other than central platforms) such as a trade association or chamber of commerce for publication of information regarding company mergers and divisions
- proposals to enable Member States to put in place arrangements for shareholders of companies being acquired during a merger to sell their shares to the acquiring company at a fair market price
- confirmation that Member States should adopt appropriate measures to ensure security of internet sites and authenticity of documents published, and for companies to make copies of reports available at the registered office

- alignment of requirements for a draft terms of merger in the case of a domestic and cross border merger
- confirmation that modifications are intended to be implemented without prejudice to systems of protection of the interests of creditors, employees and public authorities e.g. tax authorities
- clarity on timing of reports
- a requirement for Member States to provide transposition details

The department for Business Innovation and Skills (BIS) has been involved in discussions concerning the amendments and is content that the changes add clarity and that the first two points above which are the most significant are Member State options which if adopted would provide flexibility and do not impose additional burdens on business.

The amendments adopted correspond to what was agreed between European Parliament, Council and Commission and ought therefore to be acceptable to the Council. Consequently once the legal linguists have scrutinised the text on 25 June 2009, the Council should be in a position to adopt the legislative act. I attach the text that has been approved by the European Parliament.

24 June 2009

Letter from the Chairman to Ian Lucas MP

Thank you for your letter of 24 June which was considered by Sub-Committee E at its meeting on 8 July.

We are grateful for your update and explanation of the progress on this proposal. Like you, we support the revised text which has been agreed between the European Parliament, the Council and the Commission as reinforcing simplification whilst continuing to ensure the protection of shareholders.

However, we are disappointed that we were not updated until two months after the adoption by the European Parliament of amendments which had been discussed and agreed with the other institutions before their adoption. It is important if we are to conduct our scrutiny effectively to be updated as soon as it is clear that progress is being made towards a first reading deal.

10 July 2009

COMPANY LAW: SHIP SOURCE POLLUTION (7616/08)

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

Thank you for your letters of 24 and 29 April 2009⁶. They were considered by Sub-Committee E at its meeting on 6 May.

We are grateful for the updates on the progress of this proposal. We would be grateful for any further information you have on the views of key stakeholders as requested in the letter of 24 November from Lord Grenfell.

8 May 2009

Letter from Lord Bach to the Chairman

Thank you for your letter of 8 May. Since I last wrote to you on 29 April the Committee of Permanent Representatives (Coreper) and the European Parliament agreed, on 29 April and 5 May respectively, to the compromise text that I sent to you. I enclose a copy of the text that was agreed at Coreper. As I outlined to you in my letter of 29 April the Government is satisfied that the Directive will provide an important means of protecting the maritime environment from intentional, reckless or seriously negligent discharges of polluting substances. We envisage that the enclosed text will be adopted at the June Council once it has been finalised by jurists-linguists. Your Committee cleared this matter from scrutiny in November 2008.

In your letter you referred to Lord Grenfell's letter of 26 November 2008 in which he indicated that the Committee would be grateful to learn the outcome of consultation with key stakeholders. During the period in question, officials in the Department for Transport have had a number of contacts – including a meeting in February 2009 – with representatives of the Chamber of Shipping and the International

⁶ <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

Group of Protection & Indemnity Clubs. As negotiations with the European Parliament progressed, the concerns of these two bodies became increasingly focused on the European Parliament's approach to addressing repeated minor cases. This was a concern which the Government shared but one which the final European Parliament text largely resolved.

15 May 2009

Letter from the Chairman to Lord Bach

Thank you for your letter of 15 May. This was considered by Sub-Committee E at its meeting on 3 June.

We are grateful for the update and the further information you provided on the views of key stakeholders.

5 June 2009

CRIMINAL JUSTICE: CHILD SEXUAL ABUSE, SEXUAL EXPLOITATION AND PORNOGRAPHY (8150/09)

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

Thank you for your Explanatory Memorandum of 16 April 2009⁷ which was considered by Sub-Committee E in its meeting of 13 May. We decided to retain this matter under scrutiny.

Having had the benefit of a comparison between the measures in the existing Framework Decision and the proposal, the Committee would like to express its own support for the initiative behind this proposal and welcomes the Commission's endeavours to extend and consolidate the existing measures addressing these crimes. In particular, the Committee supports this proposal's greater focus on the needs of child victims as compared to the existing mechanisms contained in Framework Decision 2004/68/JHA.

The Committee supports the Government's attempts to clarify the detail of the draft. In particular the inclusion, in Articles 2–6, of a protection for those above the legal age of consent but still under 18 so as to avoid the criminalisation of legal sexual activity and the 'expansion' of the Article 5 offence of solicitation beyond simply 'grooming' of victims via an "information system". We ask the Government to keep the Committee informed of the progress they make in this regard.

The Committee notes from the Explanatory Memorandum that there are a number of matters upon which the Government wish to reflect and which require further work in order to ensure their compatibility with existing legal responsibilities. These include the definitions in Article 1, the measures in Article 7(4) allowing for intervention programmes to run alongside imprisonment, the detail of the intervention programmes, the exchange of disqualification information in Article 8 and the provisions dealing with the rights and roles of the victims (Articles 11, 12, 14 and 15). The Committee recognises that the evolution of this proposal is on-going but would emphasise the need to keep the Committee informed and looks forward to receiving up-dates from the Government as these matters evolve.

Finally, in relation to the issue of subsidiarity, the Committee notes the Government's comment in paragraph 16 of the Explanatory Memorandum that: "While transboundary action may be valuable, the implications of Community level action as opposed to domestic or international initiatives require careful consideration". The Committee is puzzled by the reference to international action. We would welcome a more detailed explanation of the concerns that lie behind this statement and particularly your view whether this proposal gives rise to a subsidiarity problem, and if so why?

15 May 2009

Letter from Lord Bach to the Chairman

Thank you for your letter dated 15 May 2009. I understand that sub-Committee E has retained this document under scrutiny.

I am encouraged by the Committee's support for the initiative and agree that the proposal endeavours to extend and consolidate existing measures on child sexual abuse, exploitation and child pornography.

⁷ <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

The Government welcomes the Committee's support in respect of our attempts to clarify the detail of the draft proposal, with particular reference to the application of the stipulated offences to minors above the age of consent and the extension of the grooming offence. I will certainly ensure the Committee is informed of progress made on these points during negotiations.

I note your requests for further information in relation to the issue of subsidiarity and clarification of terminology used in the Explanatory Memorandum. The reference to international action was merely a reference to the recent Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (2007).

The proposal put forward by the Commission is considered justified in so far as child sexual abuse and exploitation have transnational aspects and Community level action would produce clear benefits compared with Member State action. Our subsidiarity concerns are not with the instrument as whole but rather with certain provisions of the proposal, which appear to be overly prescriptive. For example, as mentioned in the Explanatory Memorandum, we think that the mechanism in Article 8 by which disqualification information is exchanged should not be set out in such prescriptive detail in this instrument. Resolving these matters is a priority during negotiations.

I will ensure that the Committee is updated on the developments of negotiations as they progress.

1 June 2009

Letter from the Chairman to Lord Bach,

Thank you for your letter dated 1 June 2009 which was considered by Sub-Committee E (Law and Institutions) at its meeting of 24 June.

We retain this matter under scrutiny.

The Committee welcomes your clarification of the Government's position in relation to the proposal's compatibility with the principle of subsidiarity. The Committee notes that much of the proposal's detail remains to be ironed out and we look forward to receiving updates from the Minister as matters progress.

25 June 2009

Letter from Lord Bach to the Chairman

Thank you for your letter dated 25 June 2009. I understand that sub-Committee E has retained this document under scrutiny.

In light of the forthcoming period of Parliamentary recess I am writing to update you on the progress of the negotiations on the above Framework Decision.

The proposed Framework Decision is expected to complete a first read through in negotiations at a Working Group meeting on 27 – 28 July. A second round of negotiations is expected to begin as soon as the first round is complete. Whilst the UK is supportive of the Framework Decision as a whole, we have outlined a number of areas of concern in respect of particular articles, as set out in our Explanatory Memorandum

I will ensure that the Committee is updated further on the developments of negotiations as they progress.

19 July 2009

Letter from the Chairman to Lord Bach

Thank you for your letter dated 19 July 2009 up-dating Sub-Committee E on the proposal's progress in the working groups. We retain this matter under scrutiny.

15 October 2009

CRIMINAL JUSTICE: COMBATING HUMAN TRAFFICKING AND PROTECTING
VICTIMS (8151/09)

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

Thank you for your Explanatory Memorandum dated 14 April on the proposed Framework Decision on preventing and combating trafficking in human beings. It was considered by Sub-Committee E at its meeting of 6 May 2009. We have decided to retain this matter under scrutiny.

The Committee welcomes strong and effective measures designed to combat human trafficking.

We note from your Explanatory Memorandum that the Government is still “seeking to establish the likely impact” of this proposed measure and that the Government will be seeking from the Commission clarification of many aspects of the draft’s proposals. In particular, the inclusion in Article 1 of a definition of “position of vulnerability”, the provisions on victim’s age, investigator’s training and the availability of investigative tools in Article 7 and the purpose of the reference in Article 11 to the draft Framework Decision on combating the sexual abuse of children. In relation to extra-territoriality in Article 8, we note that the Government will be considering the extent to which this provision could potentially go further than existing legislation. As this proposal evolves, the Committee looks forward to receiving the Government’s conclusion on this point and the answers to the clarifications it seeks from the Commission on the other aspects of the draft.

The Committee notes that this proposal places a far greater emphasis on the protection to be afforded victims of trafficking than the existing Framework Decision. The draft includes protection for victims from prosecution (Article 6), during the course of criminal proceedings (Article 9) and before and after the trial (Article 10). In its Explanatory Memorandum the Government states that it will seek to ensure that the measures in Articles 9 and 10 are appropriate and effective. The Committee would welcome a clearer explanation from the Government of any concerns, if any, they might have with these measures and what, if they have concerns, they would like to see included in their place. The deaths of 21 cockle pickers in Morecambe Bay in 2005 illustrated that the victims of trafficking are often poor, vulnerable, and to all intents and purposes ‘invisible’ to the authorities. Does the Government think measures to protect victims such as those included in this proposal would avoid a repeat of the tragic events of 2005?

With reference to Article 9(4), while the idea is one with which we sympathise in principle, care should be taken not to give the impression that it is always consistent under the European Convention on Human Rights to protect the identity of a particularly vulnerable victim. Depending on what width is given to the words “where appropriate” this Article may give that impression.

In relation to Article 12(3) of the proposal and the invitation to Member States to legislate to make it an offence to knowingly use services provided by a trafficked person, the Committee notes that the Government, other than stating that it “will seek clarification on the efficacy” of this measure, expresses no opinion on this suggestion in their Explanatory Memorandum. The Committee would welcome the Government’s opinion on the merits (or otherwise) of the inclusion in the draft of this offence. Would the Government anticipate creating this offence?

The Committee notes the Government’s statement that the UK already complies with existing measures designed to combat trafficking in human beings and that “significant legislative changes are unlikely to be necessary”. Existing measures include the UN’s Protocol to Prevent, Suppress and Punish Trafficking in Persons, the Council of Europe’s Convention on Action against the Trafficking in Human Beings and the EU’s existing Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings.

In relation to the latter, the Committee notes that the Commission undertook an implementation report, published in May 2006, which found that not all the Member States had implemented the existing Framework Decision’s provisions. (Indeed, the Commission failed to receive any information at all on its implementation from four Member States.) Once again, we note the absence of an impact assessment and given the plethora of existing measures and the findings of the Commission’s report, does the Government think that the EU’s efforts would be more effectively focused on the implementation and effective management of existing measures to fight the trafficking of human beings? We hope that the present proposal will not obscure existing measures to fight trafficking.

With reference to paragraph 34 of your Explanatory Memorandum, we note that the Government has not, as yet, undertaken an assessment of the financial impact of the proposal. In the light of this, the Committee wonders whether the proposed timetable for agreeing this measure in the Justice and Home Affairs Council in October or November this year, may prove too optimistic.

8 May 2009

Letter from Alan Campbell MP, Parliamentary Under Secretary of State, Home Office, to the Chairman

The Committee has retained under scrutiny document 8151/09 on the above proposals and has requested further information.

Thank you for the Committee's queries in relation to the UK Government's position on aspects of the draft Framework Decision on Human Trafficking. Our response is provided below.

As you note, we are still seeking to establish the likely impact of the Framework Decision, and are seeking clarification from the Commission on many aspects of its proposals. We will update you on the answers to the clarifications we are seeking, and the UK Government's subsequent conclusions.

The Committee notes the tragic events of 2005 when 21 cockle pickers died in Morecambe Bay. It is our belief that measures we have taken since then, especially the setting up of the Gangmasters' Licensing Authority and enactment of legislation criminalising trafficking for forced labour in the Asylum and Immigration (Treatment of Claimants etc) Act 2004 will help prevent against a repeat of such events.

EMPHASIS ON PROTECTION AFFORDED TO VICTIMS OF TRAFFICKING (ARTICLES 9-10)

The Committee has asked what concerns the UK Government has with proposals in the Draft Framework Decision with regard to Articles 9 and 10, which cover the protection of vulnerable victims in criminal proceedings and assistance to victims. The Government is broadly sympathetic to the intention behind these articles. The Council of Europe Convention Against Trafficking in Human Beings contains similar measures (e.g. Article 28) which the UK is compliant with.

With regard to Article 9 (3) on the need for vulnerable victims to be afforded specific treatment aimed at preventing secondary victimisation, whilst supporting the intention behind this, the Government is keen to ensure that we do not fetter the ability of the Courts to decide on how and when that duty should be discharged in relation to each case.

We agree with the Committee that Article 9 (4), which refers to anonymous evidence being given by victims of trafficking, may not always be compatible with the ECHR rights of the defendant to a fair trial. We believe that the caveat "where appropriate" is helpful but will press for further clarification in the text.

Article 9 (6) calls for free legal counselling for victims. As the Committee will know, this clause is not appropriate to the UK as victims are not party to criminal proceedings in our legal system (though victims may be eligible to access legal advice for immigration purposes and some civil issues under the normal legal aid procedures). We will press for this to be recognised.

On Article 10 (1), the Government will be seeking clarification from the Commission on what nature and extent of protection it envisages being provided to victims *after* criminal proceedings before we take a final view.

We will also seek clarification on the role of the Competent Authority. In particular, Article 10 (2) of the Framework Decision states that an individual should be treated as a victim as soon as competent authorities have an "indication" that the person may be subjected to a trafficking offence. The Council of Europe Convention stipulates that victims are identified as such on the basis of "reasonable grounds" (Article 10(2) of the Convention). The UK operates on the basis of the Council of Europe Convention, which it has implemented.

OFFENCE OF KNOWINGLY USING SERVICES OF A TRAFFICKED PERSON

This proposal urges Member States only to give consideration to such measures. It does not impose anything more than that (e.g. a requirement to adopt such legislation). As such, the Government is content that the UK could comply with such a provision. As the Committee will be aware, the Government is already thinking along similar lines. The proposed strict liability offence of paying for sexual services from someone who has been subject to force, threats or deception, is contained in the Policing and Crime Bill currently before Parliament.

EFFECT ON EXISTING MEASURES

We agree with the Committee that ensuring compliance with existing agreements amongst all EU Member States is vital to ensure the fight against trafficking is effective. The Government is sympathetic also to the idea that EU law on trafficking (embodied in the Framework Decision) should be updated to reflect more recent developments in human trafficking since 2002, which is when the original Framework Decision was adopted. Unlike the Council of Europe Convention, all EU Member

States would be obliged to give effect to the Framework Decision. Subject to negotiation on the detail, (to ensure that any proposals to go further than the Council of Europe add value and do not create unnecessary regulation), the Government expects the Framework Decision to further strengthen the international legal architecture against trafficking, alongside existing treaties that the Committee mentions.

The potential financial impact of the proposal is being investigated.

You have also asked to be kept informed of any clarification from the Commission on areas which are unclear. I will keep you updated.

22 May 2009

Letter from the Chairman to the Alan Campbell MP

Thank you for your letter of 22 May 2009 which was considered by Sub-Committee E at its meeting of 17 June.

We retain this matter under scrutiny.

The Committee is grateful for the information you have provided and looks forward to receiving updates on the proposal's progress as and when the Government receive answers from the Commission and the Government have drawn their subsequent conclusions. We welcome your conclusion that the proposal will "further strengthen the international legal architecture against trafficking, alongside existing treaties".

The Committee supports the Government in its attempts to clarify the impact of Article 9(3) on judicial discretion and in its push for recognition in the proposal that the availability of free legal advice to the victims of trafficking is inappropriate in the UK's context.

The Committee would like to emphasise the importance it attaches to the rights contained in the European Convention on Human Rights and we welcome the Government's efforts to secure the clarification of the relationship between the measure in the proposal allowing vulnerable victims to give anonymous evidence "where appropriate" and the right to a fair trial in Article 6 of the Convention.

The Committee notes the measures that the Government have taken nationally to avoid a repeat of the tragic deaths of the cockle pickers in Morecambe Bay in 2005, including the setting up of the Gangmasters Licensing Authority (which we note was raised as a question in the House of Lords Chamber on Tuesday 16 June) and the enactment of legislation criminalising trafficking for forced labour in the Asylum and Immigration Act 2004. However, the Committee would still like to know whether it is the Government's view that the measures included in this proposal will make a positive contribution to the avoidance of such events in the future. In relation to the potential financial impact of this proposal, the Committee notes that this remains under investigation and looks forward to receiving the Government's conclusions on the measure's financial impact. However, the Committee repeats its question: given the lack of a financial impact assessment, is agreement on this matter in October or November overly optimistic? The Committee would like to take this opportunity to point out that your letter left unanswered the Committee's two questions highlighted in this paragraph and we would like to reiterate the importance we attach to having our questions answered.

In relation to the proposed offence of knowingly using the services of a trafficked person, the Committee is aware of the proposed strict liability offence of paying for sexual services from someone who has been subject to "force, threats or deception" currently passing through Parliament in the Policing and Crime Bill. Whilst acknowledging that this new measure has the potential to make an impact on the trade in trafficked persons the offence is clearly restricted to the payment for sexual services, whereas the offence in the proposed Framework Decision contains no such limitation. Do the Government think that the new offence in the proposal would have an even greater impact on the trade in trafficked persons? Do the Government have any plans to legislate to create such an offence in the future?

19 June 2009

Letter from Alan Campbell MP to the Chairman

Further to the Explanatory Memorandum submitted to Parliament on 14 April 2009 and correspondence with your Committee on 22 May 2009, I am writing to update you on progress that has been made in negotiating the proposed EU Framework Decision; alert you to the possibility of reaching agreement on it during or just after recess, and setting out arrangements for keeping your Committee updated during that time.

PROGRESS SO FAR

The Committee will wish to be aware that negotiations progressed under the Czech Presidency with completion of first reading. The Swedish Presidency took over in July, and held a second reading. A re-drafted document was subsequently issued, taking into account views of Member States. The revised text will be discussed at the next working group, on 1 & 2 September 2009.

I am pleased to be able to report progress on a number of areas where the Government has sought clarification. In some areas improvements have been made with which we are content. I would draw the Committee's attention in particular to Article 8, which would require legislation for the UK to be compliant.

- *Article 1 – definition of trafficking*: we are satisfied that the proposal's definition of a "position of vulnerability" is consistent with the existing Framework Decision (2002) and the UK is compliant.
- *Article 7 – investigation and prosecution*: we are now satisfied that the proposals to investigate and prosecute trafficking offences are consistent with UK legislation and practice and the UK is compliant.
- *Article 8 – extra territorial jurisdiction*: our initial position was that we will consider the extent to which this goes further than our current legislation. Having done so, our view is that the UK would not be compliant with the proposal. It goes further than the current Framework Decision by removing the complete reservation available in respect to extra territorial jurisdiction. The proposal would require the UK to have jurisdiction where the offender is a UK national, even if the crime committed has no other link to the UK.
- The Committee may be aware that a similar clause is present in the Framework Decision on Child Sexual Exploitation (currently being negotiated and led by the Ministry of Justice). We are ensuring our arguments on both Framework Decisions are aligned and we will consider our position in the light of on-going discussions about the necessary legislation in the fight against trafficking.
- *Articles 9 & 10 – Provisions for victims*: The numbering of these Articles has been changed. They have also been re-drafted. We are currently assessing the implications for UK compliance. In particular, we will press for provisions in Article 9 on the identification of victims to be consistent with the Council of Europe Convention, unless there is a convincing argument for a different approach.
- *Article 11 (previously Article 9) – special measures for child victims of trafficking*: The Commission have inserted relevant provisions from the Framework Decision on Child Sexual Exploitation, which is also currently being negotiated. We are liaising with the Ministry of Justice (who lead on this framework decision) to ensure that we are content with this approach.
- *Article 12 – prevention*: the proposal urges Member States to give consideration to further legislation prohibiting the knowing use of services provided by a trafficked person. The proposal has merit in potentially preventing trafficking. The UK would be compliant.
- *Article 13 – National Rapporteurs or equivalent mechanisms*: the UK is compliant with the proposals (we have equivalent mechanisms) but we shall press for clarification on the purpose of these as they have changed from the original text which was more focused on monitoring implementation of the Framework Decision.

ARRANGEMENTS OVER SUMMER RECESS

The incoming Swedish Presidency intends to give priority to the completion of negotiations on this instrument. It may therefore be presented to the October or November Justice and Home Affairs Council meeting for agreement. October looks very challenging but November remains a more realistic prospect. I will therefore keep the Committee informed of progress during recess. We shall complete an assessment of the possible regulatory impact of the proposal by the end of recess and will make this available to the Committee as soon as possible for consideration.

24 August 2009

Letter from Alan Campbell MP to the Chairman

Thank you for your further queries in relation to the UK Government's position on 19 June 2009. They relate to the effectiveness of the Framework Decision in averting a tragedy similar to the Morecambe Bay incident and on whether agreement is realistic by October or November 2009. The Committee also raises new questions about the proposed offence of knowingly using the services of a trafficked person.

The proposed Framework Decision is designed to bolster the capability of EU Member States to combat all forms of trafficking, including for the purpose of forced labour. Coupled with the domestic measures noted by the Committee, we believe that these proposals are likely to make a positive contribution to avoiding tragedies in the future by improving legislation, investigations, victim care and prevention.

We are preparing a financial impact assessment of proposed framework decision. We understand the timetable is challenging. Our intention is to have this completed by the end of recess, and we will make this available to your Committee as soon as possible.

There is merit in the Commission's proposals for consideration to be given to a new criminal offence of the use of services provided by a trafficked person (Article 12(3)). The Government believes that legislation outlawing the use of services provided by a trafficked person can help reduce demand, especially with regard to trafficking for sexual exploitation. This may also be true of other forms of trafficking. Further thought would need to be given to the particular circumstances of those offences, and lessons learnt from our own proposed offence (in the Policing and Crime Bill, currently at Committee Stage in the Lords) before we could take a view about other areas. At present the Government has no such plans to bring forward legislation of this kind.

Finally I would like to take this opportunity to update the Committee on an issue raised previously (8 May 2009) regarding the need to ensure the rights of defendants in allowing anonymous evidence being given by victims of trafficking. Further to my reply on 22 May, I can report that the new draft text goes further in addressing the Committee's concerns. The clause now begins "Without prejudice to the rights of the defence" and a further qualification "in accordance with the basic principles of its legal system has been added in addition to the original caveat "where appropriate".

24 August 2009

Letter from the Chairman to Alan Campbell MP

Thank you for your letters of 24 August 2009 and the latest Explanatory Memorandum (14237/09) and draft text of this proposal. All have been considered by Sub-Committee E.

We have decided to clear this matter from scrutiny.

The Committee understands that this matter is a priority for the Swedish Presidency and that the latest draft of this proposal will be presented to the Member States for agreement at the Justice and Home Affairs Council on 23 October. As the Committee feared in May when it first considered this draft Framework Decision, an over-ambitious timetable has now become urgent.

In relation to your letters dated 24 August, the Committee notes the Government's assessment that this proposal will make a positive contribution to the fight against human trafficking and your opinion of the Commission's proposal in Article 12(3) for consideration to be given to a new criminal offence of knowingly using the services of a trafficked person.

As the Committee made clear in its previous letter, it attaches great importance to the rights contained in the European Convention on Human Rights. Therefore, the Committee is pleased to see the inclusion of the text of Article 10(3) as a means of reconciling the right to a fair trial included in the European Convention on Human Rights with the proposal's provisions allowing anonymous evidence.

The Committee agrees with and welcomes the inclusion in the proposal of Article 8 which requires the Member States to establish extra-territorial jurisdiction over nationals who commit these offences abroad. The Committee believes that this is a good development which will be an effective addition to the international legal regime against human trafficking.

The Committee has repeatedly asked the Government for their assessment of the financial impact of this proposal – an assessment the Committee was promised "by the end of recess". Given the time it has taken the Government to accede to the Committee's request, the Committee was both disappointed and surprised to receive in the latest Explanatory Memorandum only the single sentence at paragraph 42 of the Explanatory Memorandum.

21 October 2009

Letter from Alan Campbell MP to the Chairman

Thank you for letter dated 21 October 2009, and for your notification that this matter has been cleared from scrutiny.

The Government is pleased that the Committee is content with the inclusion of text in Article 10 (3) that reconciles the right to a fair trial included in the European Convention on Human Rights with the proposal's provisions allowing anonymous evidence. The Government is also pleased that the Committee agrees with and welcomes the inclusion in the proposal of Article 8 that requires Member States to establish extra-territorial jurisdiction over nationals who commit trafficking offences abroad.

Your letter also registers disappointment at the Government's assessment of the financial impact of the draft Framework Decision, which was provided at paragraphs 39 – 42 of the EM dated 14 October 2009. In previous correspondence, the Government shared your concerns over the challenging timetable for this instrument. I apologise that we were not able to provide you with a financial impact assessment at an earlier stage. As the Government was aware that the text of the draft Framework Decision was likely to change in response to the views of Member States, we decided that it would be best to provide an assessment of the financial impact of a near-finalised version of the text, rather than a very early version that was subject to change.

As discussed in the EM of 14 October 2009, the measures in the proposed Framework Decision are broadly in line with existing UK policy on human trafficking. Negotiations progressed positively, with the result that the potential financial impact on the UK has been significantly reduced since the original text. Implementing the Framework Decision will not result in any cost to the private sector. Costs that may arise within Government as detailed below will be met within existing budgets.

We are largely compliant with the text of the Framework Decision as it stands. Many of the proposals incorporate provisions from the original 2002 Framework Decision, with which we are compliant, so we would not incur any additional financial costs to implement these. Many of the proposals are also present in the Council of Europe Convention against Trafficking, which came into force in the UK in April 2009. The proposed Framework Decision would not require significant changes from measures implemented as part of our ratification of the Council of Europe Convention, and therefore would not incur additional costs.

There are two areas that do create an impact on the UK. We will need to legislate to ensure that we are compliant with Article 8, by extending our extra-territorial jurisdiction to cover UK nationals who commit trafficking offences abroad, where the offence has no link to the UK. The Scottish Government will also legislate. We have not found any historical or current cases where we would have needed to exercise extra-territorial jurisdiction in this way. Therefore, while it is possible that the change in legislation will result in extra prosecutions and related costs, current indications do not suggest that these will be significant.

We are also not currently compliant with the provisions for special measures for child victims in Article 13 (3), and will require legislation. However, in England and Wales, changes are already under way that will ensure compliance. Therefore the Framework Decision will not create any unanticipated costs. The Scottish Government and Northern Ireland are also currently reviewing their special measures policy.

My letter of 24 August provided a detailed update on the draft Framework Decision, as did the EM of 14 October. We have endeavoured to keep the Committee updated on our assessment of the overall impact of the Framework Decision as negotiations have progressed, and in response to changes in the text.

The draft Framework Decision was discussed at JHA Council on 23 October. We were able to lift the UK's remaining scrutiny reservation, on Article 8. The remaining outstanding issues that other Member States had were also resolved, without substantial change to the text of 12 October.

The Presidency has stated that the Framework Decision will be taken for agreement at JHA Council on 30 November. We expect that an officially revised and tidied document may be issued prior to this date, but we do not expect there to be any further changes of substance.

2 November 2009

Letter from the Chairman to Alan Campbell MP

Thank you for your letter dated 2 November which was considered by Sub-Committee E at its meeting of 11 November.

The Committee is grateful for the further information you provided and welcomes your apology regarding the timing of the financial impact assessment

12 November 2009

CRIMINAL JUSTICE: INTERPRETATION AND TRANSLATION IN CRIMINAL
PROCEEDINGS (11917/09, 12530/09)

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

Sub-Committee E has considered this proposal and your Explanatory Memorandum dated 22 July 2009. Consideration of the matter was limited to the issue of whether the proposal complies with the principle of subsidiarity; as you may know, this proposal was chosen by the Conference of European Affairs Committees (COSAC) for one of its pilot subsidiarity checks, foreshadowing the possible coming into force of the provisions of the Lisbon Treaty on subsidiarity. Scrutiny of other aspects will be resumed when the House returns in the autumn.

We conclude that the proposal complies with the principle. I attach for your information a copy of the response we have sent to COSAC which follows a list of questions addressed to national parliaments.

27 August 2009

Letter from the Chairman to Anna Kinberg BATRA, Chairwoman on European Union Affairs

As you know, this proposal was chosen for a COSAC-coordinated subsidiarity check. The check on behalf of the House of Lords has been undertaken for the European Union Committee, which I chair, by its Sub-Committee on Law and Institutions. I am pleased to enclose a note summarising the procedure involved in our check and our findings, following the list of questions set out in the aide-memoire prepared by the COSAC Secretariat.

Although we concluded that the proposal complies with the principle of subsidiarity and that, therefore, no Reasoned Opinion should be submitted, I am sending a copy of this letter and the accompanying note to the Commission, the European Parliament, and the Council, for their information. A copy also goes to the COSAC Secretariat, and we will be placing a copy on IPEX.

27 August 2009

Letter from Lord Bach to the Chairman

I understand that your committee E will be discussing, using the written procedure, the Swedish Presidency's "procedural rights package" (made up of a resolution setting out a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, a FD on interpretation and translation in criminal proceedings, and a resolution on interpretation and translation in criminal proceedings).

As I explained in the Government's original Explanatory Memorandum (and in subsequent EMs) the Swedish Presidency proposes to bring these texts to the October Justice and Home Affairs Council at the end of the week. They are hoping that the roadmap will be adopted, and that a General Approach can be agreed in relation to the Framework Decision and the resolution on interpretation and translation in criminal proceedings.

I believe that the roadmap is absolutely in line with the recommendations in your report of 11 May 2009, which I largely agreed with and responded to on 25 June. I also very much welcome the approach taken, and content, of the Framework Decision on interpretation and translation in criminal proceedings, and I know that the area of interpretation and translation was one which you identified in your report as in need of action.

I very much hope that you will be able to release all three texts from scrutiny. In my view it is absolutely crucial that the UK agrees to the proposals at the Council on Friday. I believe that a failure to do so will have extremely negative implications both for the substance of the texts and for the UK's relations with our EU partners. On the substance, there is strong pressure from some Member States to water down the text in the Framework Decision on interpretation and translation in criminal proceedings which if this led to the text dropping below the standards set by the ECHR would be particularly problematic and would call into question whether the Government could agree to the text. This becomes much more likely if negotiations continue until the November Council.

I should make clear that it would not be possible for the UK to be only able to agree to parts of the procedural rights package (for example, the roadmap). At least one Member State has made clear that their support for one element on the package is dependant on agreement on the whole package.

On our relations with EU partners, as already noted, this is the Swedish Presidency's top justice priority. It is also a very high priority for other Member States who championed the earlier work on procedural rights in 2007.

I know that this issue is complicated by the fact that I deposited a text of the Framework Decision on interpretation and translation in criminal proceedings on Monday of this week. It may be helpful for me to explain the context in which this happened. I have been in close dialogue with the Commons Scrutiny Committee as well as your Committee regarding the package. In response to the Commons report of 14 October, I wrote to Michael Connarty on Friday last week. In addition to responding to the points raised in their report, I also enclosed the latest draft of the text and explained how it differed from the previous text that had been deposited (only a week before and for which an Explanatory Memorandum was submitted on 9 October). My officials were then informed that, for the text to be able to clear Commons' scrutiny on Wednesday this week, the text which I had sent to the Committee would also need to be deposited in Parliament.

Clearly, this complicates the arrangements for your Committee and I am very sorry indeed for this additional layer of complexity.

I am happy to discuss this with you. My officials, also, stand ready to provide any further information that would be helpful. I am also enclosing the letter I wrote to Michael Connarty (not printed)⁸ which sets out the difference between this text and the last which I deposited.

20 October 2009

Letter from the Chairman to Lord Bach

Your Explanatory Memoranda on this proposal (12530/09) have been considered by Sub-Committee E. Your two detailed Memoranda were very helpful. We now clear this proposal from scrutiny.

We join you in supporting this proposal. We consider that the Resolution would provide encouragement to Member States to follow a common approach that is helpful, while respecting the need for differences of national implementation. We agree that the Resolution, like the Framework Decision, should provide Member States with flexibility to adapt to local practice.

We note that the provision for record-keeping in paragraph 23 of the original draft has been deleted. We regret that deletion, taking the view that such a provision would be helpful, so long as it did not impose undue burdens. When considering the proposed Framework Decision, we found the absence of statistical evidence made it difficult to assess the case for the measure, and we think it likely that the same difficulty would arise when evaluating the impact of the Framework Decision without proper records. One way to reduce the burden could have been to confine the scope of paragraph 23(a) to records of persons suspected of an offence, not all persons questioned.

21 October 2009

Letter from the Chairman to Lord Bach

Thank you for your letter of 20 October. The letter will be considered by Sub-Committee E in the course of their scrutiny of these proposals, but in view of the urgency of the matter and the impracticability of taking the view of Sub-Committee in time, I have considered whether the documents could be cleared from scrutiny.

In the case of the two draft Resolutions – on fostering the implementation of the interpretation measure, and on the Roadmap – Sub-Committee E has now cleared the proposals from scrutiny. I will write separately on those matters raising points which the Sub-Committee wishes to pursue.

As to the draft Framework Decision, the Sub-Committee will wish to consider the latest texts before taking a decision on clearance. However, having considered your detailed explanation of the latest text, and taking account of the Government's view on the benefits of the Council reaching political agreement on this text on 23 October, I am content to indicate on behalf of the Select Committee that agreement need not be withheld pending completion of scrutiny.

21 October 2009

Letter from the Chairman to Lord Bach

I wrote to you on 27 August to let you have my Committee's response to the Conference of European Affairs Committees (COSAC) which had chosen this proposal for a pilot subsidiarity check. Sub-Committee E considered other aspects of the proposal and your Explanatory Memoranda at its

⁸ <http://www.parliament.uk/documents/upload/ministerial-correspondence-2008-09.pdf>

meetings on 14 October and 28 October. Before that latter meeting, I wrote to you in response to your letter of 20 October indicating, in the light of the particular circumstances, that you need not await completion of scrutiny before giving agreement in the Council at its meeting 23 October.

Sub-Committee E considered the text deposited on 19 October and we are content to clear this matter from scrutiny. We endorse the Government's support for this proposal. The proper provision of interpretation and translation is vital to ensure fair trials for British citizens abroad and for other nationals in the UK.

It is clearly important that any EU measure in this area should be consistent with, and should enhance, the protection required by the ECHR. We consider significant, therefore, the evidence in the Commission's Impact Assessment showing that despite the existence of the ECHR standards, the provision of interpretation and translation is not consistently available to suspects and defendants involved in the criminal justice process outside their home state. We note that the Council of Europe Secretariat supports the establishment of common minimum standards in the EU.

We sound one note of caution. While the provision in article 3(7) for waiving the right to translations provides helpful flexibility in proceedings, there is a risk that a defendant could come under pressure to waive his right in circumstances where that would not be in his interests. It would assist in safeguarding vulnerable defendants if the Framework Decision required, for example, the courts to permit waiver only when satisfied that the defendant's decision was informed by bona fide legal advice.

30 October 2009

Letter from Lord Bach to the Chairman

This letter is to update your committee on the latest developments affecting the future of the above proposal.

Despite four months of intense negotiations and a general approach reached on the main part of the text at the October JHA Council, it is now clear that Member States will not be in a position to adopt the Framework Decision before the entry into force of the Lisbon Treaty on 1 December. This is mainly because there will not be enough time to carry out the negotiations on the remaining parts of the text (the Preamble) and for the resulting text to be finalised by the Jurist-Linguists before then.

This means that, according to EU transitional policies surrounding the implementation of the new Treaty, the measure will have to be re-introduced under a new Treaty base as a Directive under Article 82(2)(b) of the Treaty on the Functioning of the European Union. This could either be brought forward by the Commission or as a Member States' initiative (if seven co-sponsors can be identified).

On 18 November the Swedish Presidency asked the Council General Secretariat to explore, informally, whether Member States would be willing to present a Member States' initiative for such a Directive. The Council Secretariat indicated that such an initiative would be based on the text of the general approach, with only some minor changes being made to the text (e.g. replacing "Framework Decision" by "Directive", mentioning the new legal basis and inserting the names of the co-sponsors).

As you know, the Government is committed to driving up standards in the area of criminal procedural law and we believe that this Framework Decision and the accompanying resolution would add real value in this area to obligations arising under the ECHR. I also believe that it would be a very positive gesture on our part if the UK were to support such a move. Member States have been asked to give an indication regarding likely positions by 27 November.

How likely it is that the proposal will be re-presented as a Member State initiative, as opposed to a Commission proposal, remains to be seen – as does the timetable for the introduction of such a measure. Moreover, were the UK to indicate its support for the proposal, this would not be a binding decision (not least because there may not be a sufficient number of Member States who are willing to co-sponsor). However, were the matter to proceed, any expression of support would be a strong indication that we intended, in due course, to opt-in to the new proposal – whether as a Member State or a Commission proposal. Given that the instrument has only just been negotiated, that the UK supported it and that the text cleared Parliamentary Scrutiny, I would hope that giving such an indication would not give rise to difficulty. It is, after all, different to a scenario where a decision to opt-in or co-sponsor needs to be made in relation to a new instrument.

I am very conscious of the little time available to form our preliminary position, but I would be grateful for your views, if possible before the above mentioned deadline.

24 November 2009

CRIMINAL JUSTICE: PREVENTION AND SETTLEMENT OF CONFLICTS OF
JURISDICTION IN CRIMINAL PROCEEDINGS (5208/09)

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

Thank you for your letter dated 30 April 2009⁹ which was considered by Sub-Committee E at its meeting on 13 May. We are grateful for the further information you have provided.

The Committee understands that prosecutors from the UK and Germany will meet shortly in Eurojust's offices in The Hague to discuss the circumstances in which a German doctor, whose mistaken administration of a drug while working as a short-term locum in the UK led to a patient's death, was prosecuted and pleaded guilty in Germany at a time when (it appears) that the UK authorities may have been taking steps with a view to prosecuting him in the UK for manslaughter. The case does, we agree, highlight the relevance of effective measures in this area, and suggests that there may at present be a problem. However, we should be interested to know whether, and how, the Government consider that the present proposal would improve the situation in a case such as this.

15 May 2009

Letter from Lord Bach to the Chairman

Thank you for your letter of 15 May.

I believe you are referring to the prosecution of Dr Ubani following the death of David Gray in the UK. My understanding of the case is also that it is at a stage where there are issues still to be discussed between prosecutors and that there is to be a meeting at Eurojust. In these circumstances, I cannot comment on the specifics of the case.

However, I do agree that the case highlights the importance of authorities in working together both bilaterally and, where appropriate with Eurojust from an early stage in a case. We believe that the Framework Decision on conflicts of jurisdiction will help ensure that this happens as a matter of course. In particular, the Framework Decision requires discussion between the competent authorities of Member States where there are reasonable grounds to believe that both are looking at the same facts relating to the same person. Whilst I would hope that this kind of dialogue would happen in any event, it is clear that focussing the attention of competent authorities on the need to do so will be helpful. The Framework Decision also highlights the important role which Eurojust can play – and in particular in preventing double jeopardy situations from arising.

1 June 2009

Letter from the Chairman to Lord Bach

Thank you for your letter dated 1 June 2009 which was considered by Sub-Committee E at its meeting on 17 June.

The Committee is grateful for the further information you have provided.

19 June 2009

CRIMINAL JUSTICE: PROCEDURAL RIGHTS OF SUSPECTED OR ACCUSED
PERSONS IN CRIMINAL PROCEEDINGS

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

Thank you for your Explanatory Memorandum on the draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings. It was considered by Sub-Committee E.

The Committee has decided to clear this matter from scrutiny.

As you know, the Committee has taken a keen interest in the efforts made by the Member States to agree minimum standards in criminal procedural rights. Indeed, in its recent Report, *Procedural Rights in EU Criminal Proceedings – an update*, the Committee expressed support for some of the measures proposed by the Swedish Presidency. In particular, the application of minimum standards to suspects

⁹ <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

and not just those formally charged, the presentation to suspects of a “letter of rights” and access to legal assistance and advice.

Whilst the Committee is fully aware of the difficulties the Member States have experienced in agreeing minimum criminal standards in the past, the Committee would like to know if it is the Government’s view that the step by step approach advocated by the Swedish Presidency will prove a more effective route to reaching agreement in the Council than the earlier comprehensive proposal?

In its Reports addressing Procedural Rights, the Committee has repeatedly expressed the desire that action in this area should be consistent with and not conflict nor undermine the European Convention on Human Rights. With this in mind, the Committee is pleased to see the sentiments expressed in paragraphs 1 and 13 of the Council Resolution underlying the significance of the European Convention on Human Rights.

In a similar vein, Paragraph 2 of the Resolution’s introduction states that “there is room for further action of the European Union to ensure full implementation and respect of Convention standards, as well as, where appropriate, ... *to raise* existing standards...” (emphasis added). The Committee would like to take this opportunity to repeat its opinion, expressed in its most recent report (cited above), that it supports “meaningful and worthwhile” measures which remain consistent with the European Convention on Human Rights (in the sense of not conflicting with it) and that where action goes beyond the European Convention, any EU measures should “add value for those involved in criminal investigations or proceedings in Europe”.

The Committee would also like to take this opportunity to reaffirm that, where future legislative proposals raise existing Convention standards, it remains important to make clear where and how far the proposed action is intended to add to the existing European Convention standards. This is particularly important, for example, in relation to Measure C concerning “Legal Aid and Legal Advice” where the Committee notes that the Government are content with Measure C’s inclusion in the Resolution but intend to reiterate its lack of support for any measure that would increase the obligation imposed by Article 6(3)(c) of the European Convention on Human Rights in the Council meeting on October 23.

The Committee considers that these matters are potentially controversial and raise important issues concerning the division of competence between the Community and the Member States and as such, the Committee will be scrutinising the further action envisaged by the Council’s Resolution with these issues particularly in mind.

21 October 2009

CRIMINAL JUSTICE: STANDING OF VICTIMS IN CRIMINAL PROCEEDINGS (9808/09)

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

Your Explanatory Memorandum of 31 May was considered by Sub-Committee E (Law and Institutions) at its meeting of 24 June. We appreciate the thorough and helpful analysis of UK implementation and we decided to clear this matter from scrutiny.

In doing so we note that only 13 Member States provided information to the Commission, and even that was partial. It is not surprising that the Commission’s conclusion was that implementation has not been satisfactory. This appears to us to be justified even taking into account that the position is nothing like as bad as stated on account of the misunderstandings on the part of the Commission of the information provided by the UK. Other Member States may have had similar experiences. We regard it as important to the effectiveness of the third pillar that Member States implement Framework Decisions such as this fully and in good time; and promote mutual trust by participating fully in exercises such as this by providing full information as to their implementing measures.

In respect of implementation by the UK, the Committee is grateful for the additional information concerning 6 Articles of the Framework Decision. As a result, our implementation does appear considerably more satisfactory than outlined in the Report. Nevertheless the information provided does not demonstrate that the UK is fully compliant. There is very little information at all about implementation in Gibraltar and still some omissions in relation to other jurisdictions. Furthermore, significant reliance is placed on non-binding practices.

25 June 2009

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

Letter from Phil Woolas MP, Minister of State, Home Office, to the Chairman

When Meg Hillier wrote to Lord Grenfell on 4 April 2008¹⁰ she said that she would update the Committee when the situation on the Commission Document on the feasibility of an index of third country nationals convicted in the European Union changed.

There is still no formal legislative proposal from the Commission and we still do not expect one to be issued in 2009. Nevertheless there have been recent developments in that the Commission issued a document on 2 April 2009 informing Member States that UNISYS has been invited, using a JLS framework contract to conduct a study over a one year period into the feasibility of establishing an index. The Commission asked each Member States to nominate a Single Point of Contact (SPOC) who would liaise with UNISYS.

The study will look at three options.

- a. An index restricted to alphanumeric information,
- b. An index including alphanumeric and biometric data (or giving access to biometric data). This would have two options
 - biometric information on all convicted third country nationals or
 - biometric data on all third country national convicted of certain specific offences (according to availability and the legislative situation at national level.
- c. Evolution from an index including only alphanumeric data to an index also including biometric data.

Whilst progress has been significantly slower than we had been given to understand in March 2008 it is good news that the feasibility study will now be taking place. As indicated in Meg Hillier's letter of 4 April 2008 the United Kingdom continues to favour the option that includes full biometric information.

The United Kingdom has nominated Det Supt Gary Linton of the ACPO Criminal Records Office as our SPOC. Gary is content to be nominated. He is also fully aware of the territorial dimension to criminal records and fingerprints in the UK as well as the issues around data ownership (each Chief Constable) and data processing (by the National Policing Improvement Agency, the Scottish Police Services Authority or the Police Service of Northern Ireland). He will ensure that UNISYS are able to speak to all parties, including central government.

I will keep the Scrutiny Committees informed of any further substantive developments in this area, including on the outcome of the feasibility study and any legislative proposal in due course.

1 June 2009

Letter from the Chairman to Phil Woolas MP

Thank you for your letter dated 1 June 2009 updating the Committee on developments in this area. It was considered by Sub-Committee E at its meeting of 24 June.

The Committee notes your statement that progress towards an index has been slow and welcomes the initiation of a feasibility study into the index. The Committee would like to take this opportunity to repeat its expectations that biometric data should be used to verify an individual's identity only and that any future legislative proposal will include robust data protection provisions. Are you able to inform us as to the costs of the feasibility study?

25 June 2009

¹⁰ Correspondence not yet published

CRIMINAL JUSTICE: TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS
(11119/09)

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

Thank you for your Explanatory Memoranda both of which were considered by Sub-Committee E at its meeting of 4 November.

We retain this matter under scrutiny.

In our Report, *Initiation of EU Legislation* (22nd Report of Session 2007-08, HL Paper 150) at paragraphs 163-164, Member State initiatives are described as a “mixed blessing” and the Committee urged Member States to “practise what they preach and provide impact assessments and the other explanatory material” required of the Commission. Whilst this proposal is accompanied by a Council explanatory report there is no formal impact assessment providing detailed evidence identifying a problem in this field. We have always emphasised the importance of impact assessments and we would expect one now; this proposal should not go forward without one.

The explanatory report which accompanies this proposal points to two previous European attempts to address specifically the transfer of criminal proceedings: a Convention emanating from the Council of Europe, ratified by 13 of the current 27 EU Member States, and another under the auspices of the European Community, prior to the Maastricht Treaty’s reforms, which died due to insufficient ratifications. In addition, earlier this year the Committee cleared from scrutiny another Member State sponsored initiative which was designed to avert conflicts of jurisdiction in criminal matters. That proposal’s mechanisms operated alongside Eurojust’s role.

Given the lack of an impact assessment including evidence identifying a problem in this area, the apparent lack of enthusiasm for past proposals on the transfer of criminal proceedings, the recent agreement of the Framework Decision on conflicts of jurisdiction in criminal matters and the existence of Eurojust, does the Government believe that this proposal is necessary and that it will make its own specific contribution to the aims and policies of the EU’s area of freedom, justice and security?

In relation to the proposal’s content, the Government’s main concern appears to be with Article 5, indeed in both Explanatory Memoranda, you express “strong reservations” with this aspect of the proposal, in particular with the potential impact this could have on the UK’s traditional approach to settling jurisdictional issues in criminal proceedings. The Committee is not opposed to extra-territorial jurisdiction being applied to crimes, indeed the Committee recently expressed support for the expansion of extra-territorial jurisdiction to the crime of human trafficking. However, the Committee shares the Government’s concerns as regards Article 5’s potential impact on the UK’s system and supports the Government in its attempts to secure a pragmatic solution.

The latest draft splits Article 7 governing the conditions for requesting a transfer between situations where Member States share competence and where competence is transferred. In the Committee’s view, this is a marked improvement on the initial draft as it significantly clarifies the Framework Decision’s operation and distinguishes between transfers based on shared jurisdiction and transfers based on a single (transferred) jurisdiction. According to your most recent Explanatory Memorandum the Government feel that the criteria in Article 7(2) remain “too wide and would support the narrowing of these criteria”. The Committee would welcome an explanation from the Government as to why they consider the criteria remain “too wide”.

In relation to Article 11, conditions for accepting a transfer, your latest Explanatory Memorandum describes Article 11 as including “important qualifications” that “need to be read in conjunction with Article 5”. Can the Government explain to the Committee why the qualifications in Article 11 need to be read in conjunction with Article 5?

Your first Explanatory Memorandum, said that Article 12 should provide the Member States with “adequate control over the cases it accepts” and the Government believed “that the current criteria would need to be adapted to ensure this”. Your most recent Explanatory Memorandum describes Article 12 as giving the Member States “a wider degree of control over refusing cases”. The Committee notes the change of emphasis between the old Article 12 and the new Article 11 i.e. grounds for refusal are now conditions for acceptance. However, in its original Explanatory Memorandum, the Government expressed doubt over the criteria listed in the old Article 12—these are now repeated in Article 11(2). Are the changes to Articles 11 and 12, in the Government’s view, sufficient to ensure the Member States retain sufficient autonomy to control the cases they accept?

We noted with interest that the Presidency will be seeking political agreement of this matter at the Justice and Home Affairs Council on 30 November. Given your four substantive concerns outlined in

your Explanatory Memorandum, do you anticipate that these will have been addressed by then? If not, what will happen?

In your original Explanatory Memorandum the Government welcomed the statement in Article 17(3) that upon acceptance of a transfer the new Member State was free to apply “any procedural measures permitted under its national law”. The Committee notes that this paragraph no longer appears in the latest draft. Does the Government support its removal?

In relation to the practicalities of this proposed Framework Decision, what would be the ramifications of our receiving in the UK a transferred prosecution which failed to comply with UK procedural rules, for example, the failure to record a police interview?

Finally, the Committee would like to express its support for the Government’s attempts to secure a definition of the term “transfer of proceedings” and reverse the cost burden as expressed in Article 20.

5 November 2009

Letter from Lord Bach to the Chairman

Thank you for your letter of 5 November detailing the discussion of Sub Committee E on Transfer of Proceedings in Criminal Matters at its meeting on the 4 November.

I am grateful for the time taken by the Committee to look at this Framework Decision and the quality of the observations made on the text.

Since I submitted the text to the Committee in early November, there have been a number of developments. Due to the ratification of the Lisbon Treaty, and the imminent collapse of the Third Pillar under which this Framework Decision was being discussed, the Presidency no longer intends to seek political agreement on the Transfer of Proceedings at the Justice and Home Affairs Council (JHA) on the 30 November. Instead the discussion at the JHA Council is being billed as an “orientation debate”. It will discuss in general terms Transfer of Proceedings but the outcome of the meeting will not have any binding status. Transfer of Proceedings will then cease to exist as a draft Framework Decision as a general approach has not been agreed and the instrument is not at a stage where it can be adopted before the end of November.

It follows that there will be no further consideration of this proposal in the Council. If it is decided that a directive on Transfer of Proceedings is something the Commission or a group of Member States wishes to continue to pursue, a new proposal will have to be re-tabled after the Lisbon Treaty comes into force. We have no indication of when, if at all, this may happen.

22 November 2009

EMPLOYERS OF ILLEGALLY STAYING THIRD-COUNTRY NATIONALS (10770/08)

Letter from the Chairman to Phil Woolas MP, Minister of State, Home Office

Thank you for your letter dated 13 October which was considered by Sub-Committee E at its meeting of 11 November.

The Committee notes your statement that the adopted text does not go far enough to address the Government’s concerns and that you “fully expect to maintain the position that the UK should not opt in”.

The Committee would like to take this opportunity to reiterate the statement it made in its letter clearing this matter from scrutiny, dated 5 March 2009:

“...we are prepared to clear this matter from scrutiny but on the basis that, if the Government were to contemplate opting in to this measure, we will, of course, expect to receive a further Explanatory Memorandum well in advance to enable us to resume scrutiny then”.

This would provide the Government’s analysis of the advantages and disadvantages to be expected from exercising the opt-in and would assist us in conducting scrutiny.

12 November 2009

FUNDAMENTAL RIGHTS: CHARTER OF FUNDAMENTAL RIGHTS (9811/09)

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

Your Explanatory Memorandum on this Report was considered by Sub-Committee E at its meeting on 17 June.

In our report, *Human Rights Proofing EU Legislation*, to which you referred, we welcomed the Commission's Communication of 2005 on compliance with fundamental rights, setting out its system of internal monitoring of legislative proposals. The present Report provides a useful assessment of that system. We consider that the Commission's proposals for improving compliance further should be beneficial.

It is clearly vital that the Commission's legislative proposals comply with, and where appropriate protect, fundamental rights. The internal system of monitoring plays a significant part in ensuring compliance and, while we have from time to time criticised proposals for inadequacies in this respect, our impression is that generally the Commission's system seems to be working. We endorse the Commission's view that the most important aspect of maintaining the culture of respect for fundamental rights is promoting a "rights reflex" among its people. The Report appears to show a determination on the part of the Commission to embed that culture.

19 June 2009

INSTITUTIONS: EUROPEAN AGENCIES (7972/08)

Letter from Baroness Kinnock of Holyhead, Minister for Europe, Foreign and Commonwealth Office, to the Chairmam

I am writing in response to John Turner's Sub-Committee E letter of 6 August (not printed) requesting an update on developments over the past year pertaining to the above-mentioned Communication on EU Agencies.

With this Communication the Commission wanted to evaluate the existing regulatory agencies and established an Inter-Institutional Working Group (IIWG) to create ground rules for them. This IIWG is working in parallel with external contractors producing an evaluation report for the Commission that they hope to issue in November this year. There is a moratorium on establishing new agencies until this review is complete.

The IIWG met for the first time at political level on 10 March, and at technical level on 2 April. These were both introductory meetings and did not result in any decisions being taken. The next political working group will be in October and will, among other things, determine the end date for dialogue. A preparatory technical meeting is scheduled for 23 September, with another tentatively planned for November.

A reference group consisting of the Council (current and two future presidencies), the Commission, the European Parliament, agency representatives, academic experts and external contractors is establishing terms of reference and topics for discussion. It first met on 9 February and produced a list of headings and sub-headings for review. The Commission is producing an analytical report on each of these issues. The first phase of this report – taking stock of the current situation in agencies – is planned for September. The second phase, looking at possible solutions/improvements, will follow once the evaluation is finished.

The external contractor's report for the Commission should be made available towards the end of 2009. This will help inform the work of the IIWG. The Presidency trio (Sweden, Spain and Belgium) met with the external contractors in July. Data collection was almost complete and the analytical stage had already begun. There do not appear to be any major problems and the timetable for publication at the end of November is on track.

The Government maintains its position that decision-making must continue to reflect agencies' diversity and allow flexibility to ensure each agency is fit for purpose. An overly prescriptive horizontal approach could duplicate or undermine the existing guiding principles in Better Regulation. Thus it is essential that an inter-institutional dialogue reflects this approach. The Government will continue to keep Parliament informed of developments on this dossier.

22 September 2009

Letter from the Chairman to Chris Bryant MP, Minister for Europe, Foreign and Commonwealth Office

Your predecessor, Baroness Kinnock, wrote on 22 September about this matter. We are grateful for your report on progress in the review of regulatory agencies and your undertaking to keep us informed of developments. We retain this matter under scrutiny and look forward to a further update. We will be interested to have the opportunity to consider the report of the contractors when that is published.

30 October 2009

INSTITUTIONS: EUROPEAN PERSONNEL SELECTION OFFICE

Letter from the Chairman to Chris Bryant MP, Minister for Europe, Foreign and Commonwealth Office

Your predecessor's Explanatory Memorandum dated 6 October was considered by Sub-Committee E at its meeting of 4 November. We decided to clear this matter from scrutiny.

The Committee welcomes the report by the Court of Auditors. It shares the Government's concern over the under-representation of UK nationals in the European Institutions. This is particularly acutely felt because the UK legal system differs from that of most other Member States. We welcome the Government's intention to work with EPSO to improve their communication strategy and their active consideration of other ways in which the imbalance may be corrected, such as through the re-introduction of the European Fast Stream. It cannot be in the UK interest that the number of UK citizens coming forward as candidates should be fewer, for example, than those from Slovenia, a country whose population is 1/30th the size of ours. The EU interest must lie in appointing the best qualified candidates, but it is alarming that four times as many should be found from Belgium, a country of only ten million people, as from the UK. The Committee would like to ask the Government to what extent is the decline in foreign language teaching a contributing factor to the under-representation of UK citizens?

5 November 2009

INTELLECTUAL PROPERTY: PROTECTION OF COPYRIGHT AND CERTAIN RELATED RIGHTS (12217/08)

Letter from the David Lammy MP, Minister of State, Department for Business Innovation and Skills, to the Chairman

Thank you for your letter of 23 April 2009¹¹ requesting further information regarding developments with the proposal to extend the term of copyright protection for sound recordings and performers. I am pleased that the Committee is supportive of the Government's aim to develop a system which delivers real and lasting benefits to performers and musicians.

Since my last correspondence, there have been votes both in the Council of Ministers and the European Parliament on this issue.

On 27 March a COREPER vote (meeting of the Deputy Permanent Representatives) took place in the Council of Ministers. The UK supported the extension to 70 years but could not support the text as it stood, because the benefits put forward for performers were not permanent. Several Member States opposed term extension on principle and others, like us, had concerns with the text on the table. The conclusion was that, even setting aside the UK position, there was insufficient support to progress to negotiations with the Parliament at that time.

Following the COREPER vote the UK (through UK Representation to the EU) worked with other Member States, the Commission and representatives of the Parliament in an attempt to foster an agreement. A great deal of progress was made and the Presidency agreed to hold an attaches meeting to discuss a new improved text put forward by the Parliament which now included permanent benefits to performers. However, at the attaches meeting the blocking minority that had existed at COREPER remained in place and the Presidency concluded that there was still insufficient support for a first reading agreement.

¹¹ <http://www.parliament.uk/documents/upload/CwMSubEDec08-Apr09.pdf>

On 23 April a plenary vote took place in the Parliament, in which members adopted a text in favour of an extension to 70 years. The agreed text also includes the following benefits for performers, largely adopting amendments requested and drafted by the UK:

- A permanent fund for session artists, setting aside a sum corresponding to 20% of all sales revenue during the extended term, to provide a guaranteed income for those who often receive very little in the way of royalties (Article 3(2) and Recital 11).
- A permanent clean slate provision making sure that, after the original 50 year term, record labels are no longer permitted to enforce contracts that provide for royalty payments to go to the label to repay the initial costs in producing the recording instead of to the performer (Article 10a(1) and Recital 8/9). This applies to all contracts, not just those concluded before the Directive comes into force.
- A permanent use-it-or-lose-it clause, ensuring that recordings, which are not made available by rights holders (following the original 50 year term) can be released by the performer (Article 3(2a) and Recital 7a).

The text agreed in the European Parliament is predominantly compatible with the UK position, although the harmonisation of co-written works remains in the text.

There is the possibility of the text being adopted at first reading. This remains a possibility as the Parliament unusually voted through a text that is almost identical to the compromise text that narrowly failed to get an indicative qualified majority in COREPER. For the text to be adopted, one or more opposing Member States needs to change its position and leave the blocking minority. As the current Parliament text is a substantial improvement on both the Commission's original proposal and the Parliament's earlier position as expressed by the JURI Committee, it now meets the UK's key concerns and we should support it.

If the proposal does not go through at first reading, the Council will start discussions in order to agree a common position in preparation for a second reading. This common position would not be expected to be agreed until the Spanish Presidency in the first half of 2010, and discussions would not normally continue in the Parliament before the Council agrees that common position.

It is possible that, following the European elections, the new Parliament will re-start a first reading in September this year.

In light of a possible first reading agreement, which may result in a COREPER vote on 10 June, I would be grateful for the Committee's urgent consideration.

I have enclosed the impact assessment [not printed] prepared by the Commission, the Council text discussed at COREPER and the text adopted by the Parliament.

2 June 2009

Letter from the David Lammy MP to the Chairman

I wrote to you last week (2 June) to let you know where things were. As this is a potentially fast moving area I thought it helpful to let you know the situation as of today. There is now an increasing expectation that at least one Member State, which originally formed part of the blocking minority, may now support the text.

As I mentioned in my previous letter the result of the vote at the previous COREPER meeting (27 March) was very close – only just resulting in a blocking minority against the proposal. Consequently, if the speculation turns out to be correct, and at any moment the blocking minority dissolves, there may be a swift move on the part of the Commission and the Presidency to secure agreement at the Council – with the possibility of an indicative vote in COREPER soon. Our sources indicate that this could happen on 10 June.

The current proposal now secures a 70 year term of protection designed to protect performers throughout their lifetime and ensures that the proposed measures to assist performers are a permanent feature of the Directive.

You asked about the UK Government's impact assessment. If the Directive were to be adopted by the EU the UK Government would have to implement it nationally, and this is the point at which we would prepare a UK specific assessment, based on the precise details of our implementation plan.

Subject to that, the Commission's assessment, which I enclose here, shows broadly that an extension of copyright would benefit record labels and performers who create successful records. The changes now made to the text mean that performer benefits have been enhanced.

As I mentioned in my previous letter, the benefits are now permanent, so will apply in the extended term whenever the recording was made. There are also other provisions which we believe enhance the overall package to musicians:

- the clean slate provision puts a break on the period in which record companies will be able to recoup expenses so they will not be able to take the performers' share in the extended term;
- under the use-it-or-lose-it provisions, performers may be able to market recordings themselves in the extended term if record companies choose not to. So a performer can use this clause to reclaim rights assigned to a record company if the company does not market his recording both on and offline. If the performer markets the recording, the producers rights expire;
- performers will retain rights to equitable remuneration for broadcasting and public performance of their works. They will also retain any rental and lending revenue in the extended term;
- we now have the option of implementing the 20% fund for session musicians through a re-adjustment in the split of equitable remuneration payments in favour of performers. We believe this could be an easier and more cost effective way of increasing the performers' share of the revenue, as it could use pre-existing mechanisms in the UK;

I would also like to take this opportunity to mention our position on musical compositions with words (originally described by the Commission as 'co-written works'), one of the remaining issues in the Directive which we have previously flagged up to you.

As you are aware, we have not supported the inclusion of musical compositions with words for a number of reasons, but we have reached the point in negotiations that we now have to balance the inclusion of this particular proposal against the gains we have made in other aspects of the Directive. The text agreed by the European Parliament addresses some of the problems with retrospective application, so that for example, the definition of musical compositions with words will not apply to poems which are later set to music, and ensures some protections for those already exploiting out of copyright works which fall back into copyright. If term is the same for both parts (music and lyrics) of a musical composition with words, this may simplify licensing arrangements.

We have worked hard in Europe to ensure that our key issues are addressed. Many of the changes to the text are in favour of the UK's aims and are a direct result of our negotiations in Brussels. We have invested a good deal of political capital in influencing the debate so far, so voting against the proposal at this stage would be extremely detrimental to the UK's position in Europe. We are also concerned that the gains we have made could be lost with a new European Parliament and new Commission. If the proposal does indeed come to the table on 10 June, we should vote to accept it.

I know the time scales are extremely tight but if this is scheduled for a COREPER meeting on 10 June we would like to support the proposal. Given the urgency of this matter I would appreciate knowing that you are content.

I would be happy to talk this through with you should you wish to discuss it further.

8 June 2009

Letter from the Chairman to the David Lammy MP

Thank you for your letters of 2 and 8 June. They were considered by Sub-Committee E at its meeting on 10 June. We decided to retain the proposal under scrutiny.

We appreciate that the matter has become urgent, but we do not consider that we have sufficient information to clear this matter in the absence of an Impact Assessment which, by quantifying the effect of the various elements of the package, would assist us in assessing whether the right balance has now been achieved between consumers, record companies and performers. Your Explanatory Memorandum indicated that an Impact Assessment would be provided following consultations with stakeholders and full consideration of the effect of the proposal, and we have requested one in earlier correspondence.

We are grateful for your explanation of how you anticipate the fund for session musicians would work and your reasons for accepting the harmonisation of co-written works. In the light of your previous indication that the UK was pressing for a workable "use it or lose it provision" we should also be grateful for further information as to how this has been achieved.

12 June 2009

Letter from David Lammy MP to the Chairman

Thank you for your letter of 12 June. I would like to express my thanks to you and to the Committee for your urgent consideration of my latest correspondence.

In spite of the information we had received to the contrary, the expected indicative vote at the COREPER meeting of 10 June did not take place and it is now unlikely that a first reading agreement will be achieved in the near future.

The recent urgency created by the sudden but unexpected potential for agreement at COREPER, had obviously created some challenges, but now that the likelihood of a first reading agreement has receded, the position has stabilised to a degree. We will now use this opportunity to prepare an impact assessment, mindful of the various scenarios that might occur in the course of the ongoing negotiations. As soon as it has been completed I will send it on to you.

Turning to the issue of the “use it or lose it” measure, aspects of the provision which lacked detail surrounding practical application required some refining, and the European Parliament (EP) text does in part address that. It now stipulates a time limit (1year) in which the phonogram producer must exploit the recording following the performer’s request to release the copyright, and recognises the measure as a permanent feature of the directive. This may make its application to both existing and future sound recordings simpler to operate in practice.

As the process continues, we are mindful that the changes to both the European Parliament and the Commission may make negotiations more difficult going forward and the UK is not in a position to dictate the final outcome. We will continue to support the EP text in the first instance, and if this is not possible, to work for a text that otherwise meets our aims. I will of course keep you informed of progress.

11 July 2009

Letter from the Chairman to the Rt Hon David Lammy MP

Thank you for your letter of 11 July. It was considered by Sub-Committee E at its meeting on 14 October. We decided to retain the proposal under scrutiny.

We look forward to receiving the Impact Assessment to assist us in forming a view on whether the package would achieve the right balance between consumers, record companies and performers.

We are grateful for your explanation of the improvements that have been made to the “use it or lose it” provision. Do you consider that these improvements do now properly meet the Government’s original negotiating aim that the provision must be workable in practice? If not, what further improvements do you consider would be necessary to do so?

15 October 2009

Letter from the Rt Hon David Lammy MP to the Chairman

Thank you for your letter of 15 October regarding the proposal to extend the term of copyright protection for sound recordings and performers.

The impact assessment is nearing completion and I will share it with you shortly.

With regard to the use-it-or-lose-it measure, we believe that establishing the timeframe in which a record producer must exploit a track following a performer’s request gives improved clarity to the provision. It continues to be our aim that the use-it-or-lose-it measure is a permanent feature of the Directive and we are pleased that the provision, as it currently stands, will apply to both existing and future recordings.

If any opportunities arise to improve the system further then we will seek to do so but, overall, the amendments now on the table deliver against our original objective and represent an acceptable compromise with the other concessions we have gained elsewhere in the Directive.

6 November 2009

Letter from the Chairman to the Rt Hon David Lammy MP

Thank you for your letter of 6 November. It was considered by Sub-Committee E at its meeting on 25 November. We decided to retain the proposal under scrutiny.

We are grateful for your explanation of how the “use it or lose it” provision meets the Government’s original negotiating aim. This is one of the matters that we will take into account when, with the

assistance of the Government's forthcoming Impact Assessment, we consider the overall balance of the proposal.

26 November 2009

JHA COUNCIL: JULY 2009

Letter from Phil Woolas MP, Minister of State, Home Office, to the Chairman

I am writing to update you on the JHA Informal Council which took place in Stockholm on 16 and 17 July.

The Council was held over two days focussing on the content of the next 5 year JHA work programme (the Stockholm Programme), which is due to be agreed in December. Discussions were centred on three themes, drawing on the Commission's Communication setting out its proposals for the new work programme: 'A Europe that protects'; 'A Europe in a globalised world based on responsibility and security' and 'Developing a Citizens Europe of law and justice'. I attended on behalf of the Home Office on 16 July, the Interior day, which focussed on the first two themes. Lord Bach attended on 17 July on behalf of the Ministry of Justice.

Opening the first session on "A Europe that Protects", which looked at internal security issues such as cooperation to tackle terrorism and organised crime, the Commission summarised the relevant parts of its Communication. Delegations welcomed the citizen-centric approach of the Communication, with some calling for the creation of an EU internal security strategy. Many also suggested the need for more police training. Delegations also drew links between internal security and border control arrangements, looking to strengthen the work of Frontex. There was strong support for an information management strategy, which was something the UK supported. The UK also argued that it was important to build on the work of the Organised Crime Threat Assessment (OCTA) prepared by Europol, to prioritise criminal asset recovery and EU counter terrorism efforts, and joined others in arguing that external relations work needed to be an integral part of all this work at EU level. The Commission saw Europol becoming the EU information centre and picked up the importance of tougher action on proceeds of crime. It also undertook to push on external funding in the next financial cycle, acknowledging the importance of an external relations strategy and better EU third country cooperation including on extradition. The Presidency concluded by highlighting asset confiscation, child protection, information exchange, an organised crime strategy and the need for more on external relations.

In the second session on asylum and migration: "A Europe in a globalised world based on responsibility and solidarity" the Commission opened by again summarising the relevant parts of their Communication. In reacting, almost all Member States referred to the Migration Pact. Several delegations also called for the rapid establishment of the European Asylum Support Office. Delegations acknowledged the need for more work on solidarity but had varying views on what that might entail; the UK agreed on the need to show solidarity across the EU but without creating pull factors. The UK, supported by several other delegations, also supported more work on returns. There were suggestions that migration issues needed to become more central in neighbourhood policy and in working with Africa, for improved cooperation with source and transit countries, and for regional cooperation. The UK thought the weight of the EU should be used to help countries of origin and noted the good work already being done by some other Member States in this area. Reiterating the message from session one, a large number of Member States, including the UK, called for a stronger Frontex. Several delegations also raised the issue of unaccompanied minors as a growing problem.

The Commission agreed that it was important to co-operate with countries of origin. It also wanted some joint assessments of labour needs. Before considering removal of migrants, the Commission suggested that it was necessary to look at entry arrangements and visa overstayers. They thought that a proper asylum policy didn't mean that pull factors would be created. The Presidency concluded that the Commission Communication was widely welcomed, noted the emphasis on the Migration Pact and the Global Approach and thought the external dimension needed to be expanded. Frontex should have a greater role and we should step up co-operation on returns and make it more effective. Practical co-operation had been emphasised alongside work on unaccompanied minors, whilst finance needed to be user-friendly.

During the third session "Developing a Citizens' Europe of Law and Justice," the Commission summarised the relevant parts of their Communication, emphasising they wanted an area in which rights were protected, where the European Convention of Human Rights was completely implemented and in which discrimination was tackled and where mutual recognition remained the cornerstone of judicial cooperation.

The Presidency invited delegations to consider how mutual trust should be further developed in civil and criminal law over the next five years and what should be the vision in the long term. Lord Bach noted that, to function effectively, mutual recognition requires an element of trust in the operation of one another's legal systems. In some cases that would require cooperation between practitioners and in some cases minimum standards.

Lord Bach also stated that in civil law, in principle we support the abolition of exequatur although we recognise that we need to think carefully about the implications in each area. Lord Bach emphasised the need for the Community to consider non-legislative options as these could provide effective results. He also suggested that more should be done to make it easier for citizens and businesses to enforce judgments in cross-border cases.

There was significant support from Justice Ministers on the need to develop the external relations aspects of Justice and Home Affairs.

The Presidency concluded that there was agreement that work in this area should be focused on citizens. Trust and mutual recognition could be obtained in a number of ways including through improved judicial training, the use of legal networks and procedural guarantees. They highlighted that there had also been calls to make more use of e-justice, to improve the rights of victims

6 August 2009

JHA: SWEDISH PRESIDENCY PRIORITIES

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

I am writing to you to set out the Swedish Presidency of the EU Council's priorities in the justice area. I hope that this will assist in the planning of your scrutiny of dossiers heading to the Justice and Home Affairs (JHA) Council in this period.

The Presidency will host JHA Council's on the following dates:

21 September (Brussels),

23 October (Luxembourg),

30 November – 1 December (Brussels).

The Swedish Presidency's focus will be to secure agreement to the next five year JHA work programme (the Stockholm programme). The Presidency are hoping to reach agreement to the new work programme at the November JHA Council with a view to submitting it to the European Council on 10 December for final agreement.

The Swedish Presidency will seek to reach agreement at the October Council on a "roadmap", setting out priority areas that the EU should take forward in the area of criminal procedural rights, advocating a step-by-step programme of measures. The Government supports this approach. The first area for action is a proposal by the Commission on interpretation and translation in criminal proceedings, which the Presidency also hopes to reach agreement on at the October Council.

The Presidency have also started negotiations on a draft Framework Decision to provide a framework for the transfer of criminal proceedings from one Member State to another. We expect the Presidency to place this on the agenda for discussion at the October JHA Council with a view to reaching a General Approach at the November JHA Council.

At the September Council we expect the Presidency to obtain Council Conclusions about a strategy to improve support to victims of crime.

On the inherited legislative agenda the Swedish Presidency will continue the negotiations to update the existing Council Framework Decision on combating the sexual exploitation of children and child pornography. The Government believes that updating the Framework Decision will strengthen the international legal framework tackling the sexual exploitation of children.

The main civil law topic under negotiation during the Swedish Presidency will be the proposed Regulation on succession and wills which is likely to be published in October. The Government recognises that this will be a challenging dossier but believes that a suitable proposal would have the potential to be of real added value to Europe's citizens.

The Presidency also plans to obtain Council Conclusions on the Commission's review of the Brussels I Regulation at the October JHA Council.

Work on e-Justice will be taken forward, with the Presidency's priority being the delivery of the first version of the European e-Justice portal in December.

We expect the Swedish Presidency to develop an Information Management Strategy – carrying over the "principle of availability" from the Hague Programme; encouraging a coherent approach to IT development (including interoperability of systems); and paying greater attention to data protection. The UK has led the way in pressing the European Union to evaluate existing information exchange agreements and designing a strategy, to be applied to all public protection/internal security data sharing initiatives and not just those related to law enforcement, to steer the direction of future proposals. We expect the Presidency to present the Information Management Strategy in conclusions language to the JHA Council in November.

2 September 2009

JUSTICE: APPLYING COMMUNITY LAW (13407/07)

Letter from Baroness Kinnock MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman

I am writing in response to the Committee's request of 6 August for an update on the results of the pilot project for resolving complaints, following Jim Murphy's letter to the Committee of 24 June 2008.

The EU Pilot project started in April 2008 with the aim of providing quicker and fuller answers to questions and solutions to problems arising in the application of EU laws – particularly those raised by citizens and businesses – by requiring confirmation of the factual or legal position in a Member State. By mid-September 2008, over 130 cases were in the system, in areas such as health and safety at work; social security and free movement of workers; visa issues; free movement of persons; protection of personal data; public procurement; environmental law; free movement of goods; and indirect and direct taxation.

The performance of the EU Pilot has not yet been formally assessed by the Commission. A report is due to the European Parliament in the autumn and the fifteen participating Member States have agreed for it to continue as a pilot until the new Commission considers its future in the New Year. This will allow gathering of more data upon which to base the final assessment of the value of the Pilot.

As the Pilot project is ongoing, we have not yet undertaken a formal review of its effectiveness from the UK perspective. However, our experience to date is that the project has been of help in resolving a significant number of complaints without recourse to the formal infraction procedure. We will, however, keep the Committees informed of the Commission's review in the New Year and any UK review of the pilot.

9 October 2009

Letter from the Chairman to Chris Bryant MP, Minister for Europe, Foreign and Commonwealth Office

Your predecessor, Baroness Kinnock, wrote on 9 October about this matter. Her letter was considered by Sub-Committee E at its meeting on 28 October. We are grateful for the update on the pilot project on the resolution of complaints about implementation, and for undertaking to inform us of the Commission's final review in due course. We note that the Commission is due to report to the European Parliament this autumn and would be grateful for a copy of that report when it becomes available.

30 October 2009

LATE PAYMENT IN COMMERCIAL TRANSACTIONS (8969/09)

Letter from the Chairman to Baroness Shriti Vadera, Minister for Economic Competitiveness, Enterprise and Regulatory

Thank you for your Explanatory Memorandum of 7 May which was considered by Sub-Committee E at its meeting of 3 June. We decided to retain the matter under scrutiny pending the results of negotiation on the proposal.

We do not find the scheme of the proposal very clear. "Commercial transactions" covers transactions between undertakings (however large, we note) or between undertakings and public authorities (Article 2(1)). Under Article 3 creditors under commercial transactions between undertakings are to be entitled

to “interest for late payment”, but no rate is specified. In contrast, under commercial transactions with public authorities, the rate payable by any debtor public authority must be “equal to statutory interest” (Article 5(1)).

However, Article 6 indicates that in considering whether the rate of payment for late interest is “grossly unfair to the creditor”, one factor is “whether the debtor has any objective reason to deviate from the statutory rate of interest”. Does this mean that even in the case of commercial transactions between undertakings justification is required for agreeing a rate different from the statutory rate? The statutory rate is on its face one which might often over-compensate a large firm, able to borrow money at a rate little above the reference rate. Would that amount to objective reason?

We are left unclear whether Article 6 means that, even in relation to commercial transactions with public authorities, it is open to the parties (subject to the constraints of gross unfairness) to agree on an interest rate other than the statutory rate provided *prima facie* by Article 5(1).

Article 4(1) and (2) introduce, as “compensation for the creditor’s own recovery costs”, fixed payment sums (EUR 40 for debts under EUR 1,000, EUR 70 for debts under EUR 10,000 and 1% in the case of debts over EUR 10,000). While the first two sums are minor, the third is arbitrary. To describe it as compensation is to give legislative endorsement to a fiction. The late payment of a EUR 10 million debt would apparently give rise to an entitlement of EUR 100,000 whether the delay was one year, one month or one day and whether the payment was made with or without any recovery steps being taken by the creditor.

Under Article 4(3), as we understand it, any recovery costs actually incurred in excess of the fixed fee provided by Article 4(1) are to be recoverable “unless the debtor is not responsible for the delay”. In what circumstances might a debtor *not* be responsible for delay in paying what he ought by definition to have paid? One notable feature of the present and proposed Directive is that it does not make any allowance for the possibility of a *bona fide* disputed debt, which nonetheless proves on investigation or after adjudication to be due. Equally, it appears to make no allowance for delay (which could be for some years) in the pursuit by a claimant of a claim to a payment which ultimately proves due. (In other situation, an English court would have a discretionary power whether or not to award interest and at what rate in such circumstances.) But we doubt whether either of these points is what is here in mind.

Article 5 makes public authority debtors liable to pay not only interest at the statutory rate, but also and in addition “lump sum compensation equal to 5% of the amount due” (Article 5(5)). Again we do not think that it is appropriate in European legislation to use language (“compensation”) which is a palpable fiction. The actual intention is clearly to punish and/or deter. A one year, one month or one day delay would each on its face entitle the creditor to the same lump sum (EUR 500,000 in the case of a EUR 10 million debt), on top of statutory interest of at least 7% p.a. over the reference rate. And as such the provision seems to us to be draconian and disproportionate – and also by the same token, in the hands of a scrupulous contractor or a contractor wishing to do any further public authority business, unlikely to be invoked. Insofar as the Commission suggests that objective public procurement procedures should mean that contractors would have no concerns about their reputation or about enforcing rights against public authorities to what could be seen as unfair windfalls, with the result that such rights would in future be enforced, and the further result that public authorities would modify their payment habits and pay up without delays, we are not so sanguine.

That brings us to the impact assessment. We note that the Government intends to carry out its own assessment, which we look forward to receiving. We have ourselves considered the Commission’s impact assessment, including the results of the public consultation on which it is based. We are not impressed by the quality of analysis in the Commission’s assessment, and their conclusions about the need for or efficacy of their current proposals appear to us often to amount to little more than assertion coupled with some wishful thinking.

The Commission’s proposal is based on Article 95 of the Treaty, relating to the establishment and functioning of the internal market. Recital (8) of the proposal and page 3 of the Summary of the Impact Assessment contain statements about the need for further action in this respect, which contrast with the apparently very limited number of consultants who suggested that the effect of late payment on their business was to discourage them from engaging in cross-border transactions (29 out of 361).

The Commission’s public consultation did not suggest that more stringent provisions regarding non-payment would resolve the problem of late payment. On the contrary. A majority of consultees appears, not surprisingly, to have been in favour of yet higher interest rates, but the overwhelming majority also made clear that they never applied any interest rate and never or only seldom claimed interest for late payment, and that the basic reason was fear that the customer would be lost and (the other side of the same coin) the fact that competitors never claimed interest for late payment. The reality is that the more draconian the legal entitlement, the less likely it is to be enforced. These points are lost or over-looked in the Commission’s analysis. An example is paragraph 1(5) of its Summary of the Impact Assessment,

which suggests instead that the real problems can be identified in terms of lack of legal rights or remedies.

We also note that, although the consultation indicated a strong majority in favour of a distinction between the protection needed by micro and small enterprises and others, the proposal draws no such distinction at all. Even if the proposal is appropriate in relation to the former, we question whether it is appropriate to interfere with the freedom of contract of large undertakings in the manner proposed.

We turn to the Government's own Explanatory Memorandum. We would be grateful if you would reconcile your paragraph 25 expressing support for the measure with paragraph 26 in which you state that you do not believe that further legislation on payment terms should be introduced. Furthermore we are puzzled by your agreement, in paragraph 22, that the proposal is consistent with subsidiarity bearing in mind also that the measure is not limited to cross border transactions.

8 June 2009

Letter from Shriti Vadera MP to the Chairman

Thank you for your letter of 8 June 2009 about the European Commission's proposal to tackle late payments in commercial transactions.

The European Competitiveness and Growth Working Group on Late Payments begins detailed discussions in September 2009 and UK officials will ensure that the technical points identified by your Sub-Committee are covered.

We are preparing for the Working Group by undertaking a consultation with the Confederation of British Industry, Institute of Directors, Federation of Small Businesses, Forum of Private Business, British Chambers of Commerce and Engineering Employment Federation. The consultation will be complete in mid-August.

Late payment remains a key barrier to business success in the UK. Data suggests that 4,000 businesses going insolvent in 2008 claimed late payment was the main cause and UK business will pay more than £180 million this year in interest charges on overdue payments. We have responded by taking steps to ensure the public sector is an exemplar payer, improving access for businesses to information and support on managing customer relations and cash flow, building and promoting the financial case for business to pay on time and promoting business exemplars through the Prompt Payment Code. We are keen to ensure that UK companies trading in Europe enjoying the same payment benefits we are seeking to establish in the UK and that is why it is important to pursue discussions in the Working Group, ensuring that any proposals are proportionate and appropriate.

My officials are in contact with yours and have agreed to keep the committee updated on developments.

7 August 2009

Letter from Lord Davies of Abersoch, Minister for Trade, Investment and Small Business, Department for Business, Innovation and Skills

I refer to the letter of 7 August from Baroness Vadera, I have now assumed responsibility for small business and enterprise issues.

A substantial amount of work has taken place both in the UK and Europe since August and I am now able to respond to the questions raised in your letter of 8 June. In addition to early discussions at the Council Working Group, UK business representative groups and central Government departments have been consulted.

Your original letter sought clarification on nine topics which I have addressed in turn.

“COMMERCIAL TRANSACTIONS” IS DEFINED AS INCLUDING TRANSACTIONS WITH PUBLIC AUTHORITIES, YET THE RATE OF INTEREST IN RESPECT OF COMMERCIAL TRANSACTIONS IS NEGOTIABLE (SEE ARTICLE 2(5)) WHEREAS ARTICLE 5 APPEARS TO STATE THAT THE RATE FOR A PUBLIC AUTHORITY DEBTOR MUST BE AT LEAST EQUAL TO STATUTORY INTEREST.

There are different arrangements for public authorities and private organisations, in that private organisations have the freedom to negotiate late payment interest as part of their contractual arrangements. To aid supplier understanding and ensure simplification, the UK would ideally like the same arrangement for both public authorities and private organisations. This is something we have raised and will continue to do so, at the Council Working Groups.

IS JUSTIFICATION REQUIRED FOR AGREEING A DIFFERENT RATE FROM STATUTORY RATE FOR CLAIMING INTEREST.

Article 6 does not require a justification where there is a deviation from the statutory interest rate, rather, when considering whether a deviation is grossly unfair, consideration will be given to the existence of any objective reason(s). This language is largely unchanged from the present Directive (see Article 3(3)). It is not possible for me to list what would, or would not, be an objective reason; I think that this is really a matter for the courts.

UNDER WHAT CIRCUMSTANCES CAN PARTIES AGREE A RATE DIFFERENT FROM THE STATUTORY ONE WHEN CONTRACTING WITH THE PUBLIC SECTOR.

I recognise that there appears to be a conflict with the language in Article 2(5) and Article 5(1); as I state above in my response to the first point, I think simplification would aid supplier understanding and this will continue to be raised in the Council Working Group.

THE PENALTY OF 1% FOR SUMS OF OVER €10,000 EUROS IS ARBITRARY.

The Presidency have already responded to early discussions at the Council Working Group by proposing that the penalty for amounts over €10,000 is a fixed amount rather than a percentage of the amount payable. We have welcomed this change and are working in the Council Working Group to identify a reasonable fixed amount which creates a financial deterrent to late payment. I agree that the language "compensation for recovery costs" seems less than ideal, but this is the language already used in Directive 2000/35/EC.

UNDER WHAT CIRCUMSTANCES WOULD THE PAYEE NOT BE RESPONSIBLE FOR DELAYING PAYMENT.

This language was included in Directive 2000/35/EC to provide security for the debtor from circumstances beyond their control.

PUBLIC SECTOR COMPENSATION LEVELS APPEAR PUNITIVE.

I agree that the 5% lump sum compensation proposed by the Commission is punitive and we are working in the Council Working Group to identify appropriate compensation levels. Ideally we would like to secure common arrangements across both the public and private sector to aid supplier understanding and ensure simplification.

IMPACT ASSESSMENT.

A copy of the Impact Assessment is attached.

THERE SHOULD BE DIFFERENT LEVELS OF PROTECTION BY BUSINESS SIZE.

Our analysis of payment beyond agreed terms by business size indicates that poor payment persists at all levels, with 27% of all money owed by companies with less than 10 staff being beyond agreed terms. The responses to our consultation suggest that business is seeking simplicity in the way the Late Payment Directive addresses the issue of late payments.

SUGGESTION THAT THE MEMORANDUM PROVIDES CONFLICTING ADVICE AT PARA 25 AND PARA 26 ON WHETHER IT IS THE GOVERNMENT'S POSITION THAT FURTHER LEGISLATION IS NECESSARY.

With limited exceptions there is no appetite for further legislation on late payment in the UK. However, I am keen to ensure that UK businesses trading in Europe enjoy the same protection from late payments as those trading in the UK.

At the Council Working Group meeting on 18 September 23 member states (including the UK) expressed concerns about the 5% compensation rate applicable to late payments made by public authorities. Several Member States, including Germany, Austria and Spain also raised concerns about the unequal treatment of public authorities, compared to business to business contracts.

I trust that in the light of information supplied that the Committee will consider lifting scrutiny from this document.

13 October 2009

Letter from the Chairman to Lord Davies of Abersoch

The letters from Baroness Vadera and yourself of 7 August and 13 October were considered by Sub-Committee E at its meeting of 4 November. The Committee decided to retain this matter under scrutiny.

The Committee is grateful for the updates and the UK Impact Assessment.

My letter of 8 June noted the lack of evidence in the Commission's Explanatory Memorandum supporting this legislation. The responses do now provide evidence that late payment is a serious problem, particularly for small businesses. But they do not demonstrate that there is any particular existing problem in respect of cross-border transactions, nor how the proposal would benefit small businesses.

On the first of these points the Committee has sympathy with the aspiration of the Government to remove the culture of late payments from the UK and to provide UK businesses with the same protection when they trade in Europe – whether or not there is evidence that late payment is at present discouraging cross-border transactions.

On the second point, the UK Impact Assessment points to big businesses being able to deal with the problem of late payment without the support of the proposed legislation; and also confirms that small businesses would continue to avoid jeopardising their commercial relations by enforcing the extra payments that would be available under the proposal. However the proposal does not distinguish between small and large businesses. We should be grateful for your view as to how this proposal specifically benefits small businesses and whether there are any other legislative options that might do so.

We support, in principle, your effort to make any additional compensation payable by defaulting businesses (in respect of debts over €10,000) and public authorities a fixed amount rather than a percentage of the debt and look forward to a further update on negotiations, particularly as to the actual sum in question.

We have already raised the fact that the proposal does not directly address genuinely disputed debts. What is the Government's approach to this issue?

There remains a need to clarify the proposal raised in my letter of 8 June. We take this opportunity to emphasise that the legislation should reflect clearly the intention of the legislator; and that unsatisfactory provisions in the existing Directive should not be perpetuated by this recast. This applies to the following:

- The misdescriptions of deterrent payments as “compensation” in Articles 4 and 5.
- The intention (not reflected in the text) that Article 4 should mean that a debtor should be excused payment of the creditor's additional actual costs if the delay was caused by circumstances beyond the debtor's control.
- The inconsistency between the definitions in Article 2, and the provisions of Articles 5 and 6 as to whether a rate of payment can be negotiated for business to public authority transactions.
- The inconsistency between Article 6 providing a universal rule dealing with the consequences of negotiated rates which are “grossly unfair” and Article 5 appearing to exclude a negotiated rate of payment for business to public authority transactions.
- The wording of Article 6 providing that a negotiated deviation from the statutory rate of interest could be justified by “any objective reason” when the intention appears to be to deal with circumstances beyond the control of the debtor.

We note that one of the simplifications you seek is to have a single approach to both business to business and business to public authority transactions. If achieved this would remove the present uncertainty whether there could be a negotiated rate of payment for business to public authority transactions. In seeking simplification, however, is it Government policy that such transactions should be subject to a negotiated rate of payment or that no transactions should?

We should be grateful for your response to the matters raised in this letter and for further updates on the progress of this negotiation.

5 November 2009

Letter from Lord Davies of Abersoch to the Chairman

Thank you for your letter of 5 November 2009, in which you raise further questions about the Directive and seek clarification on the Impact Assessment.

You are right to ask what benefit the Directive has for small business, given the evidence suggests that suppliers are often reluctant to take action which might jeopardise their customer relationships. Whilst existing legislation is rarely used, it nonetheless contributes towards creating an environment where late payment is seen as unacceptable and prompt payment is the norm. Legislation sits alongside a raft of measures designed to drive both supplier and customer behaviour.

You also ask what the Government's position is regards disputed debts. Genuinely disputed debts are a matter for the Courts. If legislation included an exemption for all disputed debts, it will be very difficult to determine if there is a genuine dispute or the exemption has been used to delay paying.

You raised a number of questions around not perpetuating unsatisfactory provisions in the current Directive in the recast. We will take your points forward in the Council Working Group.

You note that we have upheld our position in the Council Working Group that the same provisions should be in place whether business is dealing with a public authority or another business (the only difference being the introduction of a 30 day payment term for public authorities). This ensures that there will be a single set of rules and guidelines for business to understand and apply. In addition, our view is that public authorities and business should be entitled to use either the statutory rate of interest or to agree an interest for late payment as part of the contract negotiations with their supplier.

There is no reason why public authorities and their suppliers should not have the flexibility to negotiate different rates of 'late payment interest' in the context of individual contract negotiations. However, as a minimum, where there is no interest for late payment agreed the Statutory rate of interest should be applied.

Since my letter of 13 October the Directive has been amended by the Swedish Presidency as a result of negotiations in the Council Working Group. I attach a more recent version of the text which I hope you will find useful. I would particularly like to draw your attention to Article 4, which provides compensation for recovery costs. The 1% rate has now been removed and fixed rates introduced. We welcome these new changes, and at the recent Council Working Group on 16 November, we suggested that paragraph 1a, point (d) should be deleted and point (c) should be amended to read "for an amount due of 10,000 euros or more, a fixed sum of 100 euros". The following paragraph provides that the creditor is entitled to any remaining reasonable recovery costs not covered by the fixed sums. Additionally, almost all Member States asked for the 5% compensation rate for Public Authorities to be deleted. The next working group meeting is being held in Brussels on 8 December 2009.

To further aid understanding I attach the UK's position paper for your Committee. This has already received clearance through NSID (EU).

I understand that my officials have been in contact with yours to explain matters more fully and take any questions. I have attached the latest version of the Impact Assessment, along with a one page summary for easier reference. I hope that this is clearer.

I hope that, in light of the information supplied, the Committee will now consider providing clearance.

30 November 2009

LISBON TREATY: PARLIAMENTARY IMPLEMENTATION

Letter from the Chairman to Chris Bryant, Minister for Europe, Foreign and Commonwealth Office

With your letter of 20 November, you enclosed a number of texts very recently circulated to Member States which are intended to be adopted, for the purpose of implementing the Treaty of Lisbon, on the entry into force of that Treaty next week. That letter supplemented your letter of 21 October, enclosing other texts, to which I replied on 5 November. Sub-Committee E has examined five of the texts:

- draft Rules of Procedure of the European Council
- draft revised Rules of Procedure of the Council
- draft European Council Decision on the exercise of the Presidency of the Council
- draft Council Decision laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council

— draft Council Decision establishing the list of Council configurations

As I said in my letter of 5 November, we welcome the fact that, in the unusual circumstances surrounding the preparations for the coming into force of the Treaty, you have provided informal drafts under discussion within the Council. It is a pity that the Council's timetable did not allow for scrutiny of these texts in the normal way and we regret the absence of an Explanatory Memorandum which we understood would be provided.

There are two issues we would like to raise on Article 3 (3) of the Council Rules of Procedure. Firstly, what is the reason for having different voting rules for deciding to shorten the eight week before any agreement on a proposal depending on the voting rules applicable to the substantive proposal? Secondly, we consider it would be preferable for this provision to include a specific requirement for there to be a statement of the reasons for shortening the eight week period in accordance with Article 4 of the Protocol on the role of national parliaments.

None of these documents has been formally deposited so we are not in a position formally to clear them from scrutiny. However, we are content to let you treat as cleared all five texts considered by Sub-Committee E, or amended versions of them so long as no significant changes are made.

27 November 2009

MUTUAL ASSISTANCE: EU JAPAN MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Letter from the Chairman to Phil Woolas MP, Minister of State, Home Office

Your Explanatory Memorandum (EM) on this proposal was considered by Sub-Committee E at its meeting on 25 November. Although your EM did not say so, we gather that you support the proposal that the EU should make the Agreement with Japan. We endorse that support. The provisions for mutual assistance should assist in the fight against crime, and are balanced by appropriate safeguards. We now clear this proposal from scrutiny.

26 November 2009

MUTUAL RECOGNITION OF FINANCIAL PENALTIES

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

I am writing update you on the EU Mutual Recognition of Financial Penalties (MRFP) Framework Decision (FD), which will be implemented in England and Wales and Northern Ireland on 1 October 2009.

By way of a brief background, sections 80 to 92 and Schedules 18 and 19 of the Criminal Justice and Immigration (CJI) Act 2008 give legal effect to the FD in England, Wales and Northern Ireland. In Scotland, section 56 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 entitles the Scottish Ministers to make provision, by way of an order, implementing any obligation created by or arising under the FD. Once operational, these provisions will allow fines that are imposed in one EU Member State to be transferred and enforced in another. It applies to fines, compensation, court costs and certain Fixed Penalty Notices imposed by a court (or certain other authorities) in criminal proceedings. It will apply to all these categories of financial penalties over seventy Euros.

The FD follows on from other EU mutual recognition instruments, such as the European Arrest Warrant. It addresses a significant gap in EU judicial co-operation by applying the principle of mutual recognition to the enforcement of financial penalties across Member States. The FD only applies to 'final' decisions no longer subject to appeal; it includes important safeguards that allow the enforcement of a financial penalty to be refused in certain circumstances (for example, where it is apparent that the offender has not had an adequate opportunity to defend him or herself).

The CJI Act will enable a magistrates' court to transfer for enforcement, via the central authority for England and Wales, a financial penalty where it appears to the court that the defaulter is normally resident, or has assets in, an EU Member State. Likewise, where a defaulter is normally resident, or has property or income in, England and Wales, Scotland or Northern Ireland, then another EU Member State can transfer a financial penalty to the UK for enforcement. The law of the executing state governs the enforcement of financial penalties under the FD. Any fine income will normally be retained by the enforcing state, with the exception of compensation, which will be returned to the compensatee, and

where agreement is reached between the states concerned to return monies collected (for example, in the case of high value fines).

EU Member States were asked to implement the FD by 22 March 2007. HMCS assumed full responsibility for MRFP from the Home Office after the Criminal Justice and Immigration Bill received its Royal Assent in mid 2008. In January 2009, the European Commission published a report concerning progress made by EU Member States in implementing the FD. The Commission asked those Member States that have signalled that they are preparing relevant legislation to enact and notify this FD as soon as possible. In response, I gave a commitment in the MoJ's Explanatory Memorandum to Parliament (ref: 5201/09 COM (2008) 888 final) that MRFP would be implemented by summer 2009.

Finally, your predecessor, Lord Grenfell, asked a number of questions last year on MRFP in correspondence with Jim Fitzpatrick MP, then Parliamentary Under-Secretary of State, Department of Transport, regarding the proposed EU Directive facilitating cross-border enforcement in the field of road safety. In particular, Lord Grenfell asked whether Fixed Penalty Notices came under the FD. The reply from Mr Fitzpatrick (20 Nov 2008) said that the issues raised were under consideration by the MoJ and its legal advisers and that he would write again once the position has been clarified. We have now received a legal opinion from Cabinet Office Legal Advisers (COLA). With DfT's agreement, I would like to clarify the position. In COLA's view, FPNs fall within the definition of 'decision', as set out in Article 1(a)(ii) of the FD. Furthermore, once registered in a magistrates' court, such a FPN is a financial penalty falling within the definition in Article 1(b)(i) of the FD.

22 July 2009

ROMANIA AND BULGARIA: COOPERATION AND VERIFICATION MECHANISM (CVM) (12386/09)

Letter from Baroness Kinnock of Holyhead, Minister for Europe, Foreign and Commonwealth Office, to the Chairman

I am pleased to enclose a copy of the Government's Explanatory Memorandum on the Commission's latest reports under the Cooperation and Verification Mechanism, which I hope will be of assistance to the Committee in its scrutiny of the reports.

The Government welcomes these balanced and thorough reports from the Commission. The reports note that both countries have made some technical steps in the right direction since the February interim reports. However, they also recognise that a number of serious shortcomings persist in both countries, and call on the Bulgarian and Romanian Governments to demonstrate the strong political will and commitment to reform that is needed to deliver tangible and sustained results. The reports also recommend that the mechanism must continue until such a time as it can be lifted entirely, a position that the Government fully supports.

19 August 2009

SUCCESSION AND WILLS (14722/09)

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

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E at its meeting of 11 November. The Committee had already launched an inquiry into the proposal and published a call for evidence on 23 October.

This proposal is, as you are aware, subject to the United Kingdom opt in and accordingly subject to the commitments made by Baroness Ashton in June last year. They include a commitment to set out in the Explanatory Memorandum, to the extent possible, an indication of the Government's view as to whether or not it would opt in. In this case the Explanatory Memorandum provides no substantive discussion on this issue. Whilst we appreciate that the proposal is also subject to Government consultation and this precludes any firm statement of the Government position it would nevertheless be of assistance to us to know the Government view as to the significant considerations governing a decision to opt in and the approach you were minded to take; and we consider that this is information which could have been provided in the Explanatory Memorandum. We should therefore be grateful if you would provide us with further information on the exercise of the opt-in. It would be useful to have this information in time for our next meeting on 25 November.

12 November 2009

Letter from Lord Bach to the Chairman

I am writing in response to your letter of 12 November in which you ask what considerations the Government will be taking into account, and the approach it is minded to take, on whether to opt-in or not to the proposed Regulation on succession matters.

The Government supports, in principle, simplifying cross-border inheritance issues. We recognise that with over 2 million UK citizens living in other EU countries, the possibility of their estates being governed by a single law has considerable merit. Those considerations weigh significantly towards opting in.

As the Explanatory Memorandum made clear, however, we have identified some significant concerns, particularly in relation to the issue of clawback and the absence of an adequate connecting factor. These were set out in our initial Explanatory Memorandum. Our initial analysis of the Regulation concluded that these issues were significant enough to weigh heavily towards a decision not to opt-in to this proposal. These issues will certainly be addressed during negotiations, but we estimate that it is far from certain that a satisfactory compromise can be agreed. In the context of a qualified majority voting regime, and having regard to the impact this provision might have on our legal system if it remains unamended, the Government's preliminary view is that opting-in might carry a significant risk.

As you acknowledge in your letter, we are still in the early stages of consulting on this proposal and await the collective evidence to inform our decision. It is hoped that the issues we have identified, and the concern resulting from them, will be tested in the consultation exercise which could reveal other unforeseen benefits and risks. The results of the consultation exercise, which ends on 2 December, coupled with a considered view as to the negotiability of solutions, will inform the Government's decision on whether to opt-in to the Regulation or not. In accordance with Baroness Ashton's undertaking, the Government will also take into account the Committee's opinion if it can be expressed within the first 8 weeks of the 3-month opt-in period. The Government must make its decision by 22 January 2010.

I hope this helps explain the general position of the Government in respect of this dossier at this point in time. I would of course be interested in hearing your own views on this matter. I know your own inquiry is underway and I look forward to meeting the Committee as part of that on 16 December.

17 November 2009