



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

This edition includes correspondence from December 2009 to May 2010.

HOME AFFAIRS (SUB-COMMITTEE F)

CONTENTS

ASYLUM QUALIFICATIONS AND PROCEDURES DIRECTIVES (14959/09, 14863/09).....	2
ASYLUM SUPPORT OFFICE (6700/09, 6702/09)	5
CHEMICAL, BIOLOGICAL, RADIOLOGICAL AND NUCLEAR SAFETY (11480/09).....	7
COMBATING TERRORISM AND CROSS-BORDER CRIME (17709/09)	7
COMMITTEE ON INTERNAL SECURITY (COSI) (16075/09).....	8
DATA PROTECTION: FOLLOW-UP FROM EVIDENCE SESSION OF 12 JANUARY 2010.....	9
EURODAC: COMPARISON OF FINGERPRINTS FOR EFFECTIVE APPLICATION OF DUBLIN REGULATION AND COMPARISON OF DATA BY LAW ENFORCEMENT AUTHORITIES (13263/09, 13322/09).....	10
FINANCIAL ACTION TASK FORCE	11
FREEDOM, SECURITY AND JUSTICE: MANAGEMENT OF LARGE-SCALE IT SYSTEMS (11709/09, 11722/09, 11726/09)	11
FRONTEX: SCHENGEN BORDERS CODE: EUROPEAN AGENCY FOR THE MANAGEMENT OF OPERATIONAL COOPERATION AT THE EXTERNAL BORDERS (6898/10)	12
FRONTEX: SURVEILLANCE OF THE SEA EXTERNAL BORDERS (16870/09).....	13
HOME OFFICE DOSSIERS.....	14
INTERNAL SECURITY: INFORMATION MANAGEMENT STRATEGY (11312/3/09, 16637/09).....	16
INTERNAL SECURITY STRATEGY	17
PNR AGREEMENT: AUSTRALIA AND THE EUROPEAN UNION (17686/09).....	18
PNR AGREEMENT: THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION (17697/09).....	19
PROTECTING EUROPE FROM LARGE SCALE CYBER ATTACKS (8375/09)	21
READMISSION AGREEMENT WITH PAKISTAN (7510/09, 5942/10).....	23
RESETTLEMENT PROGRAMME (6702/09, 12986/09, 12985/09).....	24
SCRUTINY OF UK DECISIONS ON OPT-INS	27
STOCKHOLM PROGRAMME: UPDATE OF NEGOTIATIONS	29
SWIFT AGREEMENT: US TERRORIST FINANCE TRACKING PROGRAM (17702/09)	34

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ASYLUM QUALIFICATIONS AND PROCEDURES DIRECTIVES (14959/09, 14863/09)

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

I am writing to let you know the Government's opt in decision in relation to these proposals, and to respond both to your Committee's report of 4 December 2009 and to a number of points raised in the debate on that report that took place on 12 January.

During that debate, Lord West stated that although the Government was minded not to opt in to the two Directives, we would reflect carefully on the points made before announcing our final decision. We have done that but have decided that **it would not be right to opt in to either Directive** at this stage.

I am pleased that a number of Peers who spoke in the debate, in particular Lords Joplin, Hannay and Hodgson, agreed that the Directives as drafted were not satisfactory. I acknowledge the force of the argument, made by those Peers and also by Lord Avebury, that the Government should opt in to the proposals in order to improve them in negotiations.

Our discussions with other Member States have certainly indicated that many share our opposition to key parts of the proposals. However, as Lord West indicated in his speech, the Directives are subject to the EU's ordinary legislative procedure, which includes co-decision with the European Parliament.

The Parliament has not yet considered the proposals, but in discussions on earlier proposals under the second phase of the common European asylum system it has taken a position much closer to that of the Commission than to that of the UK. Even if we are able to persuade other Member States to agree with our objections to the proposals, the Directives that are finally agreed are likely to be a compromise between the position of the majority of Member States and that of the Parliament. Even if we opted in and had a vote in the negotiations, we think this creates a real risk that the eventual outcome would include measures that we could not accept.

As Lord Dykes made clear in his speech, there is some flexibility over how Directives are transposed into domestic law. However, they are binding as to the result to be achieved, and so this would not allow the UK not to apply provisions about which we were unhappy.

We note the Committee's view, amplified by many speakers on 12 January, that if we do not take part in these Directives, we will remain bound by the original Qualification and Procedures Directives that they replace. I am also of course aware that the Commission shares the Committee's view.

In my letter to you of 7 December, I confirmed that the Government does not agree with the Committee on this point. We believe that the better view is that the original Directive will be taken out of the *acquis* altogether once it is repealed by the new Directive, and that it will therefore cease to bind the UK. Lord West acknowledged in his speech that there is a clear difference between our opinion and that of the Committee, and it may well be that this issue is eventually resolved in the Courts.

Your Committee raises in its report the issue of cross references between the various asylum Directives which are, it argues, intended to form a coherent whole. Both Lord Avebury and Baroness Neville-Jones referred to this argument in their speeches on 12 January.

I will not repeat the points I made in my letter of 7 December about the cross references in the draft Dublin Regulation to the Reception Conditions Directive.

The Committee correctly notes that the draft Procedures Directive contains cross references to the Reception Conditions Directive. We have not opted into either Directive at this stage, so this will only be an issue for the UK if, after they have both been adopted, we seek to take part in one but not the other. That is a hypothetical question at this stage, but the extent and effect of the cross references will be a relevant consideration when we come to take that decision.

I am sorry that Lord Hannay and Baroness Hamwee were dissatisfied with the Explanatory Memoranda that were presented on the proposals. As you will know, Explanatory Memoranda need to be presented within ten days of a proposal being published. They therefore reflect the Government's initial analysis of a proposal, and that analysis is likely to develop over time as more detailed scrutiny is applied. Nevertheless, we are always happy to receive feedback, from you, your Committee or its staff, about their quality.

One area in which our thinking has developed since the Memoranda were published is on the provisions in Articles 11 and 16 of the draft Qualification Directive. These provide for certain people who no longer require protection to be allowed to stay if they are able to "invoke compelling reasons

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arising out of previous persecution”. Baroness Hamwee raised this in her speech. I can say that this is less of a concern than we thought when the Explanatory Memorandum was published, as it would not require a serious departure from our current policies. However, we still have significant concerns about other parts of the Directive, as set out in this letter and in Lord West’s speech.

I will now address the specific points on the individual Directives raised in the Committee’s report, referring to issues raised in the debate where these are relevant to them.

QUALIFICATION DIRECTIVE

The Committee correctly summarises at paragraph 14 of its report the overall view that I took of the Directive in the Explanatory Memorandum. I indicated that some of the proposals would cause us difficulties. As Lord West indicated in his speech on 12 January, our greatest areas of concern are with Articles 2 and 7, and also with the tighter definition of the concept of “internal protection” that appears in Article 8.

The amended definition of a family member – in particular its extension to include the parents of unaccompanied minors whose claims are granted – is the most worrying. We believe that this, especially when combined with the obligation to maintain family unity (Article 23(1)) and to trace the relatives of unaccompanied minors (Article 31(5)) carries an unacceptable risk of requiring us to admit the parents of unaccompanied minors who are granted status, with the undesirable consequences outlined by Lord West in his speech.

I must respectfully disagree with the view expressed by Lord Avebury and Baroness Hamwee that these proposals simply reflect existing UK practice. Paragraph 349 of the Immigration Rules, to which Lord Avebury referred, allows the “spouse, civil partner, unmarried or same sex partner or minor child” of an asylum applicant to be included in his or her application for asylum. It does not extend to the parents of a child with international protection as Article 2(j) of the Reception Conditions Directive would.

We believe that the changes to Articles 7 and 8 of the Directive have the potential to increase significantly the proportion of asylum claims that are granted, particularly from countries where the central Government is weak or non-existent and so individuals must rely on non-State agents for protection. Internal relocation is also often an issue in asylum claims as individuals who are at risk in one part of their home country can often avoid that risk by moving to another part.

The Government believes that granting international protection to people who can obtain protection in their home countries undermines public support for the concept of asylum. It is also likely to lead to an increase in asylum applications from people who do not need protection.

I note that the Committee welcomes the Commission’s proposal to remove Member States’ discretion to treat people with subsidiary protection less favourably than refugees. The Committee is correct to observe that the UK does not make use of that discretion, but that does not mean that we agree that Member States should lose it. Removal of the discretion would, in our view, reduce Member States’ policy making flexibility and amount to over-regulation of their protection systems.

For these reasons, we have concluded, contrary to the Committee’s view in paragraph 17 of its report, that there is a serious risk that the changes proposed in the recast Qualification Directive would damage the UK’s asylum system.

PROCEDURES DIRECTIVE

The Committee correctly identifies the likely impact of this Directive on the Detained Fast Track (DFT) system, and on our system of non-suspensive appeals, as major concerns for the Government. However, I must say that we do not agree with the Committee’s assessment of the likely impact of the proposals on our existing systems.

The existing Procedures Directive (Article 23(5)) allows the acceleration of any application for international protection in accordance with the basic procedural guarantees that the Directive lays down. This allows us, subject to our own safeguards, to place any application that is capable of being decided quickly into DFT.

The recast Directive would restrict acceleration to cases that fell into one of the categories set out in paragraph 27(6) – for example people from a safe country of origin and applicants who have misled the authorities by providing false documents. This would remove the discretion, which is the key feature of the DFT, to accelerate any case that would benefit from acceleration. In our view, Member States should retain discretion to accelerate the examination procedure in any case, provided that the

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applicant retains the right to appropriate procedural safeguards, such as a proper interview and an effective judicial remedy, as those in DFT do. The Directive as drafted would not allow this.

The restrictions to non-suspensive appeals arise from Article 41(6) of the Directive. This would restrict non-suspensive appeals to decisions taken in the accelerated procedure, or to applications that have been ruled inadmissible. This *would* allow us to continue to give a non-suspensive appeal to applicants who were entitled to reside in a country that the Secretary of State had listed as generally safe (in accordance with the procedure set out in Section 94(4)-(6B) of the Nationality, Immigration and Asylum Act 2002). But it would not allow applications from people who do not come from such a country, but whose applications are nevertheless clearly unfounded, to be given non suspensive appeals. We do not see why this should be the case.

In this context, I must point out that, contrary to the point that Lord Avebury made, we have no objection to the provision in Article 34 requiring us to consider whether a country that has been deemed generally safe for its inhabitants is actually safe for the individual applicant before determining that his or her application is manifestly unfounded. That is already the law in the UK.

However, we are concerned that the proposed amendments in Articles 27 and 41 would prevent us from designating part of a country as generally safe, or from designating a country as generally safe for one part of its population but not for another (e.g. for men but not for women). This would remove necessary flexibility from our asylum decision making.

We do not share the view expressed by your Committee in its report from Session 2000-2001 (HL paper 55) that accelerated procedures, and the concept of a safe country of origin, are as such likely to prejudice asylum applicants. In the UK, even if the applicant comes from a listed country, a non-suspensive appeal cannot be given unless his or her application is clearly unfounded. We consider the safeguards for applicants in the Detained Fast Track and for those subject to a non-suspensive appeal to be adequate, and see no need for the amendments proposed by the Commission.

CONCLUDING POINTS

Although we are not opting into either Directive at this stage we will, as Lord West stated during the debate, remain engaged in the negotiations with a view to applying to take part in the Directives after they have been adopted, if our concerns have been met. This approach- not opting in at the start but remaining in the negotiations- is the same as the one we took to the Reception Conditions Directive. As Lord West acknowledged, this will reduce our influence in the negotiations, but we believe that the damage that the Directives could cause to our asylum system leaves us with no other choice.

Even if we are not able to take part in the Directives post-adoption, I can confirm that we have no intention of lowering our existing asylum standards. As Baroness Neville-Jones implied in her speech, there is no incompatibility between staying out of these Directives for now and maintaining an asylum system that meets international standards, and that is what we intend to do.

Finally, despite our decision not to opt in to the proposals, we remain strongly committed to European cooperation on asylum and broader Justice and Home Affairs issues. I agree with Lord Hannay that asylum in the EU is a matter that affects the UK whether or not specific legislative provisions apply to us. Lord Wallace rightly referred in his speech to the practical cooperation that takes place on the ground across Europe, such as the presence of UK Border Agency officials at the juxtaposed controls in France and Belgium. We are strongly committed to such cooperation, whether bilaterally between Member States or through EU-wide institutions such as the European Asylum Support Office.

22 January 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 22 January 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 3 February 2010.

We are grateful to you for providing further information about the Government's position on the two proposals following the debate on the Committee's report (1st Report of Session 2009-10, HL Paper 6).

We also note that the Government has decided not to opt in to these proposals at this stage. As we have no further points to make about the current text of the proposals we have decided to clear the documents from scrutiny. We assume that significantly altered texts may emerge as negotiations

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progress in Council and look forward to examining new drafts of the proposals once they are deposited and explanatory memoranda submitted in the usual way.

4 February 2010

ASYLUM SUPPORT OFFICE (6700/09, 6702/09)

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

Thank you for your letter of 23 November 2009. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 9 December 2009.

We are grateful to you for informing us of the state of play of negotiations in the Council and note the Government's success in amending the wording of the proposal's text which sets out the desired qualifications of the Executive Director of the European Asylum Support Office (EASO).

We also note the Government's support for Malta's bid to host the EASO and the subsequent confirmation by the Swedish Presidency that Malta had been successful on 30 November 2009.

10 December 2009

Letter from Chris Bryant MP to the Chairman

During my evidence session on 12 January I undertook to write to the Committee with an update on signatures to the Copenhagen Accord and progress towards the establishment of the European Asylum Support Office (EASO). I have also written to Meg Hillier and asked her to write to you on points raised in previous Sub Committee F meetings on the impact of new Commission proposals about privacy and personal data.

EUROPEAN ASYLUM SUPPORT OFFICE

The location of the EASO was discussed over lunch at the Justice and Home Affairs Council meeting on 30 November. The Council agreed that the EASO would be located in Malta, whose bid the UK supported. Political agreement on the EASO was also reached at the JHA Council. The provisional date for adoption of the EASO regulation is the end of February.

The next steps will include appointment of the EASO Management Board and Executive Director. The Commission has signalled that it intends to advertise the post of Executive Director by the end of February (the deadline for applications will be 4-6 weeks thereafter).

The Commission is also expected to send out letters to EU Member States' Permanent Representations in Brussels shortly, seeking nominations for national representatives for the EASO's Management Board. The EASO's Management Board will consist of senior officials from Member States' asylum services, and will be responsible for appointing the Executive Director. It is understood that the Commission hopes to hold the first meeting of the board in the next few months. In the meantime a Commission representative will act as interim Director. The Management Board will also be responsible for agreeing the EASO's work programme. The UK is keen that this includes encouraging Member States to build up their asylum capacity in cooperation with the UNHCR, following the model of our own Quality Initiative.

THE COPENHAGEN ACCORD

Under the Accord the EU must submit a mitigation target to be inscribed in an Appendix by 31 January. This raises two issues, the legal form of the submission and the wording of the mitigation commitment.

On the legal form, our preferred option is a joint submission with the Commission and Presidency of 28 identical targets (for the EU and its 27 Member States), to be listed on separate lines in the Appendix to the Accord. The EU would then notify at a later date what the burden sharing is for this target (a footnote to the target would indicate this). This is the same approach as for the mitigation targets inscribed in the Kyoto Protocol.

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On the wording, ideally the EU submission would refer to the 30% target subject to conditions. This does not move the agreed EU position but sets it out in a way that helps leverage high commitments from others.

26 January 2010

Letter from Meg Hillier MP to the Chairman

I am writing to let you know that the Council adopted its first reading position on the Regulation establishing a European Asylum Support Office at the Justice and Home Affairs Council on 25 February 2010. Following political agreement between Council and Parliament at the end of last year, we expect the Regulation to be formally adopted soon (at a forthcoming European Parliament Plenary session).

At the same meeting, the Council also adopted its first reading position on the Proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund (ERF). The Council's Statement of Reasons makes it clear that, if the text is transmitted to Parliament as the Council's position at first reading, the Chair of the LIBE Committee will recommend that the Council's position be accepted without amendments in Parliament's second reading, thus paving the way for early establishment of the European Asylum Support Office.

I enclose a copy of the text of both instruments as finally agreed by the Council, together with the draft Statements of the Council's Reasons for adopting each instrument (not printed).

In my letter of 23 November 2009 I informed the Committee that an "in principle" political agreement on the Regulation setting up the European Asylum Support Office had been reached between the Council and the European Parliament. That agreement met the UK's aim of creating an Office that will promote practical cooperation but without taking on decision making functions in areas that are best left to Member States.

The Statement of the Council's Reasons on the Asylum Support Office sets out the key amendments that were made to the Commission's original proposal in the negotiations that led up to that political agreement. These include:

- clarification of the role of the Asylum Support Teams that will assist countries facing particular pressures on their asylum systems;
- confirmation that the transfer of people with international protection from one Member State to another will only happen on an agreed basis;
- confirmation of the selection process for the Office's Executive Director;
- clarification that an Executive Committee for the Office will only be established if the Management Board considers it necessary;
- Clarification of the role of Non-Governmental Organisations- particularly the UNHCR- in the role of the Office.

In addition, the Statement sets out the Council's response to the amendments proposed to the instrument by the European Parliament.

As Chris Bryant MP, the Minister for Europe, explained in his letter to you of 26 January, the Justice and Home Affairs Council of 30 November agreed that the seat of the Office would be in Malta. This, as I made clear in my letter of 23 November, was the Government's preferred option. At the same time as the Regulation was adopted, the Council also took a formal decision to award the Office to Malta, and I enclose a copy of that (not printed).

In my letter of 23 November, I indicated that we would be tabling a Minute Statement on the adoption of the Regulation by the Council, calling on the Budget Authority to ensure that the agency is funded with resources reallocated from other Community Projects. However, the Commission has since made it clear that the Office's funding for the first two years of its life will come exclusively from resources reallocated from the European Refugee Fund by the Decision that was adopted at Council on 25 February and separately from the European Migration Network. We therefore did not think a Minute Statement upon adoption was necessary, though we will continue to work with like minded Member States to ensure budget discipline, particularly in the third and subsequent years of the Office's existence.

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Now that the instrument setting up the European Asylum Support Office has been adopted, the next steps in the Agency's creation will be as follows:

- The appointment of the **Management Board**. This will consist of one representative of each Member State (except Denmark), two representatives of the Commission and a non-voting representative of the UNHCR. The intention is that Member States will be represented by senior officials in their asylum services. The Commission is currently asking Member States to nominate their representatives;
- The appointment of the **Executive Director**. The vacancy notice for this post was published in the EU's Official Journal on 26 February, with a closing date for applications of 9 April. The appointment will be made by the Management Board after the European Parliament has given its opinion on the candidate that it is proposed to select.

We expect the Office to be fully established in Malta early next year. In the interim period until then, it will be managed by the Commission.

2 March 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 2 March 2010 (see RESETTLEMENT PROGRAMME). Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 17 March 2010.

We are grateful to you for informing us of the state of play of each proposal after consideration by the Council and European Parliament and note the next stages that are set out regarding the creation of the European Asylum Support Office (EASO). We also look forward to monitoring the work of the EASO once it becomes fully operational in early 2011.

18 March 2010

CHEMICAL, BIOLOGICAL, RADIOLOGICAL AND NUCLEAR SAFETY (11480/09)

Letter from the Chairman to Lord West of Spithead, Parliamentary Under Secretary of State, Home Office

Thank you for your letter of 23 November 2009 which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 9 December 2009. We are glad to hear that the Commission accept the importance of EU actions complementing NATO activities and not duplicate them, and that this will be reflected in the final draft of the paper. This is indeed reassuring.

10 December 2009

COMBATING TERRORISM AND CROSS-BORDER CRIME (17709/09)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 3 February 2010.

We note that this document was published by the Commission on 19 December 2009 but that the related EM was only received by the Committee on 19 January 2010. This is a clear breach of the undertaking provided by the Government on 9 June 2008 which promises to provide such an EM within a maximum of ten days from the date of publication of the document, rather than the date of deposit, where a decision needs to be made on whether to opt in. We are deeply concerned by this delay, particularly since this is not the only example of such a delay in the case of documents deposited in December where a decision on an opt-in is required. We hope that in future there will be strict compliance by the Government with their undertaking.

With regard to the document, we note the Government's support for the signing of the underlying Agreement and their view that any additional costs to the UK arising from the conclusion of the Agreement would be negligible. We therefore assume that the Government will choose to opt in to

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the proposal but as the deadline for the UK opt-in is 18 March 2010, we would welcome confirmation to this effect.

In the meantime the Committee will continue to keep the document under scrutiny.

4 February 2010

Letter from Meg Hillier MP to the Chairman

I am writing in response to your letter of 4 February 2010, in which you requested an explanation for the delay in depositing the draft Council Decision on the conclusion of the EU-Norway and Iceland Prüm agreement (Council No. 17709/09), and for the delay in depositing the accompanying Explanatory Memorandum (EM).

The delay was most regrettable and I would like to offer my deep apologies for this. I fully accept that this contravened the undertaking in Baroness Ashton's statement on JHA opt-ins. The delay in depositing the draft Council Decision occurred because the document was published just prior to the Christmas period and officials consequently only became aware of it in the New Year. The accompanying EM was delayed as a result, for which I also offer apologies.

I assure you that we remain fully committed to the new procedures following the ratification of the Lisbon Treaty and that we take our responsibilities to the Scrutiny Committees very seriously. We will work closely with colleagues in the Cabinet Office and FCO in taking a very proactive approach in this area, to ensure that any such delays do not occur in the future.

As indicated in the EM, our deadline for opting in to this EU-Norway and Iceland Prüm Agreement is 17 March. We have yet to finalise our decision on UK participation, and would welcome your Committee's thoughts.

9 February 2010

Letter from the Chairman to Meg Hillier MP

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 24 February 2010.

The Committee is grateful for your reassurance that any further delays with the deposit of documents and the receipt of the accompanying EMs will be avoided.

With regard to the proposal, the Committee does not consider there to be any good reason for the UK not to participate in this measure, and therefore we hope that the Government will decide to opt in to this Decision. Pending notification of the Government's decision in this regard we will continue to keep the document under scrutiny.

24 February 2010

COMMITTEE ON INTERNAL SECURITY (COSI) (16075/09)

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

Thank you for your letters of 18 and 24 November, for the revised text of the Council Decision, and for your further Explanatory Memorandum. Sub-Committee F of the Select Committee on the European Union considered all of these at a meeting on 16 December 2009.

In my letter of 29 October dealing with the earlier (un-numbered) draft of the Decision I said that we were prepared to let you treat as cleared any proposal not significantly different from the one we had seen, so long as it was the Government's intention to opt in to it. Although the substance of the new draft of the Decision does not differ from the earlier draft, our Clerk explained to your officials that they should treat the change of legal base as a significant difference which the Committee would want to re-examine.

Having done so, we believe that it would have been preferable to use both TFEU Articles 71 and 240(3) as a legal base, with the United Kingdom opting in. We note your view that Article 71 is self-executing, but are not persuaded that this is the case. It is at least arguable that it is not applicable in the UK, not because it is self-executing, but simply because it is in Title V of Part 3, so that its application is excluded by Article 2 of the Protocol. However we accept that a respectable argument

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can be mounted the other way, and on that basis we are prepared to clear the document from scrutiny.

The last sentence of Article 71 provides for national parliaments to be kept informed of the proceedings of the Standing Committee. We would be glad to have your assurance that the fact that Article 71 is not part of the legal base of the decision setting up the Committee will not affect the legal obligation that all national parliaments should be kept informed of the proceedings.

16 December 2009

Letter from Meg Hillier MP to the Chairman

The EU Presidency has proposed a European Pact to combat Drug Trafficking. This Pact has been discussed at COSI, and at an informal 'Friends of the Presidency' working group, but has yet to be agreed. However, we are bringing this to the attention of the Committees now for their information, as we anticipate that the Presidency may push forward to get the Pact agreed by the Justice and Home Affairs Council on April 23rd.

The Pact is designed to complement the EU Drugs Strategy, and the EU Action Plan on Drugs 2009-2012. It aims to identify specific areas where Member States could cooperate operationally to benefit the fight against drugs trafficking. The Pact focuses on three thematic areas; disrupting cocaine routes; disrupting heroin routes; and countering the proceeds of crime.

In the section on disrupting cocaine routes, the pact will support the work of the regional information exchange centres, making better use of Europol strategic analysis, and supporting capacity building in transit countries.

In the section on disrupting heroin routes, the pact will look to strengthen the effectiveness of Member States Liaison Officer networks in the West Balkans, strengthen the coordination of technical cooperation activities in that region, and to make more effective use of Europol resources.

In the section on countering the proceeds of crime the pact will look to encourage relevant third countries to strengthen their approach to confiscating criminal assets.

We will forward on the final version of the document as soon as we are able to.

6 April 2010

DATA PROTECTION: FOLLOW-UP FROM EVIDENCE SESSION OF 12 JANUARY 2010

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

In the [EU Select Committee] evidence session held on Tuesday 12 January, Chris Bryant MP undertook to ask Phil Woolas MP to respond on the points raised by Lord Jopling (Q25). I am responding on Phil Woolas' behalf as the Ministry of Justice is responsible for Data Protection policy across government and I am the Minister responsible for the department's European and International matters.

Lord Jopling asked what had been done since October to take into account the impacts on people's privacy. As you will be aware Meg Hillier and I wrote jointly to you on 24 November and on 14 December concerning the Council Conclusions for an EU Information Management Strategy in the area of Justice and Home Affairs. We explained that the Strategy should, amongst other things, improve the management and transparency of European data sharing systems and ensure that data protection is considered at the outset.

The work of the Ad Hoc Information Exchange Working Group has now turned to the task of producing an action list to support the implementation of the Strategy. One of the actions, which is being supported by the UK, is to "develop the methodology and indicators for data protection impact assessments concerning information exchange and new initiatives". Member States have been invited to indicate whether they wish to take an active part in taking any of the actions forward on the draft list and I can tell you that we have indicated our willingness to be the driving force behind this action and chair a technical subgroup. Such impact assessments should help to demonstrate clearly to citizens and the European Parliament that the data protection implications of EU initiatives have been carefully considered.

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I note that Lord Richard raised a follow-up point about whether there “any movements to try and coordinate privacy and freedom of information regulations of all Member States.” At present, the UK is not aware of any move to coordinate freedom of information regulations in Member States. However, the European Commission has undertaken a consultation on new challenges for personal data protection, in particular in the light of new technologies and globalisation. The UK has already responded to the consultation and this can be seen at:

http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0003_en.htm

Once again we highlighted our view that privacy impact assessments can provide a useful tool for ensuring that new initiatives remain proportionate and necessary.

10 February 2010

**EURODAC: COMPARISON OF FINGERPRINTS FOR EFFECTIVE APPLICATION OF
DUBLIN REGULATION AND COMPARISON OF DATA BY LAW ENFORCEMENT
AUTHORITIES (13263/09, 13322/09)**

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

Thank you for your letter of 25 November 2009. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 9 December 2009.

We note the Government’s view that a further opt-in is necessary regarding the amended proposal and assume that, as the deadline for the UK opt-in is 15 December 2009, the Government has already opted-in to the measure. In any event, we would appreciate confirmation to this effect and would also be grateful if you could keep us informed about any re-issued proposal that may follow now that the Treaty of Lisbon has entered into force and provide a further Explanatory Memorandum accordingly.

We also note the Government’s view that the safeguards in the proposed Council Decision and the imminent implementation of the Data Protection Framework Decision will provide a justification for the interference with the rights under Article 8(1) of the ECHR.

In the meantime the Committee will continue to keep the documents under scrutiny.

10 December 2009

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 10 December. I am writing to let you know that the Government has decided that the UK should opt-in to this Regulation. This is in order to secure continued access to EURODAC for immigration purposes, as it plays a vital role in combating abuse of the UK’s asylum system.

As you are aware following the entry into force of the Lisbon Treaty, both the Regulation and the Council Decision granting law enforcement access to EURODAC (Document 13322/09) will need to be re-presented by the Commission under a new legal base. We therefore expect the Commission to table a new consolidated legal instrument which covers the subject matter of both instruments some time early next year when a new Explanatory Memorandum will be provided. There will consequently be a new opt-in decision for the UK which will apply to both the immigration and law enforcement aspects.

We are still considering the points raised by the Commons European Scrutiny Committee in its report of 21 October 2009 about law enforcement access to EURODAC, and will respond to these within the agreed three month deadline.

15 December 2009

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FINANCIAL ACTION TASK FORCE

Letter from Sarah McCarthy-Fry MP, Exchequer Secretary, HM Treasury, to the Chairman

In the report of the House of Lords EU sub-committee F into money laundering and the financing of terrorism last year, you recommended that the Government should submit written summaries of Financial Action Task Force (FATF) meetings to Parliament following each plenary session.

On 7 December 2009, Lord Brett undertook that the Government would provide a written ministerial statement on the work of the FATF on a regular basis. I have decided to do this on an annual basis: I shall issue such a statement in the summer of 2010, at the end of the FATF Presidency cycle, when the current Dutch President will hand over to Mexico.

I will continue to lay the Chairman's summary before Parliament after each FATF plenary. I therefore enclose a copy of the most recent summary of the meeting which took place in Abu Dhabi on 17-19 February.

10 March 2010

Letter from the Rt Hon the Lord Jopling to Sarah McCarthy-Fry MP

Thank you for your letter of 10 March which Sub-Committee F (Home Affairs) of the Select Committee on the European Union considered at a meeting on 17 March 2010. We are grateful to you for enclosing the copy of the Chairman's Summary. We note that some of the documents to which the Summary refers are available on the FATF website. However this does not seem to include the Typologies Report to which reference is made on the second page. I wonder if we could have a copy of this report to circulate to members of the Committee. Do you know if the FATF intend to put it on their website?

The Government's views on the activities of the FATF would be still more interesting, and we welcome your undertaking to issue a Written Statement this summer, and thereafter annually. We hope that the Statement will give as full a review as possible of the activities of the FATF over the previous year.

18 March 2010

Letter from Sarah McCarthy-Fry MP to the Chairman

Thank you for your letter of the 18 March in response to my recent update on the activities of the Financial Action Task Force (FATF).

I am pleased inform you that the typologies report, Money Laundering Vulnerabilities of Free Trade Zones will be published by the FATF on their website very shortly. The report will be available from the following address, www.fatf-gafi.org.

25 March 2010

FREEDOM, SECURITY AND JUSTICE: MANAGEMENT OF LARGE-SCALE IT SYSTEMS (11709/09, 11722/09, 11726/09)

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

Thank you for your letter of 18 November 2009. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 9 December 2009.

We note that despite having notified the Swedish Presidency of the UK's intention to opt-in to the proposal you have not yet received a response from either the Presidency or the Commission concerning the exact nature of the UK's participation in the measure. While we tend to share the Government's views on the substance of a partial opt-in to this Regulation, we continue to have concerns about the legal practicalities of such an opt-in arrangement. You state in your letter that we identified that the view of the Commission was in accordance with the legal advice that you have received concerning the validity of a 'partial opt-in'. This advice is, in fact, contrary to our view and

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that of the Commission (copied to Phil Woolas with my letter of 6 November 2009) which agrees with the conclusion in the Committee's Report (7th Report of Session 2008-09, HL Paper 55).

Therefore, we would be grateful for your thoughts on this matter and to receive copies of the Presidency and Commission responses to your notification of opt-in as soon as they are received. We would also welcome regular progress reports on the negotiations regarding possible amendments to the text of the Regulation concerning the UK's voting rights on the management board.

The Committee will continue to keep the documents under scrutiny.

10 December 2009

**FRONTEX: SCHENGEN BORDERS CODE: EUROPEAN AGENCY FOR THE
MANAGEMENT OF OPERATIONAL COOPERATION AT THE EXTERNAL BORDERS
(6898/10)**

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 17 March 2010.

The Committee welcomes the provisions in the proposal which intend to enhance Frontex's operational capabilities and to clarify its mandate. Some of these matters were recently considered in the Committee's report on Frontex (7th Report of Session 2008-09, HL Paper 55), which included a recommendation that the agency should develop its cooperation with other agencies in the fight against organised crime, including through the transfer of information and intelligence. Therefore, the Committee shares the Government's disappointment that the Commission has decided not to award the agency data processing powers in the short term.

The report concluded by stating that the Committee considered that it was not in the interests of the EU or Member States that the UK should be excluded from full participation in the development and operation of Frontex and recommended that the Government should pursue negotiations in the Council of Ministers to end this exclusion. The Committee would be grateful for information about any progress the Government has made in this respect.

The Committee also notes that as this is a Schengen-building measure the UK cannot participate in the proposal nor be bound or subject to its application.

The Committee are content to clear this document from scrutiny.

18 March 2010

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 18 March in which you welcome the provisions in this proposal and seek information about any progress the Government has made to pursue negotiations in the Council of Ministers to end our exclusion from full participation in the development and operation of Frontex as recommended in the Committee's report on Frontex.

The Government is unable to pursue negotiations in the Council of Ministers to end our exclusion from full participation in the development and operation of Frontex as we challenged our exclusion from the Frontex Regulation but the European Court of Justice ruled against us on 18 December 2007. The Court held that the United Kingdom may only take part in the adoption of a new measure in connection with the Schengen Acquis when it is a proposal or initiative building upon an area of the Acquis in which the United Kingdom has already been authorised to take part. Therefore, the UK cannot be considered to be a 'Member State' for the purposes of the application of and participation in the Frontex Regulation and specific provision is required to ensure we are able to participate in Frontex activities in any capacity. The Regulation does however make provision for the UK (and Ireland) to participate in Frontex operations and other activities on a case by case basis but not on the same level as Schengen and Schengen associated countries because European law prohibits us from doing so. UK staff support operations in an observer/advisory role and cannot exercise executive powers at the external Schengen borders e.g. to admit or refuse entry. The UK is invited to meetings of the Management Board where we are active participants but are not allowed a vote. The UK does not pay directly to support Frontex but UKBA makes a financial contribution to the operational costs of those activities in which we wish to participate.

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In the Committee's report on Frontex published 2008, paragraph 60 states "For the present the United Kingdom has to accept that, not being a full Schengen State, it cannot play a full role in Frontex. Subject to that legal limitation, the Government should ensure that the United Kingdom participates effectively in the development and operation of Frontex." In response to the Committee's request and Ministerial wishes, we have actively participated in the development and operation of Frontex by deploying experts to joint operations, return operations, training activities, research and development, risk analysis and through the secondment of national experts.

In the Committee's report on Frontex published 2008, paragraph 60 states "For the present the United Kingdom has to accept that, not being a full Schengen State, it cannot play a full role in Frontex. Subject to that legal limitation, the Government should ensure that the United Kingdom participates effectively in the development and operation of Frontex." In response to the Committee's request and Ministerial wishes, we have actively participated in the development and operation of Frontex by deploying experts to joint operations, return operations, training activities, research and development, risk analysis and through the secondment of national experts.

24 March 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 24 March 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 7 April 2010.

The Committee is grateful to you for providing an explanation of why the Government is unable to pursue negotiations in the Council of Ministers to end their exclusion from the future development and operation of Frontex.

The Committee also notes the UK's ongoing involvement in Frontex operations on a case-by-case basis, as permitted under the Frontex Regulation. We hope however that whoever forms the next administration will give further thought to the unsatisfactory position of the United Kingdom following the judgment of the European Court of Justice, and will continue to look for opportunities for the United Kingdom to be more fully involved in the work of Frontex.

I do not require a response to this letter.

7 April 2010

FRONTEX: SURVEILLANCE OF THE SEA EXTERNAL BORDERS (16870/09)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 13 January 2010.

The Committee welcomes efforts at ensuring that border surveillance operations coordinated by Frontex are rendered more compliant with Member States' existing obligations under international law, including the principle of *non-refoulement*. This matter was recently considered in the Committee's report on Frontex (7th Report of Session 2008-09, HL Paper 55) and as a result we would like to endorse the Government's view that the guidelines contained in the proposal are a broadly positive step in clarifying the application of the relevant aspects of international law to such operations and ensuring that fundamental rights and the rights of refugees are respected accordingly.

The Committee also notes that as this is a Schengen-building measure the UK cannot participate in the proposal nor be bound or subject to its application. Nevertheless the Committee would welcome an indication as to whether the Government, while being in no way legally bound by the Decision if and when it is adopted by the Council, will conduct the policing of the UK's sea-borders in a manner consistent with it.

The Committee are content to clear this document from scrutiny.

13 January 2010

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Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 13 January. The General Affairs and External Relations Council decided on 25 January to submit the Proposal to the European Parliament under the comitology procedure. On 29 January the Director General, Legal Adviser to the Council, Jean-Claude Pirus wrote to the European Parliament indicating that if it does not oppose the measure by 7 April the Council will adopt it. As you are aware the UK will not be bound or subject to its application as it is a Schengen building measure in which the UK does not participate. Nevertheless I can confirm that the Government will conduct the policing of the UK's sea-borders in a manner consistent with the Decision if and when it is adopted by the Council in accordance with and to the full extent of the UK's ongoing obligations under international conventions to which the UK is a party, including in particular the UN Convention on the Law of the Sea and the 1951 Refugee Convention.

23 February 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 23 February 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 3 March 2010.

The Committee is grateful to you for providing an update on the progress of the proposed Council Decision in the comitology procedure.

The Committee also welcomes the Government's commitment to conduct the policing of the UK's sea-borders in a manner consistent with the Council Decision, if eventually adopted, despite not being bound by its terms as a Schengen-building measure.

3 March 2010

HOME OFFICE DOSSIERS

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

I am writing to update your Committee on likely progress of current and forthcoming Home Office dossiers in the areas of Freedom Security and Justice. The Ministry of Justice have written separately on their dossiers.

There will be two JHA Council meetings taking place before the end of the Spanish Presidency, on April 22-23 and June 3-4. We will provide the usual report after each Council.

The EU Internal Security Strategy (ISS) is likely to be agreed at the Spring European Council on 25 and 26 March following agreement by JHA Ministers in February.

On organised crime and drug trafficking in West Africa, Latin America and the Caribbean, the Presidency will compile a matrix of existing initiatives and structures at EU, national and regional level.

The EU Pact on Drugs is designed to suggest potential avenues for operational cooperation between Member States, and EU institutions, in the fight against drug trafficking, particularly with regard to the cocaine route, heroin route and money laundering. As such, it complements the EU Drug Strategy and Action Plan on Drugs 2009-2012. The UK government is supportive of the principles of the Pact. I will forward a copy of the Pact as soon as possible.

A proposal for a new Directive on combating trafficking in human beings is expected at the end of March to replace the Framework Decision which was under negotiation when the Lisbon Treaty came into force. Agreement in principle was reached on the text of the Framework Decision on 1 December 2009 at the JHA Council. The Government is keen to ensure that this text is used in the replacement Directive.

We understand that the Commission is aiming to publish the proposal for an Action Plan to implement the Stockholm Programme in April with a view to its adoption by the June Council. I attended the EUC to give evidence on this on March 17.

On migration, Spain will undertake the first annual assessment of the European Pact on Immigration and Asylum which gained political agreement under the French Presidency. The Pact sets out the fundamental principles, priorities and aims of a common migration policy. Informed by reports from all Member States and other sources the Commission supported by Spain will compile an evaluation

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report on the Pact, which will be adopted following a discussion at the JHA Council in June. This will enable the European Council to monitor how far the EU and Member States have implemented their commitments in the Pact.

The Spanish will also progress work on a range of Commission proposals on the Common European Asylum System (CEAS). These include recasts of the Dublin Regulation, the Eurodac Regulation, and the revised Reception Conditions Directive as well as the Asylum Procedures Directive and Qualification Directive. We have not opted-in to the last three, but are committed to participating actively in the negotiations with a view to reconsidering the issue post-adoption if our concerns about them are met. The Presidency will aim to complete negotiations on the establishment of a voluntary EU resettlement scheme, and accompanying changes to the European Refugee Fund.

Earlier this month you received an EM on the Commission's proposal to amend the Frontex Regulation. The Spanish will give this proposal a high priority as the JHA Council have said they are keen to seek agreement on the Commission's proposal as a matter of urgency in order to reinforce the capabilities of the Frontex Agency.

You have recently received an update on the "protection of animals used in experiments" dossier. We expect the final text of the Directive to be agreed shortly and to be presented to an Agriculture Council for adoption between April and the end of the Spanish Presidency on 30 June.

The Spanish have given high priority to a new proposal for a Passenger Name Records Directive being issued by the Commission. However, the latest indication from the Commission is that a new proposal will not be published until June 2010, despite lobbying from the UK and other Member States for this to be brought forward.

A Belgian led Member State initiative, the European Investigation Order, was expected to be tabled before the end of March but has been delayed. There is current uncertainty as to progress as a final co-sponsor has yet to be found. The UK is supportive, in principle, of this initiative. There are, however, concerns over whether such an instrument will take sufficient account of the common law system and whether a 'one size fits all' approach to deadlines would be workable. I expect an opt-in decision might need to be taken in June.

The Commission is likely to propose a further longer-term Terrorist Finance Tracking Programme (SWIFT) Agreement to replace the measure defeated by the European Parliament on February 11. HM Treasury updated the Committees on 13 February on this. It is believed that the April JHA Council will be asked to agree the negotiating mandate with a view to conclusion of the agreement itself at the June JHA Council.

A number of outstanding European Free Trade Association agreements with the EU, concerning various aspects of Schengen acquis participation, were signed before the Lisbon Treaty came into effect, but these now require separate conclusion. The texts are in preparation and publication times are not yet known.

I will continue to ensure the Committees are updated with measures as they progress during recess and any period of prorogation.

25 March 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 25 March 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 7 April 2010.

We are grateful to you for providing information about the prospective progress of a number of Home Office dossiers, which are of interest to the Committee. We are particularly interested in the reference to the European Investigation Order and pending its potential publication would welcome further information about the background to this proposal as well as its intended purpose. I would be grateful to receive a reply to this letter within the standard deadline of ten working days.

We are also grateful for your commitment to keep the Committee updated on the progress of these dossiers during the coming months.

7 April 2010

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INTERNAL SECURITY: INFORMATION MANAGEMENT STRATEGY (11312/3/09,
16637/09)

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

Thank you for your letter of 24 November 2009. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 9 December 2009.

We are grateful to you for informing us of the state of play of negotiations in the Council regarding the proposed EU Information Management Strategy and note the Council Conclusions adopted by the Justice and Home Affairs Council on this matter, on 30 November 2009, including a resolution to adopt and implement the said Strategy.

We will look forward to considering the finalised Strategy once it becomes available.

10 December 2009

Letter from Meg Hillier MP to the Chairman

On 24 November 2009, we wrote to your Committee concerning Council conclusions for an EU Information Management Strategy in the area of Justice and Home Affairs. In this letter we outlined the underlying principles that would guide the Strategy, its potential impact on data-sharing within the EU, and the progress of its negotiations through the Council's hierarchy.

The purpose of this letter is to provide you with a further update on the Strategy, including a confirmation that it was adopted as an A point at JHA Council on 30 November 2009.

As you will recall, in our last letter we discussed the last remaining negotiating hurdle – the scope of the Strategy. At the time, we stated that the UK had broad support from other Member States for a scope that extended to not only police and judicial cooperation but also to border control, whereas a few Member States were arguing for a more limited scope.

As noted in the Preamble of the adopted text, the Strategy is intended for “internal security”, which can be understood in terms of the draft COSI (Committee on Internal Security) definition as including:

“...police and customs cooperation and between authorities responsible for the control and protection of external borders. It shall also cover, where appropriate, judicial cooperation in criminal matters relevant to support operational cooperation in the field of internal security.”

However, a footnote was added in the adopted Council Conclusions which allows a Member State to apply the Strategy in a “step-by-step approach, for instance by limiting its application to specific sectors of internal security such as law enforcement and judicial cooperation in criminal matters”; and then, if it chooses, to extend the application at a later stage. It therefore can be seen as having a targeted scope, with leeway for Member States in terms of its application.

As we mentioned in our previous letter, the Strategy should improve the management and transparency of European data-sharing systems and ensure that data protection is considered at the outset. Costs should be reduced through reutilisation of existing systems and a professional, business-orientated mindset will ensure that proposed systems are only considered if there are significant net benefits of implementation.

The Strategy recognises that national and EU information management strategies or policies should be in line with each other. Within the UK, the Strategy will exist as a document to be referred to when considering proposals for new domestic systems in the field of justice and home affairs. It could also be used as a tool for existing systems as a method of improving their efficiency and effectiveness. However the Strategy is not a legal instrument and therefore the UK, like any other Member State, is not bound to implement any changes, technical or otherwise, in national data-sharing systems.

14 December 2009

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 14 December 2009. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 6 January 2010.

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We are grateful to you for providing further information about the scope and purpose of the Information Management Strategy for EU Internal Security as adopted by the Justice and Home Affairs Council on 30 November 2009.

The Committee welcomes the Strategy's focus on improving existing and future EU data sharing systems. However the Committee notes the non-legally binding nature of the document and as a result has doubts about its likely effectiveness in achieving its stated goals. The Committee also notes that Member States may adopt a "step-by-step approach" in the application of the Strategy. The Committee hopes that the Government will work within the Strategy to address the Committee's previous concerns about the inadequate standards of data protection in the Data Protection Framework Decision, which has yet to enter into force.

7 January 2010

INTERNAL SECURITY STRATEGY

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

I wrote to you on 4 January to provide you with an update on the alterations leading to the final version of the Stockholm Programme. In that note I informed you that there would be a Spanish initiative for an EU Internal Security Strategy (ISS). I have enclosed a copy of the draft text at Annex A for your information (not printed). This was the subject of a discussion at the Toledo Informal JHA Council on 20-21 January and we expect it to be formally agreed at either a JHA Council or European Council during the Spanish Presidency. We expect the Commission to bring forward a Communication to take forward the ISS later this year / early next year, which we will of course deposit for scrutiny.

The Internal Security Strategy was a Spanish priority as part of the discussions on the Stockholm Programme aiming to create a more strategic approach to the dynamic between EU police cooperation, criminal judicial cooperation and border management. Section 4.1 of the Stockholm Programme calls for the Commission to:

"define a comprehensive EU internal security strategy based, in particular, on the following principles:

- clarity on the division of tasks between the EU and the Member States, reflecting a shared vision of today's challenges,
- respect for fundamental rights, international protection and the rule of law,
- solidarity between Member States,
- reflection of a proactive and intelligence-led approach,
- the need for a horizontal and cross-cutting approach in order to be able to deal with complex crises or natural or man-made disasters,
- stringent cooperation between EU agencies, including further improving their information exchange,
- a focus on implementation and streamlining as well as the improvement of preventive action,
- the use of regional initiatives and regional cooperation,
- the aim of making citizens aware of the importance of the Union's work to protect them."

The ISS defines Internal Security as "protecting the people and values of freedom and democracy, so that everyone can enjoy their daily lives without fear. It also reflects Europe's shared vision of today's challenges and our combined resolve to address these threats, where appropriate, with policies that harness the added value of the EU."

The ISS is split into two sections – a 2 page foreword and a 12 page substantive section. The foreword is intended to be a political statement to be used by the Presidency with the press and adopted by a European Council. The second substantive element of the ISS presents in general terms the threats/challenges; the values and principles which should underpin future work; and ideas for future action. The ISS does not recommend specific initiatives beyond basic next steps to use COSI

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(the new Committee on Internal Security) to drive forward this work and for the Commission to write a Communication.

The ISS also calls (although not in the “next steps” section) for “A strategy to prevent and tackle threats such as organised crime”. This is a major point of importance for the Government where you may recall that one of our objectives during negotiations on the Stockholm Programme was to initiate work on an EU Organised Crime Strategy. Section 4.4.1 of the Stockholm Programme states: “The European Council therefore calls upon the Council and the Commission: to adopt an organised crime strategy, within the framework of the Internal Security Strategy”. The UK intends to present ideas to the Commission and Council as to the content of such a strategy drawing on the UK’s Organised Crime Strategy “Extending Our Reach¹”.

Article 4(2) of the Treaty on the Functioning of the EU states that matters of national security are reserved solely to each Member State. We are confident that the ISS as drafted does not stray into matters of national security, and it is unlikely that any Member State will propose anything that touches on national security, but should anything be proposed along these lines the Government will argue against its inclusion.

27 January 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 27 January 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 24 February 2010.

We are grateful to you for providing a draft of the EU Internal Security Strategy as discussed at the informal Justice and Home Affairs Council on 20-21 January 2010. We note that the final version of the Strategy is likely to be agreed before the end of the Spanish Presidency in June 2010. We will look forward to considering the adopted Strategy, as well as the Commission’s Communication regarding the detail of its implementation, when they both become available later this year.

24 February 2010

PNR AGREEMENT: AUSTRALIA AND THE EUROPEAN UNION (17686/09)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 3 February 2010.

We note that this document was published by the Commission on 17 December 2009 but that the related EM was only received by the Committee on 20 January 2010. This is a clear breach of the undertaking provided by the Government on 9 June 2008 which promises to provide such an EM within a maximum of ten days from the date of publication of the document, rather than the date of deposit, where a decision needs to be made on whether to opt in. We are deeply concerned by this delay, particularly since this is not the only example of such a delay in the case of documents deposited in December where a decision on an opt-in is required. We hope that in future there will be strict compliance by the Government with their undertaking.

With regard to the document, we note the Government’s support for the signing of the underlying Agreement and therefore assume that the Government will choose to opt in to the proposal. However, as the deadline for the UK opt-in is 17 March 2010, we would welcome confirmation to this effect.

In the meantime the Committee will continue to keep the document under scrutiny.

4 February 2010

Letter from Meg Hillier MP to the Chairman

I am writing in response to your letter of 4 February 2010, in which you requested an explanation for the delay in depositing the draft Council Decision on the conclusion of the EU-Australia Passenger

¹ <http://www.homeoffice.gov.uk/documents/extending-our-reach/extending-our-reach-accessible2835.pdf?view=Binary>

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Name Record (PNR) Agreement (Council No. 17686/09), and for the delay in depositing the accompanying Explanatory Memorandum (EM).

The delay was most regrettable and I would like to offer my deep apologies for this. I fully accept that this contravened the undertaking in Baroness Ashton's statement on JHA opt-ins. The delay in depositing the draft Council Decision occurred because the document was published just prior to the Christmas period and officials consequently only became aware of it in the New Year. The accompanying EM was delayed as a result, for which I also offer apologies. This same situation arose with the proposal to conclude the EU-US PNR Agreement (Council No. 17697/09), the deposit of which was also delayed.

I assure you that we remain fully committed to the new procedures following the ratification of the Lisbon Treaty and that we take our responsibilities to the Scrutiny Committees very seriously. We will work closely with colleagues in the Cabinet Office and FCO in taking a very proactive approach in this area, to ensure that any such delays do not occur in the future.

As indicated in the EM, our deadline for opting in to this measure and the EU-US PNR Agreement is 17 March. We therefore have yet to finalise our decision on UK participation, although I am of the view that we will wish to opt-in to both Agreements. To that end, if the Committee does have any views on the UK's participation in the substance of what is proposed we would factor that into our final deliberations.

9 February 2010

Letter from the Chairman to Meg Hillier MP

Sub-Committee F (Home Affairs) of the Select Committee on the European Union considered this document at a meeting on 24 February 2010.

The Committee is grateful for your reassurance that any further delays with the deposit of documents and the receipt of the accompanying EMs will be avoided.

With regard to the substance of the proposal, the Committee agrees in principle with the exchange of PNR data with third countries and has noted that this Agreement contains more satisfactory data protection provisions than the EU-US PNR Agreement; in particular its shorter data retention periods and the full application of Australian data protection laws to the Agreement.

24 February 2010

PNR AGREEMENT: THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION (17697/09)

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

Sub-Committee F of the Select Committee on the European Union considered at a meeting on 24 February 2010 this proposal for a Decision on the conclusion of the EU-US PNR Agreement.

As with the PNR Agreement with Australia and the Prüm Agreement with Iceland and Norway, there was a delay in depositing the document and producing the EM. We are grateful for your apology for this in the other two cases, and for your assurance that you will avoid such delays in future.

You will know that when this Agreement was in draft, this Committee conducted an inquiry into the negotiations and was heavily critical of the draft Agreement: *The EU/US Passenger Name Record (PNR) Agreement* (21st Report of Session 2006-07, HL Paper 108). Our criticisms centred mainly on the lack of adequate data protection. These are criticisms which we still regard as justified, in particular following the letter from the then Secretary for Homeland Security which in effect allows the US pretty much to override such data protection provisions as there are. If the Agreement had not already been signed we would elaborate on those criticisms, but of course at this stage there is no prospect of amending the Agreement.

Article 2 of the decision on signature implies that it will be followed by a Decision on conclusion. We assume that the only reason such a Decision is now forthcoming is because, with the entry into force of the Treaty of Lisbon, Article 218 of the TFEU now requires this.

Paragraphs 24 to 26 of your EM give reasons why the UK might not wish to opt in to this Decision, and suggest that opting in might not be a foregone conclusion. We do not see how the UK could

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possibly not opt in, given that it supported the Decision on signing and, in accordance with Article 3 and the annexed Declaration, is already applying the provisions of the Agreement. We look forward to hearing from you what decision you reach on opting in.

You state that the consent of the European Parliament is required for the Decision on conclusion, but you nowhere suggest that this consent might not be forthcoming. We believe there is every likelihood that the Parliament will reject the draft Decision, as it has done in the case of the SWIFT Agreement; the Parliament has made clear ever since the first PNR Agreement with the US in 2004 how much it objects to it, to the extent of getting the Court to annul it; now for the first time it has an opportunity to decline to agree to it. In that case there would, we assume, be no Decision for the UK to opt in to. We would be grateful to know if that is also your view. We would also be glad to know whether, if that is what transpires, you believe that the provisions of the Agreement will continue to apply "on a provisional basis", as now.

The Committee will keep this document under scrutiny.

24 February 2010

Letter from Meg Hillier MP to the Chairman

I am writing in response to your letter of 24 February 2010, in which you requested further information regarding the Council Decision on the conclusion of the EU-US Passenger Name Record (PNR) Agreement (Council No. 17697/09).

I note your concerns on the data protection safeguards provided by the US in respect to EU-sourced PNR data. In addition to the assurances and guarantees made in the US letter to the EU on data protection, I can assure you that the Government is playing an active role in the regular reviews on the implementation of the Agreement, which have been set up mutually to assure the effective operation and privacy protection of the US PNR system. The latest of these Joint Reviews was held on 8-10 February 2010 in Washington. As well as a UK delegation, the Joint Reviews are attended by data protection and security experts from the European Commission. Data protection and data use are key issues for the UK and for the EU, and remain under the scrutiny of the Article 29 Working Party and the Data Protection Unit of the European Commission. As a final safeguard, paragraph 6 of the Agreement provides a power for the EU to terminate/revoke the Agreement if it determines that the data protection afforded by the US is inadequate.

As indicated in my letter of 9 February 2010, we have yet to finalise our decision on UK participation, although I am of the view that we will wish to opt-in to both the EU-US and EU-AUS Agreements. I will of course inform you once the opt-in decision has been made.

We are aware of the European Parliament's position regarding the EU-US PNR Agreement and are monitoring the situation closely. As you are aware, the Agreement entered into force provisionally on 26 July 2007, with the Council Decision to conclude it requiring the European Parliament's consent. It is our view that if consent is not given, the Council Decision would fall and the Agreement would cease to apply on a provisional basis.

3 March 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 3 March which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 17 March 2010. The Committee were glad to hear from you that the United Kingdom has opted in to this Decision.

We are glad to hear about the Joint Review meeting in Washington on 8-10 February, and to know that the Government is playing an active role in these reviews. We hope that the views of the data protection experts are heard above those of the security experts.

We note your view that if the European Parliament does not give its consent to the Decision to conclude the Agreement, the Agreement itself would cease to apply even on a provisional basis. Does it necessarily follow that the Declaration made by the Member States on 23 July 2007 when they signed the Agreement ceases to have any validity? It is arguable that the status of the Agreement is the same as any other multilateral agreement which is signed but not ratified: it is not in force, but signature alone imposes on the parties certain obligations (e.g. not to act in a manner inconsistent with it). Since the Declaration provides that the Agreement will "pending its entry into force, be implemented provisionally by the Member States in good faith, in the framework of their existing

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national laws," does this not constitute an obligation which continues to be binding on the Member States? We would be interested in your views.

The Committee will keep this document under scrutiny.

We look forward to receiving your reply. As you know, it has been agreed that ministers should reply to letters within 10 working days.

18 March 2010

Letter from Meg Hillier to the Chairman

I am writing in response to your letter of 18 March 2010, in which you requested further information regarding the Council Decision on the conclusion of the EU-US Passenger Name Record (PNR) Agreement (Council No. 17697/09).

You questioned whether the Declaration made by the Member States on 23 July 2007 would no longer have any validity if the EU-US PNR Agreement ceased to apply on a provisional basis. It is our view that the Declaration would no longer place Member States under any obligation because the Agreement itself would cease to exist, and could not therefore be implemented even on a provisional basis. The Declaration states that 'this Agreement...will, pending its entry into force, be implemented provisionally by the Member States;' however, if the European Parliament does not consent to the conclusion of the Agreement then the Agreement will fall, and would no longer be pending entry into force.

I would like to update you on the latest situation regarding the conclusion of the EU-US and EU-Australia PNR Agreements. On 4 March the European Parliament's LIBE Committee proposed that the European Parliament postpone the vote entirely on both PNR Agreements with the view to renegotiating them after the Commission has come forward with a single model for international agreements with third countries on PNR. The Committee stated that postponement of the European Parliament vote would allow the EU to take the time to find a single solution to transfer of data to third countries, and could also serve as a model for an EU PNR instrument. Whilst the UK Government would have preferred the Committee to have recommended that the European Parliament votes to approve the PNR Agreements, we are aware that the Committee have been critical of the Agreements and believe that this approach is preferable to an outright rejection. Moreover, the Committee's approach will allow the PNR Agreements to continue to apply on a provisional basis, and will therefore continue to allow PNR to be used in the fight against the terrorist threat, and will also continue to provide legal cover for air carriers.

I will provide you with further updates on the conclusion of the PNR Agreements as negotiations continue.

30 March 2010

PROTECTING EUROPE FROM LARGE SCALE CYBER ATTACKS (8375/09)

Letter from the Lord West of Spithead, Parliamentary Under Secretary of State, Home Office, to the Chairman

Following on from the oral evidence I presented to the Select Committee on 13th January 2010, I am writing to offer supplementary answers in response to one of the two of the questions posed during the session.

As Minister for Digital Britain at the Department for Business, Innovation and Skills (BIS), the Right Honourable Stephen Timms MP has agreed to provide an answer to the first of these questions, on the dissemination of lessons learned during Exercise White Noise, directly to the Committee.

With regard to the extent of state-based attacks in cyber space, the UK Cyber Security Strategy published in June 2009 identifies established, capable states seeking to exploit computers and communication networks as the most sophisticated threat in the cyber domain.

Large scale cyber attacks frequently make the news, as demonstrated by coverage of the alleged attacks on Google and aimed at the email accounts of Chinese human rights activists, among others. A network of computers carried out a denial-of-service attack on US government websites in July 2009, and brought down 11 South Korean government websites the following week. Denial-of-service attacks on Georgian government and media websites during the Russian invasion in August 2008 severely hampered Georgia's ability to disseminate accurate information about events on the ground.

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And a series of denial-of-service attacks against Estonian government and commercial websites in 2007 prevented Estonians from accessing accounts and conducting e-commerce for several weeks.

However, definitively attributing cyber attacks to state actors, cyber terrorists or others is extremely challenging. By its very nature the Internet is highly connected with hackers and criminals able to transit many time zones and many countries in a matter of seconds.

Whilst the Government is actively responding to the threat posed to the UK by our growing dependence on cyber space, it is in the interests of national security for the Government to refrain from publicly providing details of any specific attacks.

25 January 2010

Letter from the Rt. Hon Stephen Timms, to the Chairman

During the oral evidence by Lord West on 13 January, Lord Avebury asked about the lessons learnt and the dissemination of the results of Exercise White Noise.

I am glad that Lord West was able to report that the Exercise had been a success. Indeed, as the Minister with responsibility for the response during the Exercise, I found it realistic in terms of the pressure that Ministers and officials would face and certainly worth the effort of the large number of people involved in planning and playing.

Lord West gave an accurate summary of the operational lessons that the Department learnt from the exercise. We now have a clear agenda for improving the ability of our staff to meet the specific roles, work in teams and manage shift changes, demonstrate leadership and be able to use the information coming in from the industry and other Government Departments. We have learnt a number of lessons around communication between key players in the management of an exercise and, importantly, with the public through proactive engagement with the media.

Together with the telecommunications industry, we need to make progress on establishing a back-up communication channel to avoid the obvious problem of not being able to manage a communications failure through lack of communications. This will need to be a priority for our work in the industry group EC-RRG in the coming year building on the useful groundwork that has already been done.

The exercise had a separate value for the Government as a whole in that the preparation of the scenario and the identification of the sort of issues that would ensue, caused key Government Departments to look at their own dependency on the PSTN. The Cabinet Office will ensure that this work feeds into the ongoing process to improve the resilience of the machinery of Government.

Given that this Exercise featured as one of our Digital Britain commitments, I propose that we put an account of the exercise and our planning to ensure we implement the improvements identified as a result of the exercise on our web site and any other appropriate sites.

12 February 2010

Letter from the Chairman to the Lord West of Spithead

The House of Lords Select Committee on the European Union has today published its report Protecting Europe from large-scale cyber attacks (5th Report, Session 2009-10, HL Paper 68). This was prepared by Sub-Committee F (Home Affairs). I enclose a copy, which I hope will be of interest.

The Committee believe that the European Union does have a part to play in helping the Member States to protect themselves and each other, though there is more that can be done on a local, national or even a global level. There are great variations in the dependence on the Internet in the different Member States, and in the efficacy of the defences they have against attacks or against natural or man-made disruption. This is where the EU has a part to play in bringing the less advanced Member States up to the level of those with the best defences. The creation of national CERTs, as suggested by the Commission, may be appropriate for States in the former category, but we are not persuaded that this would be useful for those with the best defences – certainly not for the United Kingdom. Liaison between the EU and NATO leaves much to be desired, in this as in other matters, and is something to which resources should be devoted. We have also made recommendations about resilience exercises, and suggested expansion of the mandate of ENISA.

We look forward to receiving the Government's responses to our report; as you will know, Cabinet Office guidance requires this to be received within two months of publication. Thereafter the report will be debated in the House.

18 March 2010

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READMISSION AGREEMENT WITH PAKISTAN (7510/09, 5942/10)

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

On 17 July 2009, Phil Woolas wrote to inform you that the UK had notified the President of the Council of its intention to participate in the signature and adoption of a European Community Readmission Agreement with Pakistan (7510/09).

The Agreement was signed by the European Community and by the Government of Pakistan on 26 October 2009. Subject to acquiring the consent of the European Parliament in May, the Agreement is now expected to be presented to the JHA Council for adoption in May/June. I attach the final copy of the Council Decision to conclude the agreement which has not changed in substance from that which was cleared by the Commons European Scrutiny Committee on 3 April 2009 and the Lords European Union Committee on 23 April 2009. The only changes are procedural to reflect:

- i. a new (corresponding) legal base in TFEU;
- ii. in a recital, Ireland's non participation; and
- iii. in Article 2, the fact that references in the text of the Agreement to "EC" should be read as references to the "EU" following the entry into force of the Lisbon Treaty.

The underlying Readmission Agreement is identical to that which was attached to the Council Decision of March 2009. We have considered whether the entry into force of the Lisbon Treaty between signature and conclusion of this measure re-triggers the UK's opt-in Protocol. However, we have concluded that this proposal is not a new proposal within the terms of that Protocol and that our original notification to the Presidency of 29 May 2009 stands. This is reflected in Recital 6 of the Council Decision.

This position reflects that we have taken in relation to other proposals presented before the Lisbon Treaty entered into force but which are concluded post Lisbon such as the EASO Regulation. We believe that such measures can be distinguished from those where the legal base disappeared and was replaced by one which changed the fundamental working methods for negotiating and adopting the initiative e.g. those Framework Decisions which were agreed by unanimity and consultation with the European Parliament under Title VI TEU and which must now be re-tabled as Directives subject to QMV and co-decision, and consequently the UK's opt-in. The only procedural change introduced following the Lisbon Treaty in relation to the current proposal is the need to acquire the consent of the European Parliament, which will be voting in May.

I apologise that you were not informed sooner of progress on this dossier. I know my officials have already been in touch with the Clerk to your Committee about this oversight. As you are aware we have, since events early in the year, put in place arrangements to improve our handling of scrutiny to reflect the enhanced arrangements for consideration of the application of the opt-in. We have rolled out a full programme of training amongst policy officials on handling scrutiny and opt-in arrangements post-Lisbon, and these processes will remain a key element of the EU training programme being delivered across the Home Office and UK Border Agency in 2010. I am confident that the arrangements we now have in place will ensure that documents are deposited on time and regular updates are provided.

30 March 2010

Letter from the Chairman to Meg Hillier MP

Sub-Committee F of the Select Committee on the European Union considered your letter of 30 March 2010 at a meeting on 7 April 2010.

As you say, your officials had previously been in touch with the Clerk explaining the position and sending him a copy of this latest draft of the Decision on the conclusion of a Readmission Agreement with Pakistan. We accept your apology that this information was not provided sooner.

We also note and accept your view that, because this is not formally a new Commission proposal, the original UK opt-in will suffice, and there is no need for the UK to opt in again.

However we do not understand why the fact that the Commission did not make a fresh proposal should apparently mean that in your view document 5942/10 did not need to be deposited and an EM provided, as with any new legal instrument which will need to be adopted by the Council. The changes are as you say procedural, though you omit to mention the amendment reflecting the fact

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that the consent of the Parliament will now be needed, and indeed the change in the title of the Decision to reflect the full title of the Agreement. The EM could have explained these matters very briefly, but it could also have explained your reasons for believing that a new opt-in by the United Kingdom is not required, and could have given details of the timing.

If you now, very belatedly, deposit the document and provide an EM, it will of course reach the Clerk after Dissolution when there is no possibility of it being sifted for scrutiny or cleared from scrutiny. These are matters which would have to be left to our successor Committee at the end of May.

We have considered whether, in these unusual circumstances, we should not insist on formal deposit of the document with an EM and further scrutiny. Given that we were satisfied last April that the Agreement in its current form should be signed and approved, we are content to accept the explanations in your letter and to treat this draft Decision as if it had been deposited and cleared from scrutiny.

We note that you have put in place a new programme of training on scrutiny and on opt-in arrangements. We do however wonder, on the strength of this dossier, just how effective it is yet. We hope that if a similar situation should arise in future the new draft Decision would be deposited and an EM provided.

We would be interested to know whether there have in the past, before the signature of this Agreement, been any particular problems over the return of illegal immigrants to Pakistan.

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

7 April 2010

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

Thank you for Lord Roper's letter of 7 April in response to my letter of 30 March regarding the signature and adoption of a European Community Readmission Agreement with Pakistan (5942/10).

I am pleased that the Committee agrees that the republished Council Decision does not trigger a new opt in.

You asked in your letter if I could provide information on whether there have in the past, before the signature of the Pakistan Readmission Agreement, been any particular problems over the return of illegal immigrants to Pakistan. I can advise that a bilateral Memorandum of Understanding on Managed Immigration was signed with Pakistan in July 2005 setting out the framework for returns processes and the redocumentation of immigration offenders. We work closely with Pakistan officials on returns issues and although we have encountered some difficulties with the Pakistan authorities over the time taken to redocument those we believe to be Pakistani nationals, we have established very good relations with the Pakistan High Commission in London which are enabling us to facilitate our returns objectives.

The conclusion of the Pakistan Readmission Agreement will strengthen frameworks and strong cooperative working relationships already in place to resolve any operational difficulties directly with the Pakistani authorities on removals.

27 April 2010

RESETTLEMENT PROGRAMME (6702/09, 12986/09, 12985/09)

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

Thank you for your letter of 6 November 2009 to Phil Woolas MP and copy of the Commission's response to your report. I will respond to the Commission's comments in turn.

1. CONTINUED APPLICABILITY OF THE RECEPTION CONDITIONS DIRECTIVE IN ITS CURRENT FORM

As previously expressed in our correspondence on this issue we hold a different view. The Commission's response has not presented any new arguments to change our view. Our position remains that the better legal view is that the repeal does apply to the UK, as it repeals the legislation entirely for the purposes of EU law.

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The Commission refers to Article 4a of the UK's opt-in protocol, as revised by the Lisbon Treaty. Under this new provision the UK may be ejected from an existing measure if its decision not to opt-in to an amending measure renders the existing measure inoperable. If – as we believe to be the case – the existing Directive will no longer be binding on the UK once it has been repealed, it follows that the UK could not be ejected from this measure.

2. CROSS REFERENCES TO THE RECEPTION CONDITIONS DIRECTIVE IN THE NEW PROPOSALS FOR THE DUBLIN REGULATION

We agree with the Commission that when we have opted into a proposal we will be bound by the entire instrument once it has been adopted.

However, as a matter of policy, we believe that it is inappropriate to use cross referencing to bind the UK and Ireland into instruments in which they have chosen not to participate. This is particularly true of the Dublin Regulation as it is open to participation by countries that are not even members of the EU, and so do not even have the option of being bound by the Reception Conditions Directive.

As Phil Woolas pointed out in his letter of 10 September 2009, the Government's view is that safeguards for applicants subject to the Dublin Regulation should be contained in the Dublin instrument itself, and that a suspension provision that could be triggered by a failure to adhere to standards that do not bind all participating states is nonsensical.

We will therefore continue to oppose the cross references in the negotiations on the Dublin instrument. Discussions with the Presidency indicate that they are sympathetic to our arguments.

VISA CODIFICATION

We are pleased to see that the Commission will consider withdrawing the visa format codification proposal.

8 December 2009

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

Thank you for your letter of 8 December 2009 which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 16 December 2009.

We are disappointed that, despite the very clear views of the Commission, you have not changed your opinion on the legal effects of the United Kingdom's failure to opt in to the Reception Conditions Directive.

As you know, the Government is making time on 12 January 2010 for a debate on our report *Asylum directives: scrutiny of opt-in decisions* (1st Report, Session 2009-10, HL Paper 6), in which we urged the Government to opt in to the two other proposals for revised asylum directives, on Qualification and Procedures. We look forward to being able to air these issues in that debate.

16 December 2009

Letter from Meg Hillier MP to the Chairman

Thank you for your letter dated 6 November 2009 regarding the above documents.

In your letter, you ask whether the Government has decided to opt in to proposed Decision 12985/09. Following an analysis of the potential impact of the Decision and consultation with the NSID (EU) Committee, I can confirm that the UK has opted in to the amending Decision.

You also ask whether UK participation in the voluntary joint EU Resettlement Programme would be affected by the Government's stated reluctance to create an "immigration superhighway."

The Joint EU Resettlement Programme will build on the UK's existing resettlement programmes – and we have clear quotas and criteria under which refugees are resettled to the UK. We will reserve the right to select refugees for resettlement to the UK, as we do currently. In sum, we therefore do not believe that participation in the joint Programme will create an "immigration superhighway."

In your letter, you also ask for an update on developments in negotiations with regard to these proposals. The proposals were discussed at the Asylum Working Groups that took place on 30 September, 21 October and 6 November, and the Home Office has also engaged in bilateral

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discussions with the European Commission and other Member States. Please find below a summary of the latest position with regard to a number of key issues:

INVOLVEMENT OF UNHCR AND MEMBER STATES IN THE ANNUAL PRIORITY-SETTING EXERCISE

The UK Government was keen to ensure that the involvement of UNHCR and Member States was at the heart of the annual priority-setting exercise. The Government welcomes the fact that, at the request of the Presidency and Member States, the Commission provided an indicative timetable of the key events in the annual priority-setting exercise, which includes reference to consultation with Member States on resettlement priorities. Furthermore, the preamble and Article 1.4 of the current draft of the Decision have been amended to include reference to the fact that Member States will be consulted before the common EU annual priorities are decided; draft Article 1.4 also refers to consultation with UNHCR.

DEADLINE FOR MEMBER STATES TO PLEDGE RESETTLEMENTS

Originally, Member States had been given a 20-day deadline to pledge resettlements based on the priority groups identified in the annual decision adopted by the Commission on 1 July each year. A number of Member States, including the UK, felt this deadline was too short to enable a consultation of national experts and we expect that this deadline will be increased. The Commission has also stressed that Member States' national consultations can begin in advance of the official consultation period.

DEADLINE FOR MEMBER STATES TO SUBMIT EUROPEAN REFUGEE FUND (ERF) ANNUAL PROGRAMMES

The UK has raised its concerns that the amendments to the ERF legal instrument effectively reduce the period of time between Member States receiving confirmation of the amounts to be allocated to them in the following year, and their deadline for submitting their ERF annual programmes for the following year, by one month. The text has not been amended, but the Government can accept the text given that Member States receive earlier indications of estimated amounts to be received, on the basis of which planning work can take place.

ADMINISTRATIVE EXPENSES

The Commission estimated that the draft Decision amending the ERF would result in additional administrative expenses totalling €158,000 (c. £144,033) over the period 2010-2013 (c. €40,000 per year [c. £36,464]), but it was not clear how this amount was calculated. The Commission has responded that the calculations were estimates of how much it was likely to cost for arranging meetings of the expert working group to meet and discuss the priorities; they were calculated based on experience of costs involved in arranging the meetings of the quarterly Solidarity Funds Committee. The Government is therefore content that these costs are necessary and reasonable.

ENSURING FLEXIBILITY IN THE NUMBER OF PRIORITY GROUPS THAT CAN BE RESETTLED

There is agreement between EU Member States, the European Commission and UNHCR that the number of priority groups should be sufficiently flexible to encourage EU countries to broaden the base of resettlement. In addition, UNHCR supports the UK view that specific categories of refugees (independent of nationality or location) should be included as a fixed priority each year. Although the final decisions on priority groups are taken annually (and the first decision will not be taken until next year), we are content that there should be adequate flexibility in the number of priority groups.

DECISION MAKING PROCEDURE FOR ANNUAL PRIORITY-SETTING EXERCISE

Some EU Member States argued that the priority-setting exercise should be conducted at Council or SCIFA Committee level rather than being adopted through comitology process in the Solidarity Funds Committee meeting. The UK's view is that comitology procedures are the correct mechanism for setting the priorities (the Home Office attends the Solidarity Committee), and this view is supported by the Commission and the Council Legal Service.

EUROPEAN PARLIAMENT

The Presidency has reported to Member States the initial views of the European Parliament, which include a suggestion that Member States who resettle refugees for the first time should receive an

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increased incentive of €6,000 (c. £5,470) in the first year and €5,000 (c. £4,558) in the second year of resettlement activities. After two years the amount would steady at €4,000 (c. £3,646) per resettled person (the amount that participating Member States currently receive per resettled person). The European Parliament has also suggested that a working group be established within the European Asylum Support Office (EASO) dealing with resettlement-related issues on a permanent basis. The initial UK view is that a tiered incentive scheme has merit, and we would support the idea so long as it did not necessitate an increase of the overall financial envelope for the ERF beyond current projections; did not translate into a reduction of the main allocations to Member States; and that Member States who already resettle refugees continued to receive the existing level of financial support. We also support the exchange of information and best practice within the EASO, though feel that the remit of the working group should be limited in the first instance to comparing programmes across the EU and seeking consensus on which aspects represent good practice. The European Parliament's LIBE Committee will further discuss this issue in January.

I would be grateful if this additional information would allow the Committee to consider clearing these proposals from scrutiny.

Received 7 January 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 7 January 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 3 February 2009.

We are grateful to you for informing us of the state of play of negotiations in the Council and Parliament regarding the proposal and note the Government's reasoning for its participation in the joint EU resettlement programme as well as its decision to opt in to the proposed Decision.

The Committee also considered that in order to avoid an "immigration superhighway" to the UK developing in the future, it was important for "resettlement pledges" by Member States to be monitored annually in order to ensure that the burden was being shared fairly across the EU.

We are content to clear both of the documents from scrutiny.

4 February 2010

SCRUTINY OF UK DECISIONS ON OPT-INS

Letter from the Chairman to the Rt Hon Baroness Royall of Blaisdon, Leader of the House of Lords

You will be aware that on 9 June 2008, during the Report stage of the European Union (Amendment) Bill, Baroness Ashton of Upholland as Leader of the House gave a number of undertakings on enhanced scrutiny of EU proposals for legislation requiring a decision by the United Kingdom on opting in. The procedure agreed is set out in our report *Enhanced scrutiny of EU legislation with a United Kingdom opt-in* (2nd Report, Session 2008-09, HL Paper 25).

Since the entry into force of the Treaty of Lisbon, proposals for Decisions concluding agreements between the EU and third States in the field of freedom, security and justice require the United Kingdom to opt in to them if the agreement is to be binding on the UK. On 17 December 2009 seven such proposals were made by the Commission to the Council. They were published by the Council on 18 December. They should have been deposited before Parliament no later than the next working day, 21 December. In fact they were not deposited until 6 January, with the exception of one Agreement with the United States – the SWIFT Agreement – where the proposal was not deposited until 8 February.

The Ashton undertakings require departments "to place an Explanatory Memorandum (EM) before Parliament as swiftly as possible following publication of the proposal and no later than ten working days after publication", i.e. in this case by 4 January 2010. In fact the earliest EMs were not received for a further fortnight. In the case of the SWIFT Agreement the EM was received on 9 February, over 5 weeks late and well over half way through the 3 month period allowed for the UK to opt in.

It is regrettable that there should have been such blatant disregard of the procedures in the case of the very first such proposals made after the entry into force of the Treaty of Lisbon, dealing with seven important Agreements with third States. I hope you will ask your Cabinet colleagues responsible for the Cabinet Office, HM Treasury, the Home Office and the Ministry of Justice to

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ensure that this does not happen again, and that the undertakings given by your predecessor are strictly adhered to. The Committee look forward to hearing from you in good time for them to consider your reply before the dissolution.

24 February 2010

Letter from the Rt Hon Baroness Royall of Blaisdon to the Chairman

Thank you for your letter of 24 February, in which you set out your (and your Committee's) concerns at the failure of a number of Government Departments to comply with the terms of the arrangements agreed upon on behalf of the Government by my predecessor, Baroness Ashton.

I fully share your concerns. I understand from the Departments involved that, in the majority of cases, the delay arose in large part because of the impact of the Christmas and New Year break, which delayed onward transmission of the proposals – which were published by the Council on 18 December – from the Cabinet Office to the relevant Departments and, in turn, the preparation of the relevant Explanatory Memoranda. In some cases, there were also additional delays within the relevant Department in acting on the text(s) once received.

That is clearly, however, no excuse. The arrangements, as you set out in your letter, are perfectly clear: Departments are required “to place an Explanatory memorandum (EM) before Parliament as swiftly as possible following publication of the proposal and no later than ten working days after publication”.

I have made plain to relevant Departments my expectation that they will meet their obligations under these arrangements and of the need to adhere strictly to them. I understand that Departments have already made a number of changes in the light of the events you highlight in your letter, including measures to work even more closely with the Cabinet Office and the FCO and additional training for staff in Departments affected by the new opt-in provisions. I hope, too, that the Code of Practice referred to in Baroness Ashton's statement will act as a further reminder to all Departments of their obligations. I understand that the draft Code will soon be sent to Committee Clerks for comment and, once agreed, become an Annex to the Cabinet Office scrutiny guidance.

I therefore very much hope that such delays will not recur in the future.

5 March 2010

Letter from the Chairman to the Rt Hon Baroness Royall of Blaisdon

Thank you for your letter of 5 March which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 17 March 2010.

I am glad that you share our concerns about the past failures to abide by the Government's undertakings, and am grateful to you for making plain to the relevant departments that you expect them to adhere strictly to the arrangements set out in Baroness Ashton's undertakings.

You refer to the Code of Practice mentioned in those undertakings, and say that the draft of the Code of Practice will soon be sent to Committee Clerks for their comments. I understand that a draft has now been sent. I think it is unfortunate that the Committee Clerks were not involved at an early stage, given that Baroness Ashton's undertakings require the Code of Practice to be agreed with the Scrutiny Committees. The Clerks will be in touch with officials of the relevant Government departments to see if they can reach agreement on a draft which can be put to the Select Committee in due course.

18 March 2010

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

I am writing to inform you that the UK has exercised its right to opt in to six dossiers.

The UK has informed the Council President of its decision to opt in to the three EU-third country judicial co-operation agreements. These are:

- Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (17706/09)

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- Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto (17703/09), and
- Proposal for a Council Decision on the conclusion of the Agreement between the European Union and Japan on the mutual legal assistance in criminal matters (17708/09)

The Committee will no doubt recall that they were favourable to the UK opting in to these Council Decisions. I trust therefore that they will welcome the UK's final decision to take part in these agreements.

The remaining dossiers in which the UK will participate are:

- the EU-United States (17697/09) and EU-Australia Passenger Name Record (17686/09) Agreements, and
- the extension of Prüm arrangements to Norway and Iceland (17709/09);

The letter concerning our intention to take part in the agreement with Iceland and Norway on cross border crime and terrorism (Prüm agreement) also said that, as Gibraltar does not participate in the underlying measure and the negotiation and signing stage occurred before the entry into force of the Lisbon treaty, the UK notes that the conclusion of the agreement does not extend to Gibraltar.

24 March 2010

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 24 March which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 7 April 2010. The Committee were glad to hear from you this morning that the United Kingdom has opted in to the six Decisions listed in your letter. Those listed on the first page are in fact the responsibility of Sub-Committee E (Law and Institutions); they too are grateful for this information.

We are grateful too for your letter of 30 March giving details of the reaction of the European Parliament to the draft PNR Agreements with the US and with Australia, and for your undertaking to provide us with further updates in due course.

I do not require a response to this letter.

7 April 2010

STOCKHOLM PROGRAMME: UPDATE OF NEGOTIATIONS

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

Thank you for your letter of 24 November 2009 updating us on the negotiations on the Stockholm Programme. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 9 December 2009.

We have seen the subsequent version agreed at the JHA Council last week, and look forward in due course to seeing the version agreed at the European Council later this week. We look forward too to your response to the Committee's report.

10 December 2009

Letter from Meg Hillier MP to the Chairman

Thank you for your letters of 10 December. I am writing to update you on the finalised Stockholm Programme that was agreed at the European Council on 10-11 December 2009 and to respond to your report "The Stockholm Programme: Home Affairs". The Stockholm Programme is an excellent document for the UK and will enable us to build on the many successes of JHA collaboration.

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Phil Woolas wrote to you on 22 October with an overview of the first draft of the Council Conclusions. This noted that we had been successful in arguing for various points not originally in the Commission's Communication (document 11060/09) and I can confirm that we have safeguarded the issues set out in that letter in the Programme.

Intensive negotiations followed on from the publication of the first draft Council Conclusions with, at some points, a new text circulated by the Presidency every other day. The final Stockholm Programme shows that our negotiations brought further successes – much of the document contains UK drafting and reflects our priorities, although naturally there were points on which we had to compromise in order to secure wider negotiating objectives. I have outlined at Annex A a list of where the final document differs from the original draft Council Conclusions sent through to you in October, including commenting on the text relating to the two points raised in your letter of 10 December, namely the regulation of financial markets and the European Public Prosecutor. The final Stockholm Programme is at Annex B (although at the time of writing we understand that the Swedish Presidency is planning on providing an index and therefore the pagination and presentation may yet alter).

Your letter of 10 December expressed regret that we had not offered a more detailed analysis of the text. I am sorry that we were unable to provide a more rigorous assessment of the revised programme in my letter of 24 November. We judged that the need to let you have a copy of the text given the speed of negotiations outweighed the delay that would have been required to have provided the more detailed analysis that is now attached. As already indicated, changes to the text were moving so fast that any analysis would have been out of date by the time the letter issued.

In your report you criticised the fact that the work of the High Level Advisory Group on the Future of European Home Affairs Policy was conducted without any sort of public consultation or involvement and that the report it produced in June 2008 received scarcely any publicity. The Group was an informal initiative taken forward by the then Germany Presidency on which the UK had observer status on behalf of all common law Member States. We did however seek to ensure that Parliament was aware of its work and Baroness Scotland sent Lord Grenfell a letter on 17 July 2008 enclosing the report and noting that the report would be only one of several influences for the Commission in drafting their initial Communication.

Your report also recommends early action on any proposals leading from the Programme coming from the Commission. The Government supports this recommendation. The next stage will be an Action Plan which the European Council on 10-11 December invited the Commission to present and which had a deadline for adoption by June 2010 at the latest. We shall keep you informed of the details as this process takes place.

Your report notes that the Committee may wish to debate the Programme. I should be delighted to appear before the Committee to discuss its merits with you. I await proposed timings for such a debate through the usual channels.

4 January 2010

ANNEX A

The following note summarises the changes made since the first draft of the Council Conclusions on the Stockholm Programme were presented by the Swedish Presidency in October and the final version agreed at the European Council on 11 December. It covers the issues that the Home Secretary and Justice Secretary raised at the JHA Council on 30 November – 1 December; the areas where the Government's language was accepted by other States and incorporated within the Programme since the first draft; the areas on which the Government will wish to proceed with caution; and a list of other alterations.

Overall the Government is very satisfied with the Stockholm Programme. We believe that this is a useful roadmap for the next five years of JHA cooperation. The previous work programmes have heralded the current Dublin and Eurodac arrangements for returning asylum seekers to their port of first entry into the EU and the European Arrest Warrant that have been of significant benefit to the UK. We hope that the new work programme will see the creation of new mechanisms to improve the security of British citizens both at home and those resident or visiting other EU countries.

There were some particularly difficult negotiations where we had to focus our efforts to secure an acceptable outcome. In particular on **asylum** the first draft of the Conclusions (5.2.1) called for "mutual recognition of decisions granting protection". This could have had the potential to open up free movement rights within the EU to people with protection, and to remove the decision on who should receive protection from receiving Member States. We successfully argued that free movement should be restricted to EU citizens and their family members, and decisions on protection should be

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made at Member State level. We were successful in deleting mutual recognition of asylum decisions from the Programme, and replacing it with a reference to “the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law” (6.2.1). This text allows for those limited circumstances in which we acknowledge it could be appropriate for individuals to transfer their protection to another Member State, such as, for example, when a refugee’s language skills meant they were more likely to gain employment in a Member State other than that they had first entered, or where they wanted to move to be able to marry.

We were also successful in inserting significant caveats around a proposal to explore “new approaches concerning access to asylum procedures targeting main transit countries, such as protection programmes for particular groups or certain procedures for examination of applications for asylum” (6.2.3). We were concerned that this would mean that asylum claims could be lodged at consular posts outside the EU; we successfully argued for any such measure to happen on a voluntary basis only, and there is now no explicit mention of consular protection.

Subsequent to the first draft of the Council Conclusions, the following insertion on **trivialising certain crimes** was added to section 2.1:

The European Council invites the Commission

- to examine and to report to the Council in 2010 whether there is a need for a legal instrument covering publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.

This was inserted in order to address issues arising from Soviet war crimes. It was clearly important to some delegations, although so far as our own position is concerned, the Government believes that our domestic law strikes the right balance between protecting individuals from hatred and violence and upholding the right to freedom of expression. We took the view that the case had yet to be made for further EU legislation in this area. As such, we were successful in removing the term “legal instrument” and replacing it with “additional proposals”.

On **police and judicial training**, we considered that the text included arbitrary targets without a clear evidence base. The final text (moved from section 3.2.1 in the first draft to section 1.2.6 in the final Programme), following representations from the UK and others, helpfully limits ambitions in this area to those who are directly involved in judicial co-operation and renders targets merely aspirational.

Areas where the Government’s language has been adopted

There are various insertions that were the direct result of UK negotiations that the Government is pleased to have seen incorporated since the first draft.

On **better regulation**, we were successful in incorporating wording in 1.2.2 calling for non-legislative solutions such as handbooks, sharing best practice and regional projects.

On **free movement of EEA nationals** we succeeded in inserting text in section 2.2 “to combat actions of a criminal nature with forceful and proportionate measures, with due regard to the applicable law.”

Concerning **child protection** we were successful in gaining an action point in the final Programme in 2.3.2 for the development of “criminal child abduction alert mechanisms, by promoting cooperation between national authorities and interoperability of systems” (also see comments on 4.4.3).

In 4.2.2 we argued successfully for a reference under **managing the flow of information** to the EU Information Management Strategy based on a strong data protection regime consistent with the strategy for protection of personal data as set out in Chapter 2, as well as an evaluation of the existing instruments.

Again fitting in with the Government’s prioritisation of better regulation, section 4.2.3 on **mobilising the necessary technological tools** now calls for an evaluation of the exchange of information under the newly established European Criminal Records Information System (ECRIS).

The Government pushed for and was particularly pleased to see included reference to a new **Organised Crime Strategy** within section 4.4.1 on combating serious and organised crime. The UK has been invited to send the Commission proposals within the framework of an expected Spanish

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initiative for an EU Internal Security Strategy, a copy of which will be provided separately when it emerges in the new year. Our aim will be to consider how we can deliver elements of the existing UK Serious and Organised Crime Strategy “Extending our Reach” through an EU strategy on organised crime.

The Government is also very pleased to see an expanded section 4.4.3 on **sexual exploitation of children and child pornography**. This now incorporates key UK additions including an exploration of how to disrupt the money transfers related to websites with child abuse content and for the Commission to explore whether to create an EU-wide Child Abduction Network and exploring ways of enhancing cooperation in response to the movement of child sex offenders.

The Government also argued successfully for a broad approach to **solidarity** (6.2.2) to assist Member States experiencing migratory pressures; for explicit language to emphasise the need to ensure solidarity mechanisms do not undermine the principles of the Common European Asylum System (CEAS); and for inclusion of UK language which reflects the need for Member States to take responsibility for building capacity in their own asylum systems.

The Government argued successfully for progress on migration to be based explicitly on the framework set out in the European Pact on Migration and Asylum and the Global Approach to Migration (chapter 6), and for greater emphasis throughout the Programme on the need to tackle **illegal immigration** (6.1.6). In support of this aim we are pleased to see inclusion of the UK request for a reference to the need for new border technologies to be “interoperable” in the final draft of the text (6.4.1).

The UK was successful in arguing for the Programme to include a separate section (chapter 7) covering priorities for JHA action outside the EU, to bring greater coherence to this work.

Areas where the Government will wish to proceed with caution

Lord Roper wrote on 10 December commenting that in his Committee’s view it would not be “appropriate to include in this Programme a call for regulation of the financial markets”. The Government agrees that the reference in 3.4.2 to common rules on **supporting economic activity** including regulating financial markets and insolvency for banks is not strictly within the purview of JHA. For example, the Communication on an EU Framework for Cross-Border Crisis Management in the Banking Sector published by DG MARKT on 20 October 2009 addresses the issue of company law and a bank insolvency framework. The consultation period for that Communication has not yet elapsed, and will not do so until late January 2010. The Government made these points during negotiations. However, the action point in this section is relatively muted, calling on the Commission to “consider whether there is a need to take measures in these areas”. In light of this, of the presence of more pressing issues within the Programme, and of the fact that proposals on this will need to proceed via ECOFIN under any circumstances, the Government concluded that this reference was extraneous rather than harmful.

Equally, whilst the Government does not support the creation of a **European Public Prosecutor** as foreseen in section 3.1.1, we were prepared to accept the reference on the basis that such a proposal could only follow on from an evaluation of the operation of Eurojust. This reflects our view that legislation should only be presented where a need has been identified and where existing measures do not meet that need. This language reflects a compromise where other Member States wished to press ahead without any evaluation. We are also satisfied that any proposal to create an EPP would have to be agreed by unanimity and would be subject to the UK’s extended opt-in arrangement so we would not be obliged to participate in its creation.

Section 4.2.3 contains a new call for a feasibility study concerning setting up a **European Police Records Index System (EPRIS)**. The Government hopes that this will facilitate the sharing of useful police information but we shall continue to advise against the creation of any large new European IT systems.

Sections 6.1.4 and 6.1.5 call for a more vigorous integration policy aimed at granting migrants rights and obligations comparable to those of EU citizens. We will continue to support measures to improve the integration of migrants, but remain clear that the rights of citizenship must be earned and certain rights, such as the right to free movement, must be reserved for EU citizens.

Other Alterations

Other alterations are listed below. In terms of structure, there was a partial re-organisation of the chapters including moving all references to training into 1.2.6 and a split of the original chapter 5 into two chapters.

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The section on **free movement** (2.2) has been expanded not only to reflect UK wording on EEA criminality but to call for abolition of internal borders with remaining Member States wishing to join Schengen, and monitor the application of free movement rules and exchange information to prevent their abuse.

Section 2.3.3 on **vulnerable groups** now contains reference to victims of genital mutilation and those in need of greater protection.

2.3.4 on victims of crime now recognises the need to pay special attention to **victims of terrorism**.

Section 2.5 on **data protection** now references the 1981 Council of Europe Convention on data protection. This section is now linked to the EU Information Management Strategy set out in Chapter 4.

Section 4.1 on the **Internal Security Strategy** has been expanded to include a feasibility study to consider setting up an Internal Security Fund to promote the operational implementation of the Strategy.

Section 4.3.1 on **more effective European law enforcement cooperation** now goes into greater detail, such as recommending the use of Joint Investigative Teams and examining how operational police cooperation can be stepped up.

Sections 4.4.6 on **drugs** and 4.5 on **terrorism** have now been complemented in section 7.5 on **geographical priorities** with specific references on Afghanistan on the former and both Afghanistan and Pakistan on the latter.

The section on **management of the external borders** (now 6.4.1) has been significantly extended to give much more detail about how the expansion of the role of Frontex should proceed, and to call for better co-ordination of external border checks and the efficient evaluation and use of new technologies and IT systems.

Section 6.2.3 now sets out that the proposed joint EU **resettlement scheme** will be voluntary, and the introductory part of section 6 calls for exploration of ways to better record and, where possible, identify migrants trying to reach the EU in relation to tragedies at sea.

The UK supports the additional language in the final text on the close links between **internal and external security** (chapter 7 introduction) and the need to address threats originating outside the EU, including in countries far from the EU's borders.

During the negotiations, the UK secured additional language to reflect the important contribution made by **ESDP missions** to JHA objectives (section 7.1) and the need for greater cooperation between JHA external actions and those missions.

The UK supports the additional language in section 7.3 on **migration and asylum**, which deals with border controls, the fight against illegal immigration and the importance of returns and readmissions agreements.

On section 7.5, we support the additional text on the situation with regard to illegal immigration in the **Mediterranean**, particularly the need for stronger cooperation with countries of origin and transit. This is also supported in the additional text on tackling migration routes in **Africa**. We are content with the new language on the **Black Sea** region. The UK pushed for and strongly supports the additional language on **Afghanistan** and **Pakistan**, recognising that both countries are priorities for work on counter terrorism and migration.

Concerning section 7.6, the UK supports the additional language on the Hague Conference on **Private International Law** in the section on international organisations and standards.

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 4 January 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 3 February 2010.

The Committee is grateful to you for providing such a comprehensive overview of the finalised Stockholm Programme, including the UK's negotiating positions on certain issues, and for responding to the Committee's earlier report on the home affairs aspects of the draft Programme (25th Report of Session 2008-09, HL Paper 175). We would welcome the opportunity to hear in more detail the Government's thinking on how some of the home affairs aspects of the Programme will be implemented, and therefore would like to accept your offer to give oral evidence to us, preferably sometime in March 2010 before the Easter recess. Our Clerk will be in touch with your Private Office to see what date will be convenient for you.

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4 February 2010

SWIFT AGREEMENT: US TERRORIST FINANCE TRACKING PROGRAM
(17702/09)

**Letter from the Chairman to Sarah McCarthy-Fry MP, Exchequer Secretary, HM
Treasury**

Sub-Committee F of the Select Committee on the European Union considered at a meeting on 16 December 2009 a number of documents: your Explanatory Memorandum dated 19 November 2009 relating to an un-numbered version of this draft Decision; the draft of 23 November numbered SN 4903/09; and your letter of 26 November explaining that the Government intended to support the adoption of the draft Decision at the JHA Council on 30 November. We understand that the Decision was adopted, and the Agreement signed, on that day, the last on which this was possible under the third pillar Treaty base.

You said in your letter that you were sorry Parliament would not have been able to complete scrutiny of this Decision prior to its adoption. This is something we too regret. We delayed looking at the draft until now in the hope that we could look instead at the final text of the Agreement together with the EM relating to it, as promised in your letter of 26 November. However, not having received them, we thought it best to examine now the draft Decision on the basis of the documents we have, since this is the last meeting of the Sub-Committee before the Christmas recess.

You explain in the EM that this agreement will enter into force on 1 February, and that it is only intended to be in force for a short time pending the negotiation of a full Agreement. In our view however these points are of less importance than the Declaration made by the EU at the time of signature, which provides: "This Agreement, while not derogating from or amending the legislation of the EU or its Member States, will, pending its entry into force, be implemented provisionally by the Member States in good faith, in the framework of their existing national laws." Please confirm that the provisions of the Agreement are therefore already applicable, so that the US Treasury already has access to SWIFT data in accordance with the terms of the Agreement. This is a matter which greatly concerns the Committee.

The SWIFT Agreement follows a similar pattern to the succession of agreements between the EU and the US on passenger name records (PNR), which were the subject of our report *The EU/US Passenger Name Record (PNR) Agreement* (21st Report, Session 2006-07, HL Paper 108). The view we took then, and take now, is that the exchange of sensitive personal information is permissible if it will or may have a substantial impact on terrorism, but this must be accompanied by rigorous data protection safeguards.

Paragraph 7 of your EM states that the Agreement "includes controls on ... the protection of personal data". You say that they have been strengthened compared to those in previous US undertakings, but you do not say whether you regard them as adequate. You refer to the views of the LIBE Committee of the European Parliament welcoming the efforts to secure an agreement with the US, "in particular in relation to data protection", but you do not mention the serious criticisms by the LIBE Committee of the data protection regime applying until now; nor do you refer to the views of the European Data Protection Supervisor who, reporting in February 2007, referred to the "secret, routine and massive access of third country authorities to banking data" which "breached the trust and private lives of many millions of people".

It follows that we would be content with this agreement only if it demonstrated that it did indeed provide rigorous data protection as compared with the previous situation. But under Article 5(2) of the version we have seen, information extracted from data is "subject to the retention period applicable to the particular government authority according to its particular regulations and record retention schedules". Without knowing which particular government authority happens to have any information, and what regulations govern it, this means little.

It is of course now too late to do anything to strengthen the data protection provisions in this Agreement. We would however like your assurance that when the time comes for the new agreement to be negotiated, everything possible will be done to ensure that provisions will be negotiated which will include a strict purpose limitation, a provision ensuring that data are not retained longer than is essential, and a strict limitation on who can have access to the data and to whom they may be forwarded.

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We look forward to examining in due course the final text of the Agreement and your EM. This will inevitably constitute a scrutiny override.

16 December 2009

Letter from Sarah McCarthy-Fry MP to the Chairman

Thank you for your letter of 16 December. I am pleased that Sub-Committee F was able to consider this issue, notwithstanding the timetable for adoption at the Justice and Home Affairs Council.

You note that the Committee is concerned at the EU Declaration made at the time of signature, and that the US Treasury already has access to SWIFT data in accordance with the terms of the Agreement. It is correct that the US Treasury does currently have access to SWIFT data. However, at present this access is on the basis of an administrative subpoena in the US, not of the EU-US Agreement in question. US access to data under the terms of the EU-US Agreement will begin only after planned changes to where SWIFT information is stored, which are expected to remove some of this data from US territory and hence from the scope of the US subpoena.

However, there are existing safeguards on the access to SWIFT data by the US. This is in the form of a set of unilateral undertakings made by the US to the EU in May 2007 in response to European concerns, such as those expressed by the European Data Protection Supervisor about the role of the European Central Bank in February 2007, to which you refer. The undertakings specified a series of commitments and safeguards to ensure the protection of EU-originating personal data processed under the Terrorist Finance Tracking Programme (TFTP). They set out that data would be used exclusively for counter-terrorism purposes. As set out in the Explanatory Memorandum, those safeguards, and their monitoring by the EU (through the Eminent European Person, Judge Bruguiere), have largely addressed the concerns to which you refer.

In response to your queries on data protection, as you will be aware, the Ministry of Justice has policy responsibility for data protection. In May 2009, Michael Wills, Minister of State at the Ministry of Justice, met with Judge Bruguiere to discuss the processing by the US. Judge Bruguiere was very positive about both the steps which the US had taken to comply with their undertaking and the significant value which TFTP had played in the fight against terrorism.

In fact, HM Treasury has worked closely with the Ministry of Justice and other interested departments to ensure that this Agreement affords no less protection than the unilateral undertaking. With regard to adequacy and the controls on the protection of personal data included within the current agreement, Article 6 provides that, subject to ongoing compliance with the commitments set out in the Agreement, the US Treasury Department must ensure an adequate level of data protection. As I set out in the Explanatory Memorandum, the Agreement formalises and strengthens the safeguards given in the unilateral undertaking.

In particular:

- Under the Agreement the decision to authorise transfer of data to the US Treasury Department will be made by a European judicial authority which must verify the legality of the request. This is a significant shift from the current situation where requests to transfer data are made directly to a private organisation without oversight by a European public authority.
- The Agreement does not foresee the transfer of any additional types of data. Article 4.2 restricts other personal data so that it must be related to financial messages.
- The Agreement contains significant safeguards for the protection of personal data transferred under the Agreement. These include:
 - a strict prohibition on using the data for any purpose other than the prevention, investigation, detection or prosecution of terrorism or its financing, including the specific demonstration of a “reason to believe” that the subject of a search is connected to terrorism;
 - a prohibition on any form of data mining;
 - strict obligations on data security;
 - a limitation on who can have access to the data (Article 5.2 (e)); and

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- a requirement on the US Treasury Department to identify non-extracted data which are no longer needed for counter-terrorism purposes and to delete them. In other cases, data held on the TFTP database generally must be deleted within five years from receipt.
- The Agreement states that any person whose personal data are mishandled in breach of the Agreement is entitled to seek effective legal redress.

The Agreement provides for reviews of the way the TFTP is operating so as to assess in particular compliance with the data protection safeguards. Either party can request a review at any stage, and in any event a review must take place within six months from the date of the Agreement. The review team will comprise representatives of the EU Presidency, the European Commission and two Member States' Data Protection Authorities.

The envisaged Agreement also seeks to strengthen the security benefits of the TFTP for the EU. It obliges US authorities to share with their EU counterparts TFTP leads obtained by the US which are likely to be of benefit in the fight against terrorism in the EU. The Agreement will also allow Member State authorities to request a search of TFTP data where they have reason to believe that a person is engaged in terrorism or its financing.

You also expressed concern about the retention periods of extracted data being subject to a particular government authority's regulations and records retention schedules. However, the text of Article 5.2 (m) is identical to the commitment given by the US in the unilateral undertakings and affords no less protection. Although it does not feature in the current agreement, in the unilateral undertakings the US explained the rationale behind the need for varying retention periods:

"The period of time for retention of counterterrorism (and any other) information is a function of numerous, well-established factors, including investigative requirements, applicable statutes of limitation, and regulatory limits for claims or prosecution. The applicability and operation of these and other factors vary from agency to agency, depending on the nature of the agency's specific duties and missions. Accordingly, the retention periods for certain types of terrorism-related information compiled by various agencies depend on the nature of the information and the investigation to which it relates."

The practice of varying retention periods which exists in the US is one which we recognise in the UK where the review and retention of records held by the police and the courts are based on business and operational needs and set out in guidance and records retention schedules.

We have therefore moved substantially away from the position which existed before 2007 where SWIFT's compliance with the US subpoenas was considered by some authorities to have breached European data protection law, to a position where the EU considers there are adequate safeguards on data protection in place. That is a significant improvement on the earlier situation.

The Government will do everything possible to ensure that a new agreement will ensure adequate data protection controls; including, as you set out, a continuance of the strict purpose limitation, the provision ensuring that data are not retained longer than is necessary, and the limitation on who has access to the data.

10 January 2010

Letter from the Chairman to Sarah McCarthy-Fry MP

Thank you for your letter of 10 January 2010. Sub-Committee F of the Select Committee on the European Union considered it at a meeting on 3 February 2010.

We are grateful to you for providing further information about the Government's position on the adequacy of the data protection provisions contained in the Agreement. The Committee welcomes your assurance that when the time comes for the new Agreement to be negotiated, the Government will ensure that it includes a strict purpose limitation; a provision ensuring that data are not retained longer than is essential; and a strict limitation on who can have access to the data. However, whether due to an oversight or otherwise, your letter does not contain a commitment to secure limitations as to whom the data may be forwarded to, which was also requested by the Committee in their letter of the 16 December 2009. Therefore, the Committee would welcome an additional assurance on this point.

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With respect to the current and prospective Agreements, the Committee was also concerned that the ability of any European judicial authority to authorise the transfer of SWIFT data to the US Treasury could result in the potentially undesirable situation were permission to access such data was granted in a location unconnected with the location from where the data emanated. The Committee would also welcome your comments on this point.

It has been drawn to our attention that the Council Legal Service have advised that the UK, if it wishes to opt in to the Decision concluding the Agreement, must do so before 10 February 2010. This of course is in direct contradiction to the Protocol to the Treaty, which gives the UK 3 months from the date a proposal is presented to the Council. We can well understand that the UK will in this case wish to opt in before 10 February 2010 under the exception in Baroness Ashton's undertaking. However, we think it important that, when the UK does opt in, it should be made clear that it is doing so quickly because it wishes to do so, and not because of the Council Legal Service's advice, which is plainly wrong. Not to make this clear might set an unfortunate precedent for a time when the UK might wish to make full use of its 3 month opt in period. We would be grateful for your confirmation that this has been done, and would be glad to know the response of the Council Secretariat.

Furthermore, the Committee has yet to receive the final text of the Agreement and your EM in relation to this document, as promised in your letter of 26 November 2009. However, the Committee also notes that as the Agreement entered into force on 1 February 2010, the utility of receiving these items is now questionable. Therefore, the Committee will instead look forward to engaging with the Government during the negotiation and adoption of the permanent Agreement later this year.

4 February 2010

Letter from Sarah McCarthy-Fry MP to the Chairman

I am very grateful to your Committee for its continued consideration of the above Explanatory Memorandum. I am now writing to you under the terms of the commitment given by the Government during the ratification of the Lisbon Treaty with regards to Parliamentary scrutiny of the Justice and Home Affairs opt-in. This letter is to inform you that the Government has decided to opt in to this agreement when it is formally concluded, which is likely to be on 10 February 2010. I attach the text which allows for formal conclusion to the agreement (not printed).

As you are aware, this agreement was signed between the EU and the US on 30 November 2009. Agreement was given prior to the entry into force of the Lisbon Treaty in order to avoid any interruption in the programme and the associated risks to national security that recommencing the negotiation under the terms of the Treaty would have entailed. Member States originally signalled agreement by unanimity, meaning that it was implicit that all Member States would opt into the agreement. The appropriate procedure for allowing Parliamentary scrutiny of the decision was completed in the normal manner, albeit in a truncated time frame. Indeed, I am extremely grateful to you and your Committee for expediting the scrutiny process to allow the UK to support the agreement.

The Council Decision to conclude the agreement has now been presented and has a legal base in Title V of the Treaty on the Functioning of the European Union. As you will be aware, decisions under Title V will normally be taken through Qualified Majority Voting and, as such, are subject to the UK's opt-in for Justice and Home Affairs. Whilst the Protocol regulating the opt-in generally permits three months for the UK to notify its decision to participate in such a measure, the Council is not required to give us three months where it believes that the measure needs to be adopted as a matter of urgency.

The Council takes such a view in this case and is therefore expediting adoption as soon as the European Parliament gives its assent, which could be as early as 9 February. This means that on this occasion the Government is unable to grant to Parliament the agreed period of eight weeks to scrutinise the decision.

The UK has been an extremely vocal advocate of the need to conclude the interim agreement and we have lobbied our EU counterparts extensively on the matter, as we see the programme as an important tool in fighting terrorism. A decision by the UK not to opt into the agreement would therefore unnecessarily jeopardise the potential for a long-term agreement by suggesting that the UK is no longer committed to the programme. Furthermore, as your Committee correctly notes, the agreement itself is temporary, and will run only until 1 December 2010. Between now and then, a permanent agreement will be negotiated which will be subject to Parliamentary scrutiny and a UK

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opt-in in the usual fashion. As a result, the Government has decided not to exercise its right to the three-month period to notify its decision, and will go ahead and opt-in to this agreement.

I hope that you will agree that it is important that the UK should support the continued success of the Terrorist Finance Tracking Programme, and that as such it is important that the Government opt-in to this agreement.

4 February 2010

Letter from Sarah McCarthy-Fry MP to the Chairman

Thank you for your letter of 4 February 2010 on the above document. I am grateful to your Committee for its ongoing consideration of this important matter. For the completeness of your records, I attach to this letter the final text of the interim agreement that was signed by the EU and US on 30 November 2009 (not printed).

As you will be aware, the European Parliament voted on 11 February 2010 to reject the EU-US Agreement, with the consequence that it ceases being in force since the Treaty requires that the European Parliament's assent be granted. Prior to this, the Council sent a declaration to the European Parliament undertaking to take its views into account in the negotiation of the Permanent Agreement. I have also attached this declaration for your reference (not printed). The result of the rejection is that the Draft Council Decision referred to above will not be concluded and the UK will therefore not be required to exercise its opt-in. However, for the sake of completeness, I shall address each of the issues you raise in turn.

First, your letter notes the Committee's outstanding question regarding a strict limitation as to whom the data may be forwarded. Under the unilateral undertakings made by the US to the EU in May 2007, the US described how the data provided by SWIFT are searched to extract only information that is related to terrorism or its financing. The US also went on to describe how information derived from SWIFT data are appropriately shared with its domestic and internal partners. The limitation on sharing information is set out in Article 5(2)(h) of the interim agreement: that is, information obtained through the Terrorist Finance Tracking Programme (TFTP) shall only be shared with law enforcement, public security or counter-terrorism authorities in the US, EU or other countries for the purposes of the investigation, detection, prevention or prosecution of terrorism or its financing. The Government will do everything possible to ensure that this control continues in a longer-term agreement.

Second, you raise a concern that a European judicial authority may authorise the transfer of SWIFT data to the US Treasury where the data had not emanated from that jurisdiction. As you are aware, the very purpose of the Agreement is to enable a European judicial authority to authorise the transfer of SWIFT data emanating from any and all countries, when such data are held or processed within their jurisdiction. The means under which this would be done are specified in the Agreement, and include the strict data protection and access controls as has been the subject of previous correspondence to the Committee. Global coverage is important to the effectiveness of the TFTP in investigating terrorist financing. However, the Agreement does not of course enable a judicial authority to give permission to transfer data which are not held or processed within their jurisdiction, or in a manner that does not respect the terms of the Agreement.

Finally, you raise the issue of the UK's opt-in. As you will be aware, I have written to your Committee addressing some of the issues your letter outlines. However, I will seek to give as full a picture as possible in this letter of the legal situation. The Protocol on the Position of the United Kingdom and Ireland states that the UK "may notify the President of the Council in writing, within three months after a proposal or initiative has been presented... that it wishes to take part in the adoption and application" of a proposed measure. However, in exceptional circumstances, the EU institutions may consider it essential to adopt measures urgently within a period of less than three months, and in this case we were alerted in January 2010 to the intention of the Presidency to put the Council Decision for adoption as soon as the European Parliament had given its assent.

The vote in the European Parliament was initially expected by 10 February 2010, suggesting that adoption could happen at the next Council thereafter. You will be aware that the Decision would not have had to go to a Justice and Home Affairs Council since the Council is itself an indivisible whole where any Council formation can adopt a measure. Consequently, we were aware that if the UK was to participate in adoption of the Council Decision we would have to notify the Presidency within that timetable, cutting short our usual three months. I can therefore reassure the Committee that we were not acting on an opt-in date of 10 February provided by the Council Legal Service but rather an expedited timetable for adoption set by the Presidency.

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Although such circumstances are exceptional they are not unique and were recognised in the undertakings given by Baroness Ashton during the passage of the Lisbon Treaty, where the statement gave as an example EU-third country readmission agreements that had been submitted for rapid adoption necessitating an early opt-in decision by the UK. While the UK could have informed the Presidency that it required three months in which to decide whether to opt-in to the agreement, it would by no means have been certain that that period would have been provided, and failure to opt-in by the date of adoption would have put in jeopardy the UK's ability to opt in at all. Equally, for the reasons I have previously set out, the Government did not feel this would have been an appropriate course of action.

I am grateful to your Committee for its acknowledgement of these exceptional circumstances.

13 February 2010

Letter from the Chairman to Sarah McCarthy-Fry MP

Sub-Committee F considered at a meeting on 24 February 2010 this proposal for a Decision on the conclusion of the SWIFT Agreement, deposited on 8 February; your Explanatory Memorandum dated 9 February; your letter of 4 February on the Decision on the signing of the SWIFT Agreement, which crossed with my own letter of that date; and your further letter of 13 February. We are grateful for these documents.

The document under scrutiny, the proposal for a Decision on the conclusion of the SWIFT Agreement, was, as you say in paragraph 23 of your EM, published on 18 December 2009. It should have been deposited that day, or at the latest the following working day, 21 December. Your EM states that it was deposited on 5 February 2010. It was not in fact deposited until 8 February: see Batch List 19/10 issued by the FCO.

Your EM continues: "It, however, became clear that the Proposal for a Council Decision concluding the agreement was also subject to scrutiny. This unfortunately delayed deposit of document 17702/09." You do not explain why it should ever have been thought that this Proposal, involving the conclusion of a major and controversial agreement with the US, and subject to a UK opt-in, would not have been subject to scrutiny. We do not understand the connection between the two sentences of your EM we have quoted, nor why, once your officials realised that the document was indeed subject to scrutiny, this should have delayed its deposit. We would have hoped it might even have hastened the deposit.

It is not clear to us why you have attempted to rely on the exception given in Baroness Ashton's undertakings as a reason for giving the Committees of both Houses no time at all for scrutiny of this draft Decision. Readmission agreements, as you may know, are often concluded at the same meeting at which they are signed, or shortly thereafter. This was not the case here. Had the EM been supplied within a maximum of ten working days after publication, as required (i.e. by 4 January 2010), the document and EM could have been considered by the Committee at its first meeting after the Christmas recess. The Committee would not have had 8 weeks from publication to make its views known to you, but it could have told you its views a month before you had to reach a decision on opting in. For the record, those views would have been that it was in the interests of the United Kingdom to have the benefit of this agreement, so that it should opt in; and moreover that it was scarcely possible for the UK not to be a party to the conclusion of the agreement when it had voted for its signature.

As it is, your failure to comply with the Ashton undertakings means that you reached your decision on opting in without being able to take into account the views of this Committee; this constitutes a scrutiny override. In the event, of course, given the rejection of the Decision by the European Parliament, the issue of opting in did not arise.

The Committee has also seen the urgent question put to you on 4 February on the floor of the House of Commons by Michael Connarty MP, the Chairman of the Commons European Scrutiny Committee, and we fully support the complaints made by him and by others who spoke about the failure of the Government to comply with the Ashton undertakings.

We are glad to know that the Council Secretariat were informing you only of the likely wish of the Member States to adopt the Decision less than three months after it was published, and were not attempting to suggest that the three months allowed under the Protocol for the UK to opt in could be abbreviated. We would be glad to know what procedure the Government would adopt in future if a decision on whether or not to opt in had not been reached by the time the Council wished to adopt a Decision.

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When, in December, the Committee scrutinised the Decision on the signing of the Agreement, this was with a text of the Agreement still under negotiation; and I asked in my letter of 16 December for the text of the Agreement as signed. I am glad at last to have received it with your letter of 13 February, though I note that it is in a document, 16110/09, dated 27 November 2009. It would have been useful to have sight of this before the Committee considered the first Decision on 16 December.

I also see that, among the changes made in the final stages of negotiation, the date of expiry was amended. In the text of 27 November, and in the text now published in the Official Journal, Article 15(3) provides that the Agreement will expire on 31 October 2010. This is nine months after its provisional entry into force on 1 February. However in your letter to me of 4 February you state that the agreement "will run only until 1 December 2010"; and presumably that was your view when you stated in the House of Commons that the agreement would "last for 10 months". I would be grateful if you would clarify this issue. It is of course important to know when the negotiations for the new agreement will have to be completed.

Another issue on which we would be grateful for your clarification is the precise standing of the Agreement at this time. On 30 November 2009, when the parties signed the Agreement, the EU declared that the Agreement would "pending its entry into force, be implemented provisionally by the Member States in good faith, in the framework of their existing national laws." Article 3 of the Decision adopted that day provides that "the provisions of the Agreement shall be applied on a provisional basis in conformity with existing domestic law as from 1 February 2010, pending its entry into force." We understand that, after the rejection by the European Parliament of the Decision on conclusion, the Agreement cannot enter into force, but are we not right in thinking that its provisions have been and remain applicable throughout the EU?

On the substance of the agreement, I note that you believe that judicial supervision will be satisfactory to deal with the transfer of data from a jurisdiction in which it does not originate. I am grateful for your assurance that the Government will do everything possible to ensure that the categories of persons to whom data may be forwarded continue to be limited when the longer-term agreement comes to be negotiated later this year.

The Committee will keep this document under scrutiny.

24 February 2010

Letter from Sarah McCarthy-Fry MP to the Chairman

Thank you for your letter of 24 February in which you asked further questions about the scrutiny process followed for the decision to conclude the SWIFT agreement, particularly regarding the UK's opt-in. I would like to address each of the issues you raise in turn.

First, you correctly note that the Proposal for a Decision to conclude the agreement should have been deposited in Parliament on 18 December 2009 but was not. I agree that this was extremely regrettable and I would like to offer my apologies for the fact that this truncated further the time available to your Committee to consider the decision. This error on the Government's part was attributable to the unique nature of this case that resulted in uncertainty surrounding the appropriate protocol to be followed. This was compounded by the fact that Member States were only informed of the Treaty basis for the Decision on 17 December 2009, and the fact that Justice and Home Affairs matters are not routinely dealt with by HM Treasury. Nonetheless, that does not excuse the failure, and I have asked officials to review this incident and implement the appropriate procedures to ensure it is not repeated. The Government is drafting a Code of Practice that will set out clearly the Government's commitment to the opt-in process under the Lisbon Treaty. In addition, HM Treasury has put in place measures to work even more closely with the Cabinet Office and FCO on the new scrutiny procedures following the ratification of the Treaty.

This is related to the second question you raise, which concerns the apparent doubt around whether this document should be subject to scrutiny. I can assure you that there was never any doubt over Parliament's right to scrutinise the EU-US agreement, as enshrined in the Scrutiny Reserve Resolution. Indeed, this is the reason the Government submitted an unnumbered Explanatory Memorandum on the content of the agreement prior to signing, on 19 November 2009. However, on this particular document, the late confirmation of the legal basis, as noted above, led to uncertainty over exactly what procedure should be followed. This is what caused the delay, rather than any suggestion that Parliament should not be given sight of the document. I can further reassure you that as soon as the position had been made clear and I became aware of the error of not depositing the document, I wrote immediately to inform you of the situation.

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Third, you ask what procedure the Government will adopt in future if a decision on whether or not to opt in had not been reached by the time the Council wished to adopt a measure, such as a Council Decision. As you are aware, the ability of the Council to adopt measures to which the opt-in applies within three months of their presentation is not a new eventuality. It arose on occasion under the original Protocol on the position of the UK and Ireland in relation to measures under what was Title IV of the Treaty establishing the European Community. However, with the enhanced scrutiny arrangements for the use of the opt-in following the entry into force of the Lisbon Treaty, the Government has undertaken to explain to the Committees if it is necessary to notify an opt-in within the first 8 weeks of its presentation. In applying that undertaking I would draw a parallel with the procedure used to notify the Committees in those exceptional cases where a Minister has taken the decision to override the parliamentary scrutiny reserve to participate in an agreement on a text. I would also expect this to be further addressed in the Code of Practice, to which I have already referred.

Finally, you also ask for clarification over the length of the provisional agreement and over the precise standing of the agreement at this time. I can confirm that, due to last minute changes to the agreement, it would have expired on 31 October 2010. As you are aware, the agreement entered into force provisionally on 1 February, but consent of the European Parliament to be concluded. Since that consent has not been given, the agreement is no longer in force. The President of the Council has officially notified the US that the agreement has been terminated. As such, the provisions are no longer applicable inside the European Union, not even on a temporary basis.

1 March 2010

Letter from the Chairman to Sarah McCarthy-Fry MP

Thank you for your letter of 1 March which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 17 March 2010.

We are grateful for your apology for the delay in depositing the document and submitting the Explanatory Memorandum.

You say that "The Government is drafting a Code of Practice that will set out clearly the Government's commitment to the opt-in process under the Lisbon Treaty". Baroness Royall of Blaisdon, the Leader of the House, has said that the draft "will soon be sent to Committee Clerks for their comment and, once agreed, become an Annex to the Cabinet Office scrutiny guidance". I have replied to her that in our view it would be easier for all concerned if the Committees were to be involved at an early stage.

The procedures you suggest for scrutiny when the Council wishes to adopt a measure urgently will, as you say, be addressed in the Code of Practice. What was concerning us was to know what procedure the Government would adopt when Ministers themselves had not reached a decision on whether or not it was in the interests of the United Kingdom to opt in to a measure by the time other Member States wished to adopt it. If we are right in thinking that these decisions must always be taken by a Cabinet Committee, it seems to us that this may sometimes be a real problem. We would be interested to know how the Government would handle such a situation.

We note your view that the European Parliament's rejection of the Decision to conclude the Agreement means that the Agreement itself has been terminated. Does it necessarily follow that the Declaration made by the Member States on 30 November 2009 when they signed the Agreement ceases to have any validity? It is arguable that the status of the Agreement is the same as any other multilateral agreement which is signed but not ratified: it is not in force, but signature alone imposes on the parties certain obligations (e.g. not to act in a manner inconsistent with it). Since the Declaration provides that the Agreement will "pending its entry into force, be implemented provisionally by the Member States in good faith, in the framework of their existing national laws," does this not constitute an obligation which continues to be binding on the Member States? We would be interested in your views.

The Committee will keep this document under scrutiny.

We look forward to receiving your reply. As you know, it has been agreed that ministers should reply to letters within 10 working days.

18 March 2010

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Letter from Sarah McCarthy-Fry MP to the Chairman

Thank you for your letter of 18 March. You raise several important questions as regards opt-ins and, more specifically, on the status of the EU-US Agreement on the processing and transfer of Financial Messaging Data (the "SWIFT Agreement").

You ask about what would happen in a situation where UK Ministers had not reached a decision on whether or not to exercise the opt-in by the time the Council wished to adopt a measure. Opt-in decisions are agreed at Cabinet Committee level and in the circumstances that an early opt-in decision is needed, this process can be expedited. At the same time it is important that Ministers are given adequate time to consider the issue at hand in order to ensure the principle of collective agreement is upheld. The UK would therefore expect to be fully involved in any discussions about the need for early adoption of measures, which would enable the Government to plan in advance for an opt-in decision that needed to happen in a shorter timeframe than the usual three-month period.

You also asked about the status of the SWIFT Agreement for Member States now that the European Parliament has rejected the Council Decision. You are correct that the Declaration states that the Agreement will "pending its entry into force, be implemented provisionally by the Member States in good faith, in the framework of their existing national laws". However, this provisional implementation was only intended to apply during the period before the Agreement entered into force. The European Parliament's rejection of the Decision to conclude the Agreement means that the Agreement will not now be concluded or enter into force, and accordingly the provisional implementation of the Agreement has also been terminated.

Finally, I would like to let you know that negotiations will shortly begin on a negotiating mandate for a permanent Agreement. Although this document is not publicly available, I intend to write to both Houses to update them on this shortly.

30 March 2010

Letter from Sarah McCarthy-Fry MP to the Chairman

As noted in the 21 April unnumbered Explanatory Memorandum on the above subject, the European Commission has sent to Member State governments a recommendation that will form the basis of a Council Decision detailing a negotiating mandate for an Agreement between the European Union (EU) and the United States of America (USA) on the processing and transfer of financial payment messaging data from the EU to the USA for the purposes of the Terrorist Finance Tracking Program (TFTP).

The cessation of the TFTP has created a very real security gap in the EU, as the USA no longer has access to data on terrorist financing that it can share with Member States' authorities. As such, the Government considers it an urgent priority that a permanent agreement is reached, and welcomes the rapid publication of a draft negotiating mandate.

I would like to alert you to the fact that the Government intends to opt in to the Council Decision to authorise the opening of negotiations between the EU and the USA. Given that the Government is extremely supportive of the Agreement, it is important that the UK is in a firm position to influence its content to ensure it meets the necessary standards and strikes the right balance between facilitating an effective TFTP and protecting citizens' data.

The Government was supportive of the interim Agreement and will be pushing for a future long-term Agreement along these lines, particularly in regards to data protection. The Government believes that enshrining the protection of personal data in any long-term agreement is vital and that appropriate safeguards are necessary to ensure the respect of the fundamental right of the protection of personal data. The Government will be seeking no less commitment and compliance to standards for handling personal data in any future agreement, while ensuring that the TFTP can run effectively. This will include seeking that data held securely by USA authorities, is not subject to data mining and is not held on any systems unnecessarily (i.e. is deleted after a specified period).

Furthermore the Government will be clear on seeking the appropriate commitment to reciprocity. It is vital that EU Member States, including the UK, continue to benefit from this programme and can effectively use the data to disrupt terrorists and their finances. In order to secure such an outcome the Government will be vocal in ensuring that we have a sound legal basis agreed between the EU and the USA that ensures the necessary flow of information between the partners to the Agreement that can further be used for the disruption of terrorists and their finances.

I am aware of the commitment Baroness Ashton gave to Parliament to allow an eight-week period in which to scrutinise a decision to opt in. While the Government cannot give any firm indication of

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how long discussions on the mandate in the Council will take, once a draft Agreement has been prepared it will be submitted to the next available Council for agreement. It is possible that the Presidency may present a negotiating mandate for the Council to agree before that eight weeks has expired, and possibly as early as the 22 April Justice and Home Affairs Council.

However, I would highlight that this is the beginning of a process which has several stages. Once the Council has agreed a mandate, the Commission, accompanied by a specially designated Committee, will negotiate with the USA on behalf of the EU. Once the two parties have reached a proposed Agreement, the Commission will present it to the Council for signing. At this point, the Government will have to take a further decision on whether or not to opt in to the Decision to sign the agreement. Again, this decision to opt in will be subject to Parliamentary scrutiny, as will the final eventual decision on whether to opt in to the conclusion of the Agreement. As such the decision to opt in to the negotiating mandate at this stage is without prejudice to whether the UK will opt in to the final Agreement.

The UK opting in at this stage allows us to vote for the adoption of the mandate and be a party to negotiations with a view to a successful and mutually beneficial Agreement between the EU and the USA.

Given the importance of the dossier to the UK and EU in the fight against terrorism I would like to thank your Committee for their engagement and cooperation on these proposals. Your Committee will be updated throughout this process.

21 April 2010