



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

This edition includes correspondence from 1 December 2011 – 16 March 2012.

## HOME AFFAIRS

### (SUB-COMMITTEE F)

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ARTICLE 10(4) OF THE PROTOCOL ON TRANSITIONAL PROVISIONS - PROTOCOL  
36 TO THE TREATY OF LISBON

FOR PREVIOUS CORRESPONDENCE PLEASE SEE: EU JUSTICE AND INSTITUTIONS SUB-COMMITTEE CORRESPONDENCE WITH MINISTERS JUNE 2011 – NOVEMBER 2011

**Letter from the Rt. Hon Theresa May MP, Home Secretary, Home Office, to the  
Chairman**

Thank you for your letter dated 4 November 2011 requesting a definitive list of measures subject to notification by the United Kingdom pursuant to Article 10(4) of Protocol 36 of the Treaty of Lisbon.

I am pleased to provide at annex A [not printed] the list of measures that the Government considers to be subject to this notification. The Transitional Protocol to the Lisbon Treaty allows the UK to “opt out” by 1 June 2014 of “acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of Lisbon”. This means that all “acts” with a legal base in the former Title VI of the Treaty of the European Union (police and judicial cooperation in criminal matters) are caught by this transitional provision. This includes straightforward ‘Third Pillar’ measures as well as ‘Third Pillar’ measures classified as ‘Schengen building’.

The list at annex A is split between old ‘Third Pillar’ measures and ‘Schengen’ measures due to the slightly different procedures that would apply to any application to rejoin measures should the decision be taken to reject European Court of Justice jurisdiction resulting in the UK opting out of all measures within the scope of the decision. In respect of measures forming part of the Schengen acquis, this would be governed by the Schengen Protocol. The UK would need to make an application under Article 4 of that Protocol and the Council would decide on the request “with the unanimity of its members” and the representative of the UK. For non-Schengen measures, Article 4 of the Title V Protocol would apply, which is the process for opting in to a measure post adoption and allows for conditions to be set by the Commission.

Also included as part of the annex is a list of measures which the UK has opted in to which repeal and replace, or amend, measures which would otherwise have been within the scope of the notification.

The lists are subject to change as measures are repealed and replaced or amended and we will keep you updated with any changes that are made. In particular we are aware that the Commission is planning proposals for next year involving revisions to Europol, Ceu (EU police college), Eurojust, the framework for cooperation on confiscation of assets and on criminal measures to tackle counterfeiting the Euro, all of which fall on the current list. Those proposals will of course trigger separate opt-in decisions. We will continue to engage with the Council Secretariat to ensure that the list is comprehensive.

I am committed to ensuring that Parliament is able to properly scrutinise the decision that flows from Article 10(4) of Protocol 36 of the Treaty of Lisbon as part of our undertaking to hold a debate and vote in both Houses on this decision. I am grateful for the interest that your colleagues in the House of Lords have already shown and look forward to engaging with Parliament fully in this matter.

*21 December 2011*

ASYLUM: ENHANCED INTRA-EU SOLIDARITY (18209/11)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 25 January 2012.

The Sub-Committee has taken the view that this is a document of great importance which might well merit a full inquiry, possibly together with the Communication on The Global Approach to Migration and Mobility (Document No 17254/11 + ADD1). We are therefore keeping both documents under scrutiny.

No reply to this letter is expected.

25 January 2012

## ASYLUM SEEKERS: INTERNATIONAL PROTECTION STATUS AND STANDARDS FOR RECEPTION (11207/11, 11214/11)

### **Letter from the Chairman to Damian Green MP, Minister for Immigration, Home Office**

Thank you for your further letter of 21 November 2011 which was considered by the Home Affairs Sub-Committee of the House of Lords European Union Committee at a meeting on 7 December 2011.

We are glad that you share our view about the desirability of having recitals stating expressly that the United Kingdom is not bound by or subject to the application of each Directive. We hope you will be successful in negotiating this.

We do not require a reply to this letter, but would be glad to hear about the progress of the negotiations in due course. We are grateful for your undertaking to provide more details on the Qualification Directive.

7 December 2011

### **Letter from Damian Green MP to the Chairman**

Thank you for your letter of 7 December. I am writing to update the Committee on the progress of negotiations for the above recast Directives. You will be aware that the UK decided not to opt in to these Directives.

The Polish Presidency made it clear that working on the proposals forming the second stage of the Common European Asylum System (CEAS) was one of their priorities. The Presidency has worked hard in this area with the Council Working Group completing the first readings of both proposals and discussing various compromise texts. Some discussions have also taken place at the higher working level of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA).

You will recall our concerns about proposals in Article 15 of the Reception Conditions recast that required Member States to grant access to the labour market for asylum seekers after a period of 6 months (with some limited exceptions) compared to 12 months in the Directive in force. This has proved to be a highly controversial proposal with many Member States taking a similar view to our own, arguing that easing access to the labour market could be a pull factor encouraging unfounded claims for protection made simply to secure a route into national labour markets that would otherwise be unavailable. A minority of Member States have indicated that they could support the 6-month period if it were subject to conditions, for example that it would only apply if an administrative "first instance" decision had not been made or it would not apply if the applicant had failed to cooperate in the asylum procedure.

Similar concerns have been expressed on the proposals on access to material reception conditions (asylum support) in Articles 17-20. In bringing forward its proposal in June the Commission indicated that it had taken into account the reservations held in Council about proposals in the earlier recast referring to equal treatment of asylum seekers compared to nationals and the position of the European Parliament: the Commission proposed that Member States could grant less favourable social welfare assistance to asylum applicants compared to nationals where it is "duly justified" and other levels of support are provided in kind at the same time. We did not believe that the requirement to "duly justify" such differences was necessary or that other proposals concerning the withdrawal or reduction of reception conditions were workable. Other Member States share our views and have challenged the proposal as drafted arguing that it would highlight differences between Member States and that as a result Member States offering higher levels of social welfare would become more attractive to asylum applicants.

The strength of disagreement on both access to the labour market and the provision of material reception conditions led to the issues being discussed at the higher levels of SCIFA at the end of last month (November), but deadlock remains. The incoming Danish Presidency has indicated that it will seek to address these issues at the higher political level in the New Year.

Another contentious area of debate has focussed on the provisions on detention in Articles 8-11 of the Reception Conditions proposal and related references to detention in Article 26 of the proposal on Asylum Procedures. You will recall our assessment that the restrictions on the use of detention proposed by the Commission were unnecessary given the provisions of Article 5(4) of the European Convention on Human Rights that concern an individual's right to challenge the lawfulness of his or her detention before the courts. We were also concerned that these provisions would have a negative impact on the UK Border Agency's ability to operate its Detained Fast Track (DFT) system. The content of these provisions remains under discussion as attempts to reach a compromise continue, but in a positive development the Presidency has accepted our argument that insofar as they are considered necessary any provisions concerning the detention of individuals subject to procedures under the Dublin Regulation should be included in the recast Dublin Regulation. We look forward to considering proposals within the Dublin Regulation in due course.

Turning to the proposals on Asylum Procedures you will recall that we had some concerns around the provisions in Article 6 of the proposal that set down requirements to provide access to the asylum procedure. The Commission proposal was based on seeking to identify three stages within that process where an individual first expresses a desire to make an application, followed by a stage when the application is deemed to have been "made" and finally a stage where the application is "lodged" once all administrative functions are completed. Discussions in the Council Working Group have revealed that there are significant difficulties with this provision as drafted, not only in terms of the conceptual divide into a 3-stage process, but also at the practical level of translation into different languages. Some Member States have noted that in their national language versions of the text there is no difference in the wording used for the proposed stages when an application is considered to be "made" and then "lodged". We have argued that there needs to be consistency between any wording used in this article and that used in both the EURODAC and Dublin Regulations, as there needs to be a clearly defined moment from which participating States' responsibilities to take and transmit fingerprint data to the EURODAC database are triggered.

Although we noted that the proposals concerning the provision of medical reports in Article 18 of the recast were simpler than those contained in the earlier proposal (document 14959/09) we remained concerned about the requirement on Member States to commission reports in certain circumstances. Many Member States have expressed concerns about this article. Various compromises have been proposed, but concerns remain, in particular around the evidential weight to be given to medical reports in the context of the asylum procedure on the basis that there is not necessarily a link between the results of an examination and the grounds for international protection. There have also been concerns expressed that the proposal and some of the suggested compromises have built opportunities into the procedure that allow for the asylum procedure to be delayed. Finally there are differences of opinion between Member States on whether medical examinations should be conducted at the expense of the applicant or the Member State and if the former applied whether this would unfairly discriminate against those applicants unable to afford the costs.

We were concerned that the provisions in Articles 31 and 46 concerning the examination procedure, unfounded applications and remedies when taken together would restrict the UK Border Agency's use of the DFT procedure and non-suspensive appeals (NSA). Both articles have been the subject of intense debate in the Council Working Groups with many Member States expressing serious and multiple concerns with the proposals, many of which are in line with our own. In the course of the discussions the Commission has indicated that it is unwilling to support some of the suggestions put forward by Member States that seek to reintroduce into Article 31(6) (on accelerated procedures) provisions it proposes to delete from the directive in force, for example those provisions that currently permit acceleration: where the applicant has failed to make an application earlier having had an opportunity to do so; where the applicant has entered the territory unlawfully or prolonged their stay unlawfully and without good reason has not made an application as soon as possible; and where the applicant refuses to comply with an obligation to have their fingerprints taken.

The European Parliament has not so far considered either of the proposals since the Commission re-presented them.

The incoming Danish Presidency has expressed its commitment to work on these proposals in the coming months and we will keep the Committee informed of progress.

*19 December 2011*

## CIVIL PROTECTION MECHANISM (18919/11)

### **Letter from the Rt. Hon Francis Maude MP, Minister for the Cabinet Office and Paymaster General**

I am writing to you as Chairman of the House of Lords Select Committee on the European Union to convey to the Committee the Government's Explanatory Memorandum on a proposal for a Decision on a European Union Civil Protection Mechanism. This has been prepared in consultation with Government Departments and the Devolved Administrations.

The Directive raises a number of issues that we will want to explore carefully. The Commission's proposal replaces the existing Civil Protection Mechanism and associated Financial Instrument with a single new Decision based on the Civil Protection Article in the Lisbon Treaty (Article 196). In doing so, it incorporates most of the existing provisions, as well as proposing a significant extension of the Union's role in a number of areas. In considering the proposals, the Government will take particular care to ensure that they are consistent with the legal base set out in the Lisbon Treaty and the principle of subsidiarity.

The Danish Presidency programme for civil protection gives special priority to the negotiations on this proposal, and tentatively provides for a Ministerial orientation debate at the June JHA Council. This is in the context of the wider Presidency programme for civil protection, which aims to: strengthen the systematic learning of lessons from disasters; continue work on critical infrastructure protection; follow up recommendations of the EU's CBRN Action Plan; work to improve robustness against natural disasters and increase cohesion among disaster management phases including reconstruction and development in prolonged crises; support the role of the United Nations as the overall international coordinator of emergency assistance in the event of need; and work to convene the central EU actors to discuss future common challenges and joint measures to secure emergency assistance in major disasters and crises.

*31 January 2012*

### **Letter from the Chairman to the Rt. Hon Francis Maude MP**

Thank you for your explanatory memorandum of 30 January 2012. This was considered by EU Sub-Committee F on Home Affairs at its meeting on 29 February 2012; it was decided to clear the Report from scrutiny, but to retain the draft Decision under scrutiny.

At the outset, we note that the proposal for an updated Civil Protection Mechanism to take into account the new Article 196 TFEU largely covers the same ground as the existing Mechanism. We believe that European cooperation is important in order to improve the prevention of and response to major emergencies.

Taking into account the overall Government position on the EU budget, we understand your reluctance to contemplate any increase in real terms for the budget for the Civil Protection Mechanism. We wonder whether your expectation that the new Civil Protection Mechanism could be funded within its existing budget is realistic, given the proposed additional measures such as the increased operational capacity. We would be interested in your views as to whether the measures proposed by the Commission could be funded by a smaller budget if they were more cost-efficient, or whether this increased budget is simply a necessary consequence of these new measures. In the light of your comment in the explanatory memorandum that "where the proposed legislative innovations can be supported on policy grounds, then their implementation should be feasible within the constraints imposed by a real-terms payments freeze in the civil protection budget", could you please explain which elements of the proposal you believe would justify increased spending, and which would not?

On the creation of the European Emergency Response Capacity (EERC), as was stated in the European Union Committee report of March 11 2009 on Civil Protection and Crisis Management in the European Union, we believe that preserving the safety and security of its citizens is the first duty of every State, and in the modern world that often requires them to act in cohort with other States. We understand that the pre-commitment of domestic disaster response assets from the Member States to the EERC is voluntary. However, we share the Government's concern that the EERC should be built on sound evidence, and we agree it is vital that this measure is effective, cost-efficient and represents good value for money. We would recommend that robust evaluation procedures are put in place to monitor and ensure the added value of the EERC on a continuing basis.

On the development of EU-subsidised assets in order to fill “capacity gaps”, we understand the Government’s concern. Under normal circumstances, it is not acceptable for the EU budget to fund actions which could reasonably be funded at a national level. Whilst we note that safeguards are detailed in the proposal to ensure that these subsidies are used only in exceptional cases, and that Member States must ensure they have sufficient capabilities to enable them to cope adequately with disasters of a magnitude and nature that can reasonably be expected and prepared for, we nonetheless support the Government’s objective of ensuring that these subsidies do in practice meet rigorous tests of EU-added value.

We believe that the Government’s concerns that measures to deploy logistical support and assistance capacity must not duplicate the technical support already provided by a number of Member States are well-founded. We would be interested to know more about the examples of where this support has been used, as well as the views of the Member States currently providing this support; do they also share the concerns of the Government that the Commission’s proposal would duplicate their current role?

It is surprising that there is little attention paid in either the Commission’s proposal or your explanatory memorandum to the crucial issue of co-operations with NGOs and humanitarian agencies which we believe must be an integral part of any response to disasters of this kind.

Finally, you will be aware that in the aforementioned Committee report of on Civil Protection and Crisis Management in the European Union, we made a number of recommendations. One of these was that the Government work closely with the existing Monitoring and Information Centre in the run-up to the London Olympics. A second was that coordination between the EU and NATO on civil protection matters should be strengthened. We would be very grateful to know what progress has been made towards implementing these recommendations.

I look forward to receiving your response within the standard ten days.

6 March 2012

## DANISH PRESIDENCY PRIORITIES FOR JUSTICE AND HOME AFFAIRS

### **Letter from James Brokenshire MP, Parliamentary Under-Secretary for Crime and Security, Home Office**

Denmark will take over the rotating EU Presidency on 1 January 2012, the second of this Trio of Presidencies (Poland, Denmark and Cyprus). I am writing to give you an overview of likely activity during the Danish Presidency on JHA and Government Equality Office (GEO) issues during the next six months, in terms of those dossiers covered by the Home Office. The letter also takes into consideration where dossiers will or are likely to attract the opt-in and which might therefore be debated. I hope that this will assist the Committee in planning the scrutiny of dossiers that will be put to the JHA Council in this period and any subsequent opt-in decisions. For information, the current timetable for consideration of dossiers at JHA Councils under the Danish Presidency is:

- 26-27 January 2012 (Copenhagen) JHA informal
- 8-9 March 2012 (Brussels) JHA
- 26-27 April (Luxembourg) JHA
- 7-8 June (Luxembourg) JHA

The Danish Presidency will inherit a number of initiatives from the Polish Presidency, including the ongoing negotiations on the European Investigation Order, the Cyber Crime Directive, the Passenger Name Records Directive and the asylum package. Being excluded from all EU JHA measures, the Danes have not indicated many priorities for their Presidency, except for their overall interest in the security agenda, and in maintaining momentum on negotiations around the EU PNR Directive and the Common European Asylum System.

In the area of **asylum**, the Danes have stated their intention to make as much progress as possible on the legislative measures making up the second phase of the Common European Asylum System. On the Dublin Regulation, the Danes have worked closely with the Polish Presidency to bring forward an alternative proposal for an evaluation system to give early warning of a possible crisis in a Member State’s asylum system. We support this in principle, provided it is led by Member States through the European Asylum Support Office and not by the Commission. The other priority on asylum for the

Danes will be the replacement Reception Conditions Directive. We have not opted in to this, but have a strong interest in the negotiations because the provisions on detention could well end up applying to transfers under the Dublin Regulation.

We expect the Commission to present legislative proposals on the creation of a European Entry/Exit System (EES) and a Registered Traveller Programme (RTP) - brought together under the heading of **Smart Borders** - which will electronically record the crossing of third-country nationals through the external Schengen borders. This is intended to generate reliable data on overstayers in particular, and travel flows in general, while allowing for abandoning the practice of manually stamping passports. Both measures require a long-term commitment, a common understanding and substantial investment. The UK will be excluded from both proposals as they are Schengen measures. Although there are some shared principles with existing and proposed UK systems (including e-Borders), the Smart Borders measures as currently presented are so significantly divergent that we do not have a direct key interest in developments.

The Commission is expected to bring forth proposals in 2012 for **visa facilitation** with countries of the Southern Mediterranean. The UK does not participate in the elements of the Schengen Acquis that relate to common visa policy and is not bound by EU visa facilitation agreements. Nonetheless, the UK is affected by EU facilitation, which has in some instances led to increased numbers of undocumented irregular migrants being picked up at the UK border, and we will want to engage with the Danes on this matter within the wider context of tackling illegal migration.

On **external relations**, Denmark is not expected to pursue specific geographical priorities. There will be three EU JHA Ministerial meetings under its Presidency (Russia, US and Ukraine) and they are keen to improve the process for preparing for such meetings. One suggestion is that more focused agendas would provide greater opportunity for substantive discussions. Denmark will seek to conclude ongoing discussions regarding improving the complementarity of activity between EU actors and Member States in the area of JHA external relations. In line with a commitment within the Stockholm Programme, the European Commission is expected to produce a report on this subject during the Danish Presidency

In the area of **counter-terrorism**, the Danes are keen to maintain momentum on the **EU PNR Directive**. The UK's primary negotiating objective remains securing cover within the Directive for intra-EU flights. Negotiations will also continue on the EU-Canada PNR Agreements under the Danish Presidency with consideration of the EU-US Agreement moving to the European Parliament.

The **Data Retention Directive** is currently under review: the European Commission published an evaluation report on 19 April 2011 which recognised the value of communications data retained under the Directive but suggested changes aimed at harmonising its implementation across Europe. It is likely that the Commission's impact assessment and any proposed changes to the DRD will be published during the Danish Presidency. We will want to ensure that any changes do not have an adverse impact on domestic law enforcement arrangements or our ability to legislate in this area in future.

With regard to the **freezing of terrorist assets**, the Commission is currently considering introducing a new, wide-ranging sanctions regime against 'internal' EU terrorists. We recognise the need for the Commission to re-consider the approach to listing for 'internal' terrorists in the light of the Lisbon Treaty, but believe it is important that the right legal base is chosen. We believe that the logical and quickest replacement would be the use of an Article 74 TFEU measure, which provides a mechanism for cooperation between the police and judicial authorities of Member States in order to prevent and combat terrorism. This would allow Member States to begin listing in line with previous arrangements, through a Council process, without the need to create new powers and processes.

The Commission has appointed consultants to undertake a review of Directive 2008/114 on the identification and designation of **European critical infrastructures**. The Commission plan to have the review signed off by Member States in March, and to present an impact assessment of the planned changes to the wider European Programme for Critical Infrastructure Protection towards the end of June. A Commission Communication on the Programme, including any potential amendment of the Directive, is expected towards the end of 2012. We wish to see the Programme consider how a range of mechanisms can deliver progress towards the aim of improving the protection of critical infrastructure in the EU.

In the area of **organised crime**, proposals on the future legal base of **Europol** are anticipated from the Commission, and this may happen within the Danish Presidency. We would need to be convinced any proposals add value to current arrangements and are proportionate. We also wish to ensure the maintenance of existing accountability measures, which we believe are sufficient. We support the

enhancement of Europol's capabilities and believe it can take measures within its existing legal framework and resources to implement proposed initiatives such as the EU Cyber Crime Centre, where it is felt these bring added value. We also look forward to welcoming developments on key cooperation agreements with key third parties and countries.

The Commission intends to publish a package of measures on the **confiscation of criminal assets** in January 2012 under the Danish Presidency, including two draft Directives – one on setting equivalent minimum domestic legal standards and one on mutual recognition of confiscation orders, updating current arrangements set down across existing EU Framework Decisions. The draft dossiers are likely to contain substantive criminal law measures and will therefore attract the opt-in. Working with the Danes and other EU Member States, we will need to consider carefully the proposals to help shape any potential EU law in this area. The UK is keen to promote non-conviction based confiscation (civil recovery) and would fully support proposals for its wider recognition and use across Europe. We are also keen advocates of extended confiscation and third party confiscation.

The Danes will also be continuing the direction of travel set out in the recent Commission Communication towards an EU **drugs** strategy, which we expect to result in legislative proposals on tackling drug trafficking, new psychoactive substances and drug precursors, the first two of which we expect to trigger the opt-in. Whilst recognising the Commission's right of initiative in this area, the Government thinks that the focus should be on practical cooperation between Member States and that a legislative proposal is not the only way that we can resolve the threats we face from new psychoactive substances.

With regard to the EU **Policy Cycle for organised and serious international crime**, eight Operational Action Plans have been developed and will be implemented by pan-EU project teams to address these threat areas during 2012 - 2013. The project teams are Member State led and the UK is leading the projects on West Africa and Trafficking in Human Beings. We are participating in all projects, with the exception of the project on Mobile (Itinerant) groups. The Standing Committee on Operational Cooperation in Internal Security (COSI) will monitor developments through these project teams. The UK was a partner on Project Harmony which developed the EU Policy Cycle under which these projects operate and we will therefore want to encourage the Danish Presidency to deliver the Policy Cycle's objectives in accordance with its agreed roadmap.

In the area of **judicial cooperation**, the Danes will need to lead trilogue discussions with the European Parliament on the **European Investigation Order** (EIO) and our focus will be on seeking amendments to the text through MEPs. We will need to engage with the Presidency closely on this as, despite the text agreed at Council representing good progress for the UK, there are still a number of outstanding issues. Most significantly we would like to see the inclusion of an Article on minor offences and a full dual criminality test for coercive measures. Discussions on the annexes of the EIO, including the form on which requests are made, will also take place under the Danish Presidency.

On **Eurojust**, the Commission has announced plans for a legislative proposal that aims at developing and reinforcing Eurojust's functioning and determining arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities. It remains unclear how far this proposal will go in terms of reforming Eurojust but my position is that there is no need to strengthen Eurojust's remit and powers beyond what is already provided for in existing legislation that only came in to force in June this year. Our opt-in will apply to this future instrument. The coalition programme clearly states that we will not participate in a European Public Prosecutor's Office.

In terms of **equalities**, Denmark is not expected to prioritise the draft **Equal Treatment Directive** that is currently being negotiated. We expect them to look to progress one area of the text and provide a progress report to Council. They are likely to bring forward (non-binding) Council Conclusions on gender – probably related to women and the environment. We do not expect these to be difficult.

During this period the Commission will probably bring forward a proposal to improve the **gender balance in boards of companies** listed on stock exchanges, and the initial discussion on this proposal may take place under the Danish Presidency. We expect the proposal will have the status of a Commission recommendation. It is still not clear what approach the Danish will take on this.

Finally, we understand that the Danes will host seminars on child pornography and crime prevention during their Presidency. The tenth anniversary of Eurojust will also be marked in February with Ministers invited to The Hague. The Presidency has scheduled a brief meeting of the JHA Council to coincide with this event on 27 and 28 February.

20 December 2011

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

Thank you for your provisional explanatory memoranda of 13 February 2012 on the above documents. These were considered by EU Sub-Committee F on Home Affairs at its meeting on 14 March 2012; it was decided to hold all the documents under scrutiny until you have provided us with a definitive explanatory memorandum following the completion of your recent consultation.

We recognise the importance of updating existing European legislation on data protection in order to bring it into line with recent developments. We note that the European Commission's proposals significantly increase the data protection rights available to citizens and that this could in turn increase the obligations (and costs) placed on businesses and public authorities. It will be important to ensure that an appropriate balance is struck here. In the context of the Regulation, we understand that you will shortly be producing an analysis of the Commission's explanatory memorandum and an impact assessment. We would be very grateful to receive both of these documents. In addition, we believe that ensuring that the new structure makes a connection with citizens is essential. Holding data secure is, of course, critical but the citizen needs to know what data are being stored so that he or she can assess its accuracy.

With regard to the Directive, we note that there are already a number of European instruments which involve the exchange of data and include their own individual data protection provisions, including the second Schengen Information System; the Schengen Visa Information System; the TFTP (SWIFT); Eurodac; the Prüm Decisions; and the Passenger Name Record Agreements. We would be grateful for your views on how these provisions and any other relevant provisions would interact with this proposal. In the case of an overlap, which provisions would take primacy? We hope that your response on this point will be in specific rather than general terms.

In matters of cross-border data protection in the European Union, it is of course important that the relevant national authorities work together. However, we also note the Commission's intention to establish a new European Data Protection Board and we note the Government's concerns that this could affect the flexibility and independence of national bodies. Could you please provide fuller information about the grounds for these concerns.

Finally, we note your concern at the proposed application of the Directive in the case of data transfers within a single Member State. We would be grateful for your view on whether it is in fact practical and realistic to distinguish between data transfers within and between Member States.

As soon as you are able to provide us with a definitive version of your explanatory memorandum following the recent consultation we will complete our scrutiny of all four of these documents and send you our views.

*15 March 2012*

EU BUDGET: HOME AFFAIRS FUNDS (17284/11, 17306/11, 17289/11, 17287/11, 17290/11, 17285/11)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered these six documents at a meeting on 18 January 2012.

You will be aware that the Commission's Communication The EU Budget Review, giving its views on the next MFF to run from 2014 – 2020, was the subject of a report by the Select Committee entitled The EU Financial Framework from 2014 (13 Report, Session 2010-11, HL Paper 125). The Select Committee is conducting a further inquiry into the detailed spending proposals published by the Commission in the last three months of 2011. This will in due course lead to a report which will give the Committee's views on these spending plans, including those on home affairs.

There are some aspects of the papers which the Committee found very unsatisfactory. The failure of the Commission to distinguish between 'commitments' and 'payments', and between figures 'at

current prices' or 'in real terms', compounds the difficulty; and these are matters not satisfactorily explained in the EMs.

Additionally, the change from having six home affairs funds to having two, though probably an improvement in principle, makes it harder to compare past expenditure on individual items with proposed future expenditure on those items. A case in point is the funds spent and to be spent on the large scale IT systems and the Management Agency which will run them.

We clear from scrutiny the Communication (document 17284/11) and the Staff Working Paper (documents 17306/11 and ADD1), but we keep under scrutiny the four draft Regulations.

Three of these Regulations require the Government to opt in if they are to apply to the United Kingdom. We would be glad to have, within the deadline of ten working days, your confirmation that the Government intend to opt in to these three Regulations, and also to hear from you in due course when they have opted in.

*18 January 2012*

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

Thank you for your letter of 18 January in response to our Explanatory Memoranda (EMs) on the above documents. I am writing to provide more information on the issues about which you expressed concern and to take this opportunity to update you on developments since the EMs were sent.

First you echoed our frustration over the Commission's use of 'Commitments' rather than the Government's own preference to use 'Payments'. I will take a moment to explain the terms.

The Commission describes spending on the EU Budget in terms of both commitments and payments. Commitments are the amounts committed to be spent in each year. These commitments may not be paid out in the same year they are committed, but can flow through multiple years. Payments on the other hand represent the actual spending made in a particular year. This can include commitments made in the same year, as well as spending on commitments made in previous years. Payments also give the best indication of the actual amount Member States will be required to contribute towards each year, and therefore how much money will flow from the Exchequer to the EU.

The Government wants the MFF negotiation to be conducted using both payments and commitments, and is pushing the Commission for accurate payment and commitment figures for each programme. So far the Commission has only provided payment figures (for programmes) that do not include spending on commitments made prior to 2014. This means that these payment figures do not give an accurate representation of the actual payment levels in each year of the MFF.

You also commented on the use of 'real' and 'current' prices. We too share that frustration. The MFF proposals made by the Commission in June 2011 used constant 2011 prices which did not include inflation. However, in the proposals for Regulations being discussed here, the Commission uses current prices which include 2% inflation. The Government will continue to use constant prices at 2011 to make its comparisons.

Turning to the issue of comparing previous programmes to the ones currently being considered, it is true that the amalgamation of funds in this manner does make comparison of individual policy areas more difficult. However, we are satisfied that the broad proportional spend between priorities have been maintained. We believe that merging the Refugee Fund, Return Fund and Integration Fund into a single 'Asylum and Migration Fund', and the programmes covering the Prevention of and Fight against Organised Crime (ISEC) and Prevention, Preparedness and Consequence Management of Terrorism and other Security-related Risks (CIPS) into the Internal Security Fund (police) will lead to greater flexibility. It should certainly reduce bureaucracy on the migration side. However, as we indicated in the EM for the Internal Security Fund, we will need to ensure that in setting up a new system for managing the ISF(police) (document 17287/11) through shared management we take full advantage of lessons learnt on the former migration funds and, where possible, achieve economies of scale.

You also referred to the large scale IT systems and their management. This is of course in the Fund from which the UK is excluded. The systems are primarily for establishing IT systems providing an Entry/Exit Scheme and a Registered Traveller Programme, where again the UK will not be participating since they will build on that part of Schengen from which we are excluded. We are however supportive of policies that strengthen external borders.

I am grateful that you have cleared the overall documents (17284/11 and 17306/11) from scrutiny. We agree that the broad approach is welcome; particularly the opportunity to ensure these funds can reach the broadest of beneficiaries including integrating those who fell outside of the previous criteria.

As you indicate, three of these Regulations trigger the UK opt-in under Protocol 21 of the TFEU. As the last language version did not publish until January 2012, our opt-in deadline is 10 April. We are still considering our position and will of course inform you once we reach a conclusion.

I also wanted to take this opportunity to update you on progress with negotiations. The Danish Presidency are attaching priority to swift progress on these dossiers, hoping to reach agreement on all but the financial envelope in June. They hope to adopt the final texts by the end of the year, but this is dependent on negotiations on the MFF as a whole, which are being dealt with separately. This will allow Member States and the Commission to work on the national programmes envisaged in the proposals during 2013, so that arrangements are in place once the Funds go live in 2014. This is an ambitious timetable and we will keep you updated as negotiations progress.

At the first meeting to discuss the Home Affairs Funds on 17 and 18 January we raised the issues, highlighted in the EM, concerning the legal base of the ISF (police) proposal. We had some support for our view that it was incorrectly classified as a Schengen building measure and the Presidency has undertaken to refer the matter for a decision in COREPER before the next meeting. We also sought clarification on the choice of legal bases given the inclusion of crisis management issues in the ISF (police) fund. The Commission took the view that such matters fell within Article 84 TFEU (crime prevention). They had considered Article 196 TFEU but concluded that they deal with natural and unintentional disasters but not security issues, which was the focus of this Fund. We are reviewing our position on this issue. Finally, the Commission indicated that a legal instrument to repeal the current CIPS programme, which expires at the end of 2013, will issue before the end of the year. We will deposit that when available.

The meeting also provided an opportunity for the Commission to explain its proposals more fully and for Member States to express their initial views, which will now be taken forward in a detailed consideration of the Articles. In particular, several delegations raised the concern, expressed in the EM on documents 17306/11 and 17284/11, that use of the home affairs Agencies to support actions under the Funds should not result in a duplication of funding to those bodies. The Commission was clear that this was not the intention; a clarification that we welcome.

Whilst most delegations welcomed a single set of rules for the management of the programmes, as proposed in the general provisions Regulation (doc 17285/11) it was also clear from initial interventions that the question of shared management within the ISF (police) Fund will be the subject of detailed consideration. Most delegations, including the UK, sought further information about how it would work and in particular raised queries about the distribution keys for allocating funds to Member States' national programmes.

Finally, the UK delegation took the opportunity to express concern at the proposed budget for the Funds, arguing the need for reductions in line with the Government's overall approach to the next EU Multi-Annual Financial Framework.

Negotiations will continue from 14 February with a first reading of the general provisions (doc 17285/11) and at least monthly meetings until June. We expect this to be on the agenda for the 7-8 June JHA Council.

*1 February 2012*

## EUROPEAN AGENDA FOR THE INTEGRATION OF THIRD COUNTRY NATIONALS (13290/11)

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

In your letter of 14 September 2011 clearing this document from scrutiny, you commented on the lack of reference to the potentially valuable role of the local, voluntary and private sectors in this area and asked for an update on our efforts to mitigate this omission at JHA Council.

The Communication was presented to the JHA Council in October 2011. During the discussion on the item, the Commission acknowledged that integration does take place in a local context with local involvement.

Following that meeting, Council Conclusions on integration were adopted at the December JHA. During the negotiations on these conclusions, the UK stressed the need to recognise the important role of local organisations and was successful in persuading Member States to include the following wording in the final document:

*“Integration policies should, to the extent possible, be formulated and implemented with an active involvement of local and regional authorities and stakeholders ensuring appropriate coordination between the different actors involved. The support of the European Union and national governments to local initiatives and local NGOs, inter alia by means of financial assistance, should be provided where appropriate. Best practices in this respect could be identified and exchanged”*

The Conclusions also explicitly acknowledge that integration is a matter for the competence of Member States, with the role of the EU limited to the provision of incentives and support.

I am not aware that the Danish presidency is planning any major initiatives on integration but Cyprus has announced that it will be a priority for their presidency during the second half of 2012.

14 February 2012

## JHA OPT-IN

### **Letter from the Rt. Hon Theresa May MP, Home Secretary, Home Office, to the Chairman**

I am writing to explain a change of Government policy on the issue of whether the UK is bound by an existing EU measure which has been repealed and replaced by a new measure.

As you are aware, we believe that EU measures that impose JHA obligations only apply to the UK if we choose to opt in to them. Since the entry into force of the Lisbon Treaty, the Commission has brought forward a number of JHA proposals that repeal measures that we are currently bound by and replace them with new ones. We have not opted in to all of the replacement proposals and there has been a question as to whether the measures that we currently do take part in (the “underlying measures”) would still bind us once the replacement ones entered into force.

The policy we inherited from the previous Government was that the UK was not bound by an underlying measure when we did not opt in to a measure repealing and replacing that underlying measure. Following a review of this policy, the position of the Government is that:

- i) the UK considers itself bound by an existing JHA measure when we do not opt in to a new measure that repeals and replaces it; and
- ii) Article 4a of the Title V Opt-in Protocol (Protocol No 21) should be interpreted as applying not only to amending measures but also to repeal and replace measures.

Our position has been reinforced by the fact that the Commission has started to introduce express wording in repeal and replace measures, making it clear that the underlying measures will continue to bind us if we do not opt in. Such language has appeared in the Directive on combating Human Trafficking, and the Directives on Asylum Qualification, Asylum Procedures and Asylum Reception Conditions. It is highly likely that the Commission will in future routinely insert such language into new measures.

We acknowledge that this new policy carries a small risk of the UK being bound by arrangements which no longer operate in relation to the EU as a whole but continue to apply as between the UK and Denmark (and sometimes Ireland). This would happen when only the UK and Denmark (and sometimes Ireland) remain bound by an underlying measure following a “repeal and replace” proposal. However, we already accept this position in relation to amending measures as a consequence of Article 4a of the Title V Opt-in Protocol. Article 4a of the Title V Opt-in Protocol provides that the UK remains bound by an underlying measure where a new measure amends it unless “the non participation of the UK and Ireland in the amended version of an existing measure makes the application of that measure inoperable for other Member States of the Union...”. In such cases, the measure would cease to apply to the UK.

Our decision to accept that we continue to be bound by an underlying measure where it has been repealed and replaced has a direct read across to the interpretation of Article 4a of the Title V Opt-in Protocol. Our view is that a broad interpretation of Article 4a is the correct one and that repeal and replace measures should be considered to be a type of amending measure for the purposes of Article

4a. In practical terms, if we accept that the UK continues to be bound by the underlying measure where we do not participate in the new 'repeal and replace' measure, we believe that we must also accept that, in such cases, the UK would cease to be bound by the underlying measure where it was deemed to be 'inoperable'.

I hope you are satisfied with this explanation of our position. I am aware the views of the Government and your Committee are now closely aligned on this issue.

I would also like to thank you for your letter of 14 December on opt-in interpretation issues. I can confirm we are taking forward work to resolve difficulties around the interpretation of the Protocol and I will of course write back to you in due course with a substantive response updating you on progress and answering your questions.

8 February 2012

## JUSTICE AND HOME AFFAIRS COUNCIL (13-14 DECEMBER 2011)

### **Letter from the Rt. Hon. Lord McNally, Minister of State, Ministry of Justice, to the Chairman**

I am writing to update you on the Justice and Home Affairs (JHA) Council which took place in Brussels on 13 and 14 December. The Home Secretary and Minister for Women and Equality, Theresa May MP, the Justice Secretary, Kenneth Clarke MP and the Scottish Solicitor General, Lesley Thomson, attended on behalf of the UK.

The Council began in Mixed Committee with Norway, Iceland, Liechtenstein and Switzerland (non-EU Schengen States). The Commission updated on the implementation of the second generation Schengen Information System (SIS II). Commissioner Malmström noted there had been some delays in conducting the national SIS II tests, but that mitigating actions had preserved the current schedule. The Commission assured the Council that the tools used during the milestone I tests were in accordance with the 2009 Council Conclusions. The Presidency emphasised the importance of the system and commended the Commission's work in implementing the project to date.

The Council reached a general approach on their compromise proposal for a visa liberalisation suspension mechanism. Member States would be able to ask the Commission to consider imposing temporary visa requirements if there were a substantial and sudden increase: in irregular migrants, in pressure on their asylum system or in the number of rejected readmission applications. The Presidency concluded that negotiations on the remaining issues under the proposed Schengen Visa Regulation would be taken forward by the incoming Danish Presidency. The UK does not participate in these arrangements.

The Commission presented its proposals for the Home Affairs financial instruments saying the funds had been streamlined and simplified to allow for a coherent and effective response to future challenges. The new emergency mechanism and external dimension would contribute to this. On top of the fixed national allocations, there would be additional funding to further specific EU objectives. On the budget, the Commission said that 2013 funding levels should be used as the baseline reference. The Presidency concluded negotiations which commence in January under the Danish Presidency.

France introduced the item on mobile itinerant crime groups with proposals on how to tackle the phenomenon and wanting to see a roadmap setting out what Agencies, the Commission and the Member States could do. Europol said that this would be one of the priority areas under the new EU Policy Cycle and the Presidency noted that the Standing Committee on Cooperation on Internal Security (COSI) would be the right forum for this discussion. The incoming Danish Presidency said they would also hold a discussion at expert level.

The Presidency introduced their report on the EU response to increased migration pressures, identifying further cooperation with Turkey as a priority. Conclusion of the EU-Turkey Readmission Agreement was seen as essential to launching a wider dialogue, which should continue to be discussed by the Council. The Commission saw four key aspects to the EU's future response to illegal immigration, which should be based on a 'roadmap' and a realistic timetable: solidarity and responsibility; reinforcing cooperation between the EU Agencies; partnership with neighbouring countries under a renewed Global Approach to Migration and Mobility; and maximising the use of EU funds. The Council discussion focused on particular geographical challenges, with most Member States agreeing on the need for further cooperation with Turkey.

The UK (Home Secretary) welcomed the debate, noting that illegal immigration affected everyone, damaging public confidence at the same time as undermining principles of free movement. A longer term, coordinated and strategic approach was needed, including more efficient management of systems as well as disincentives for illegal migrants. Further work with third countries was essential and Turkey was a priority, where dialogue should include measures from across the Justice and Home Affairs portfolio. Joint action should also be taken by the EU to tackle sham marriages and other abuses of free movement rights by illegal migrants. Finally, the Union needed to remain firm on ensuring returns of those with no right to remain in the EU. The incoming Danish Presidency said that this debate would remain on the Council agenda; they would develop a roadmap and identify priorities. The Commission noted the complexity of EU-Turkey discussions on migration and undertook to return to the Council with proposals on taking that dialogue forward.

Recalling that no progress had been made at the European Council last week, the Presidency asked the Council whether it was ready to adopt the Council Decision on the accession of Romania and Bulgaria to Schengen. One delegation maintained a reservation, awaiting the publication of the next Cooperation and Verification Mechanism (CVM) report in early 2012. The Presidency concluded that the file would now pass to the Danish Presidency.

Over lunch Ministers discussed strengthening Schengen Governance and the proposed amendments to the Schengen Evaluation Mechanism and Schengen Borders Code. The majority of Ministers made clear that decisions on re-imposition of internal borders were the responsibility of Member States. On the evaluation mechanism a majority favoured a legal base in Article 70 of the Treaty on the Functioning of the European Union subject to further analysis.

The main Council started with the adoption of the EU –US Passenger Name Records (PNR) agreement by a qualified majority. The UK has not opted in pending ongoing parliamentary scrutiny. The Commission said the agreement represented a considerable improvement on its predecessor, especially on depersonalisation of data, retention of data on serious crime, and the definition of serious crime. The Agreement will now move to the European Parliament.

The Presidency presented the state of play on the Common European Asylum System, reporting that significant progress had been made, but noting that the 2012 deadline was closer than ever. Ministers noted that a lot had been done to unblock negotiations on the most difficult issues, and the majority of Ministers were pleased that the issue of suspension of “Dublin” returns had at last disappeared. The UK advised caution over the respective roles of the Institutions in the proposal for an early warning mechanism; Member States ran asylum systems on a day to day basis and must be the ones to lead such a mechanism, in cooperation with the EU Agencies. The UK believed that this would increase mutual trust and practical cooperation amongst Member States. The incoming Danish Presidency said the asylum package, including the draft Dublin Regulation, would be the subject of a discussion at the Justice and Home Affairs informal Council in January, with a view to agreeing something concrete for the June European Council. The Commission admitted that a suspension mechanism was no longer viable given the position of the Council, and were supportive of the early warning mechanism. The Commission however underlined the need for this mechanism to have a compulsory dimension in order to add real value in the spirit of solidarity, and hoped that the Danish Presidency would initiate trilogue discussions with the European Parliament as soon as possible. On the rest of the asylum package, it was important to keep up momentum on the outstanding issues.

The Commission presented its Communication on the Global Approach to Migration and Mobility but debate was curtailed due to lack of time. The Presidency highlighted the link between the Communication and the earlier discussion on increased migration pressures and confirmed that discussions on the Global Approach would continue under the Danish Presidency.

The EU Counter Terrorism Co-ordinator, Gilles de Kerchove, gave a brief overview of the themes included in his strategy discussion paper, one of three presented to the Council. He picked out two main themes – the importance of ensuring that funding was available specifically for security or counter terrorism research, and the need to progress with conclusions on improving the coherence between internal and external security policy. The Commission said that the new horizon 20-20 programme might help to overcome some of the security funding issues. Commissioner Malmström also drew attention to current work on air cargo assessments, terrorist financing and finally activating the Solidarity Clause.

The justice day started with a general approach being reached on the European Investigation Order, save for one provision on the repeal of an existing instrument. The UK maintained its parliamentary scrutiny reserve. The incoming Danish Presidency will look to take forward negotiations with the European Parliament.

A general approach was also reached on the Victims' Directive. The UK gave its support to the work in this area, but noted the importance of maintaining the right to a fair trial and defendant's rights. The incoming Danish Presidency will begin negotiations with the European Parliament early in the new year.

Next there was a discussion on the proposed Regulation on Succession and Wills with the Presidency obtaining a general approach to the text of the Articles of this Regulation with the exception of those concerning administration and clawback. The UK's two key issues will be considered under the Danish Presidency. The UK expressed its desire to take part in the final Regulation if satisfactory solutions can be found to our concerns.

The Presidency presented a paper on the proposed Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). This paper sought agreement to political guidelines to assist in progressing the negotiations on this dossier. These guidelines generally acknowledged the level of agreement that had been reached by Member States on the abolition of exequatur but at the same time recognised that Member States were of the firm view that safeguards should be retained to protect the interests of defendants. The UK supported the political guidelines.

An update on the progress of the proposal for a Common European Sales Law was provided by the Presidency. The UK felt that further political debate would be required on this important measure.

The Presidency then presented a state of play report to the Council about the progress of negotiations on the draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. Negotiations will continue under the Danish Presidency.

The Commission presented its proposed instruments for the Justice and Rights and Citizenship funding programmes. Judicial training and data protection were highlighted as areas of important work. Formal negotiations will begin under the Danish Presidency. The UK noted the Commission's presentation.

Following this the Presidency reported on the EU-US JHA Ministerial meeting that took place in Washington on 21st November. The UK noted the report.

Under any other business Lithuania reiterated its request for Member States to withdraw any outstanding declarations under Article 32 of the European Arrest Warrant. The UK noted this intervention.

*20 December 2011*

## MIGRATION: THE GLOBAL APPROACH TO MIGRATION AND MOBILITY (17254/11)

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

The Home Affairs Sub-Committee of the Select Committee on the European Union considered this document at a meeting on 25 January 2012.

The Sub-Committee has taken the view that this is a document of great importance which might well merit a full inquiry, possibly together with the Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust (Document No 18209/11). We are therefore keeping both documents under scrutiny.

No reply to this letter is expected.

*25 January 2012*

## PNR: PROCEEDS OF PIRACY AND THE FINANCING OF TERRORISM

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

Thank you for your letter of 19 October 2011. I understand that your Clerk advised that you do not expect a response at this stage, but I wanted to respond to the important issues which you have

raised. These same issues were raised by Lord Hannay of Chiswick in the debate on the EU Committee Report on Money Laundering on 19 December.

Your letter suggests that there is little difference between kidnap for ransom and piracy, beyond its location. Whilst there are very different legal frameworks for the high seas and domestic jurisdictions, I agree that this is broadly true if both are being undertaken for the same reasons. This is not, though, generally the case. We assess that whilst piracy off Somalia is criminal, kidnapping by Al Qaeda in the Islamic Maghreb (AQ-IM) is terrorist in nature.

Your letter expresses surprise that AQ-IM is raising funds from kidnap for ransom. There has certainly been no attempt to conceal this development - the revised CONTEST Strategy published in July 2011 clearly sets out the threat (see paragraph 2.14), there has been extensive media coverage of the problem (for example, *The Economist*, 11 September 2008); the UK statement to the International Peace Institute on Kidnap for Ransom in September 2010 and the *Daily Telegraph* article on 15 March 2011 titled "Al Qaeda a 'money making machine'". The FCO's travel advice for countries in the region has warned of the threat of terrorist kidnapping since 2008 in the Sahel region.

As I set out in my letter of 12 October, under the Proceeds of Crime Act 2002, if individual's know or suspect that they are dealing with criminal property then they should submit a suspicious activity report to SOCA. The Government's position remains as provided to the Committee in 2009 and the previous Government's response to its report (Cm 7718), in particular the statement that:

*"We do not believe that it is for the Government to tell a person in what circumstances to seek consent from SOCA. Our view remains that decisions on whether consent is required should be made on a case-by-case basis.*

*It remains the case that if a person knows or suspects that they are dealing with criminal property then they should submit a SAR. If the reporter wishes to obtain the statutory defence in respect of carrying out that activity then they must obtain consent. If they are concerned about jeopardising the secrecy of ransom negotiations by reporting or seeking consent, it is possible that they may have a reasonable excuse for not seeking consent until after the transaction, although of course the final determination of what constitutes a reasonable excuse in any case is a matter for the courts."*

Under the existing Proceeds of Crime Act 2002, it is the reporter's knowledge or suspicion of money laundering which triggers a report to SOCA. It is therefore a matter for the reporter to determine whether a report should be made. To require a reporter to submit a report to SOCA on a basis which is not linked to their knowledge or suspicion of criminal property would require the creation of a new regime outside the scope of the existing primary legislation. At this stage we are not convinced of the necessity of such a change, as this could widen the scope and impact of the current money laundering legislation. We will of course continue to monitor this issue and consider it carefully as part of our work on developing the National Crime Agency.

12 January 2012

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

Thank you for your further letter of 12 January 2012 replying to the points made by Lord Hannay of Chiswick in the debate on 19 December 2011 on the second Money Laundering Report. The letter was considered by the Home Affairs Sub-Committee of the European Union Committee at a meeting on 25 January 2012.

We accept from the references you give that it has been known for some time that terrorist groups such as Al Qaida in the Islamic Maghreb rely on kidnap for ransom as a source of income, and that there has been no attempt at concealment of this. We still believe that it would have been helpful if ministers had drawn this to our attention in the course of our prolonged correspondence about piracy off Somalia, even if to date no evidence has been identified demonstrating that the proceeds of this are not used to fund terrorism.

We appreciate that to require those assembling a ransom to report that activity, and where appropriate to seek consent before payment of the ransom, would be a new departure. It seems to us that this would be a step worth taking, and that the information derived from such reports would be of use in combating the activities of pirates and others demanding ransoms, even if the ransoms are not suspected of going to finance terrorism. We note with regret that the Government's view is different, and that you are not prepared to take this step. We are glad that you will be keeping this matter under review, and we hope that in doing so you will bear in mind the Committee's view and,

in so far as it affects the United Kingdom and EU negotiating positions, will keep us informed of any developments.

We do not require a reply to this letter.

*31 January 2012*

**PNR: THE USE AND TRANSFER OF PASSENGER NAME RECORD DATA TO THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY (17429/11, 17430/11)**

**FOR PREVIOUS CORRESPONDENCE PLEASE SEE: CORRESPONDENCE WITH MINISTERS – EU HOME AFFAIRS (SUB-COMMITTEE F) – JUNE 2011-NOVEMBER 2011, PNR: DRAFT AGREEMENT WITH THE UNITED STATES (10453/11)**

**Letter from the Rt. Hon Theresa May MP, Home Secretary, Home Office, to the Chairman**

Further to Damian Green's letter of 7 November, I am writing to give you further details on the Presidency's proposed timetable for the adoption of the EU-US PNR Agreement.

The Agreement was published on 24 November and an Explanatory Memorandum laid on 29 November.

We also understand that the Presidency plans to adopt the Council Decision to sign the Agreement at the Justice and Home Affairs Council on 13 December. We believe they will have sufficient votes to secure that outcome, although this remains subject to confirmation. As you can see, this gives just under three weeks for the UK to make an opt-in decision rather than the three months to which we are entitled.

In spite of the representations that I have made at the highest level about our entitlement to a three month opt in period, it seems that both the Presidency and US are determined to adopt the Agreement within this expedited timetable. I am equally determined that the Scrutiny Committees should be given as much opportunity as possible to consider the text. This is why an earlier version of the text was deposited with an unnumbered Explanatory Memorandum back in July. I intend to deposit a further full Explanatory Memorandum by 1st December, which would give your Committee the opportunity to consider it at your meeting on 7th December, which I understand is your only meeting between publication on the 24th and the December Council. I would be very grateful if you your Committee could arrange consideration of the text at that time, since I would value the views of the Committee in advance of the Council.

Ireland have informed the Presidency that they are prepared to waive their 3 month opt in period on this occasion and opt-in post adoption.

I will of course keep you informed of developments in advance of the Council.

*5 December 2011*

**Letter from the Chairman to the Rt. Hon. Theresa May MP**

Thank you for your letter of 5 December 2011. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 7 December 2011, together with these documents and the explanatory memorandum signed by Damian Green MP on 29 November 2011. We are grateful to your officials for having prepared this at very short notice to enable us to consider the two draft Decisions before the Council on 13 December 2011.

The situation bears some similarities to the scrutiny of the Decisions on signature and conclusion of the EU-Australia Agreement earlier this year. In my letter to Damian Green of 12 January 2011 I had written: "In the past there has been pressure from the Presidency for agreements with third countries on PNR and other matters to be signed and concluded soon after they are initialled; we hope that you will emphasise to the Presidency the importance of Parliamentary scrutiny."

In my letter to you of 8 June 2011 I quoted that passage and congratulated the Government on having obtained a postponement of consideration of the Decisions, and I ended: "Even if the Presidency cannot be persuaded to allow the United Kingdom the full three months for it to consider whether to opt in, and for Parliament to consider the same issue, it is undesirable for Decisions on such an

important agreement to be adopted in such haste. We hope that you will continue to take a strong line in future cases.”

You say in your letter that you have made representations at the highest level about the United Kingdom’s entitlement to a three month opt-in period, but that the Presidency and the US are determined to adopt the Agreement within the expedited timetable. This does mean that there has been only limited time for proper Parliamentary consideration of the opt-in decision. Neither your letter nor the EM has given any reason for such haste, but we have been told by your officials: “Ministers take the view that there are exceptional circumstances in this case due to the expedited timetable pursued by both the Commission and the US, and the consequences of letting the Agreement collapse.” We have not been told of any reasons why this Agreement might “collapse” if the timetable is not expedited. Since the current Agreement continues in force unless and until superseded, we do not ourselves see why there is any danger of this. We believe the Presidency should have been prepared to stand up to pressure from the US authorities, and the Government to pressure from the US or the Presidency.

Your decision to opt in to both Decisions, while a natural consequence of the views you and Damian Green have expressed in correspondence, has been taken without allowing this Committee to express its views, and your waiver of the Government’s three-month period for opting in has deprived us of the time allowed under the Ashton undertakings. Those undertakings allow for an earlier opt-in where this is essential but, as we have said, you have not told us of any reason why the timetable needs to be expedited.

The text of the Agreement is an improvement on earlier versions, though it still has unsatisfactory features, in particular the lengthy data retention period. We agree that it is right that the Government should opt in to the Decisions. We are therefore prepared to clear both documents from scrutiny. However we wish to record our unhappiness at the haste, which seems to us to be unnecessary, and our disappointment that the Government has not allowed time for fuller Parliamentary consideration of these Decisions.

We do not require a reply to this letter.

*7 December 2011*

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

Further to the Home Secretary’s letter of 5 December I am writing to inform you that the UK’s Permanent Representation to the EU has communicated the United Kingdom’s formal notification to the Council Secretariat that the UK wishes to participate in the adoption of these Decisions. I will inform Parliament by way of a Written Ministerial Statement as soon as recess is over.

*15 February 2012*

**PRÜM COUNCIL DECISIONS (17709/10)**

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

I am writing to provide you with a summary of Prüm implementation developments across Member States during 2011. These developments can include extensive testing and evaluation, and formal confirmation of a Member State’s compliance through adoption of at least four standard format Council Decision texts (covering DNA, fingerprints, vehicle registration data and full readiness). As you are aware, the Government and your Committee agreed that scrutiny of individual Member States’ implementation would not be time or cost effective, as it would total 108 Council Decisions all of a similar format and content, and that the Government would provide an annual update on Member States’ progress.

The deadline for implementation by all Member States was, for all three areas, 31 August 2011. This goal proved overambitious, something now accepted by Member States and the Commission. In addition to the legal, technical and financial issues involved in such a large multi layered project, the extensive evaluation and confirmation process at national and EU level has not aided the overall process. We await Danish Presidency views on how this work will be taken forward.

By the end of 2011, only ten Member States have completely implemented Council Decision 2008/615/JHA into national law, while seven have indicated no timeframe at all for the completion of the legal implementation.

Three Council Decisions confirming that Member States are ready to fully launch DNA data exchange were adopted during 2011, meaning that twelve Member States are DNA operational. Even then, not all are connected to each other and testing is ongoing between the Member States concerned. Member States reported that the main implementation problem is of a technical nature and concerns the receiving/installation of automated data exchange software. A further three Member States' evaluation procedures were concluded in 2011 and we expect publication of their Council Decisions confirming compliance in 2012.

One Council Decision on the launch of dactyloscopic data exchange was adopted in 2011, meaning that 9 Member States are fingerprint operational. Again, not all are connected to each other and testing is ongoing between the Member States concerned. Member States reported that the main implementation problem is of a technical nature and concerns the building of the Prüm interface for automated data exchange. Three Member State evaluation procedures were concluded in 2011 but have not been finalised. We expect that their Council Decisions confirming compliance will be tabled in 2012.

Two Council Decisions on the launch of automated vehicle registration data (VRD) exchange were adopted in 2011. The vast majority of Member States are in early stages of work, under evaluation or in testing. Only 9 Member States are fully operational in the field of automated VRD exchange and are connected to each other. One is connected but only providing information and not receiving while their system is rebuilt to comply with Council Decision 2008/615/JHA. Three Member States' evaluation procedures were concluded in 2011 and we expect Council Decisions confirming compliance will be tabled in 2012.

*10 January 2012*

## SCHENGEN: SECOND MANDATE EVALUATIONS

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

I am writing to provide you with a summary of Second Mandate Schengen evaluations during 2011 and to provide you with a forward look for 2012.

Every existing Schengen State is subject to a "Second Mandate" evaluation once every five years in order to confirm that they are continuing to apply the Schengen acquis correctly. However, the reports of individual Schengen evaluation visits and follow up assessments are classified as restricted, whilst Council Conclusions summarising evaluation findings are only published in the public domain after they have been adopted. Council Decisions confirming compliance with Schengen arrangements are deposited for scrutiny as soon as they are declassified for publication in the public domain, but as you are aware this can be at a point close to their adoption, limiting the opportunities for scrutiny. As a result I am conscious that the opportunities for Parliamentary oversight are limited and I hope this correspondence will at least provide an overview of current and forthcoming activity.

The Working Party for Schengen Matters (Schengen Evaluation) met on twelve occasions during the Hungarian and Polish Presidencies. Both Presidencies concentrated their efforts on keeping a tight evaluation schedule. This included SIS/SIRENE bureau evaluation visits to five Schengen States, which had been delayed from 2009/2010 due to system changes. Council Conclusions confirming that France, Germany and the Netherlands had completed implementation of SIS/SIRENE recommendations made in 2010 were agreed between January and June 2011.

On the basis of the agreed five-year evaluation programme, regional evaluation of the Iberian Peninsular and Southern Alpine Schengen States continued into 2011 and significant progress was achieved by adopting reports on those countries in the field of data protection, police cooperation, land, air and sea borders, and visas. These reports highlighted best practice as well as made recommendations for improvements. Portugal and Spain were in a position to complete implementation of recommendations very quickly and Council Conclusions confirming this were prepared and adopted by the Council in 2011.

The evaluation of Nordic countries in the fields of data protection, SIS/SIRENE bureau, police cooperation, land borders, sea borders, air borders and visa issuance at foreign embassies began in summer 2011.

Follow up to reports forms a significant part of the work of the Working Party for Schengen Matters (Schengen Evaluation). Once a Schengen State's visit report has been scrutinized and adopted, it is required to produce an action plan covering implementation of all recommendations and to give regular updates to their peers via progress reports.

For the majority of Schengen States evaluated during 2009/2010, including Benelux and Northern European Schengen States, the appropriate follow up was carried out and recommendations were implemented. Therefore Council Conclusions were prepared and adopted for Belgium, Luxembourg, the Netherlands, Germany and Austria during 2011.

Greece was evaluated in 2009/2010 and is still subject to significant scrutiny of its land, sea and air borders. A peer-to peer mission was conducted in March 2011 in order to establish the level of progress achieved in the implementation of recommendations and to determine the possible date of a revisit. Subsequently Council Conclusions were adopted calling for Greece to increase its resolve to implement its action plan and to place focus at Ministerial level on progress against that action plan. This work will continue throughout 2012.

For other Schengen States evaluated in 2011, following confirmation that recommendations from all reports have been actioned fully or are timetabled for action, we expect that a significant number of Council Conclusions and standard format Council Decisions will be tabled in 2012 confirming that they have completed evaluation and continued to meet all necessary criteria.

The evaluation of Nordic countries will continue throughout 2012. In addition, evaluation of Baltic Schengen States will begin in early 2012.

*24 January 2012*

## READMISSION AGREEMENTS WITH ARMENIA AND AZERBAIJAN

### **Letter from the Chairman to Damian Green MP, Minister for Immigration, Home Office**

Thank you for your letter of 24 November 2011. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 7 December and again on 21 December 2011.

You will remember from past correspondence that the Committee has consistently advocated United Kingdom participation in readmission agreements, and we wrote to you earlier this year expressing our regret that the Government was not going to take part in the negotiations with Belarus.

We note that you do not believe a readmission agreement with either Armenia or Azerbaijan is necessary in itself, but that you nevertheless intend to take part in the negotiations with Azerbaijan in case you need to reopen the route for readmissions to Afghanistan through Baku. We are glad that, whatever the reason, you intend to take part in this agreement, but very much regret that you do not intend to do so in the case of Armenia. As we have said in the past, we believe participation in these agreements is desirable not just for facilitating returns (even if there are not many of them), but also for the effect on relations with the third countries which may contrast the position of the United Kingdom unfavourably with that of other Member States.

Although you believe that you can allay any concerns about the decision to participate in negotiations with Azerbaijan but not with Armenia, the contrast in the policies on the two States, coupled with the fact that only in the case of Belarus has the United Kingdom hitherto decided not to participate in negotiations on a readmission agreement, means that we are running an unnecessary risk of damage, however slight, to the good relations we enjoy with Armenia.

We do not understand your reference to "the additional burden participation in mandate discussions would place on administrative resources". The negotiations are carried out by the Commission, and we doubt whether preparation of the mandate for negotiations which follow a classical pattern can consume significant resources.

We do not require an immediate reply to this letter. However, when you deposit the decisions for Signature and Conclusion of these agreements, we hope to learn from your explanatory memoranda

whether the Government intends at that stage to opt in to the Decisions. We hope you may yet do so in the case of both countries.

*21 December 2011*

### THIRD COUNTRY NATIONALS: CONDITIONS OF ENTRY AND RESIDENCE IN THE FRAMEWORK OF AN INTRA-CORPORATE TRANSFER (12211/10, 12208/10)

#### **Letter from the Damian Green MP, Minister for Immigration, Home Office, to the Chairman**

In your letter of 23 March 2011 concerning the above measure, you indicated that the Committee had decided to keep the document under further scrutiny and asked to be kept informed about the proposal as negotiations progress.

The proposal has been the subject of continuing discussions during the Belgian, Hungarian and Polish Presidencies and I enclose a copy of the Polish Presidency's recent compromise proposal of 30 November (document 17686/11).

Recent consideration of the proposal has focused on issues which are fairly fundamental to the scope and purpose of the measure. A number of Member States have been concerned to secure agreement that the measure should not prevent their admitting intra-corporate transfers in circumstances which are not covered by the Directive. While the original proposal made some limited provision for this, the Commission is concerned that a more general dispensation to apply requirements that are more generous than those provided for in the Directive would undermine the purpose of the proposal.

The intra-EU mobility provisions have themselves been the subject of recent discussion which has reflected a conflict between some Member States' wish to preserve adequate checks on secondary movements and other Member States' wish to avoid unnecessary bureaucracy in authorising such movements. It has proved difficult to reconcile these concerns. The current proposal at Article 16 of the draft Directive is complex.

It would, in the case of short-term transfer from one Member State to another, require both the applicant to notify the authorities of the first Member State and the branch of the business in the second Member State to notify the relevant authorities in that State of the intended transfer. The proposed arrangements would appear to provide for a limit on numbers but would constrain the second Member State's ability to apply national different criteria as to the type of position that may be filled. As you are aware, the implications of the proposed provisions in respect of intra-EU movements for the operation of the UK's immigration controls and the UK's ability to determine the type of position that may be filled through an intra-corporate transfer are a key reason why the UK has chosen not to participate in the measure.

Other issues which remain the subject of ongoing discussion include the question of whether the definition of an intra-corporate transfer for the purposes of the Directive should be more closely aligned with definitions used in the General Agreement on Trade in Services (GATS) and the question of the minimum period of previous employment by the sending undertaking which should be required under the Directive. On the latter, the current proposal is a minimum period of 6 months, which is at variance with both UK policy and the EU's obligations under the GATS. You will also wish to note that the current proposal provides for a maximum length of stay of three years for an intra-corporate transfer, whereas the UK's existing Immigration Rules provide for a maximum length of stay of five years in this category.

I understand that the European Parliament will present its report on the initial draft Directive in the near future. The direction of discussion on the measure has not made it any more likely that the Government would choose to opt in to the measure if and when it is presented for adoption.

You will also wish to be aware that the proposal for a Directive of the European Parliament and of the Council on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights, which the Committee has previously cleared from scrutiny, was adopted by the European Parliament on 13 December and is now in force. The UK has not opted into this proposal.

*11 January 2012*

### **Letter from the Chairman to Damian Green MP**

Thank you for your letter of 11 January 2012. The Home Affairs Sub-Committee of the Select Committee on the European Union considered it at a meeting on 25 January 2012. The Committee would like to thank you for your update on negotiations.

We note your analysis of the Polish Presidency compromise text. However, we continue to hold the view that opting into the proposal does present significant merits for the United Kingdom. Subject to the final agreed version of the proposed Directive, the Committee welcome your previous assurance that, post-adoption, you will consider the possibility of opting in to the Directive pursuant to Article 4 of Protocol 21.

In the mean time, the Committee are now content to clear this document from scrutiny. The Committee do not require an immediate reply to this letter, but would be grateful to receive further updates from you as discussions progress in the Council and with the European Parliament.

25 January 2012

### **THIRD COUNTRY NATIONALS AND STATELESS PERSONS: MINIMUM STANDARDS FOR QUALIFICATION AND STATUS (14863/09)**

#### **Letter from Damian Green MP, Minister for Immigration, Home Office, to the Chairman**

I am writing to let you know that the Council adopted this Directive on 24 November 2011, following its approval by the European Parliament on 27 October. I enclose a copy of the agreed Directive for your information.

The Directive will come into force two years after its publication in the Official Journal of the EU.

The Directive had been under negotiation since October 2009. As I indicated in my letter of 24 August 2011 to Bill Cash MP, the key issues in the negotiations included the definition of family members, “actors of protection” (the circumstances in which an applicant need not be granted international protection because someone in his/her home country can protect), “internal protection” (the circumstances in which international protection need not be granted because the applicant can move to a safer part of his or her home or country) and the approximation of refugee status and subsidiary protection. Agreement on these areas has been reached in the following way:

- The definition of family members (Article 2 (j)) no longer includes married minor siblings but still includes parents/ adults responsible for minors who have received refugee status.
- There have been changes to Article 7 of the text, which limits the definition of “actors of protection” (the people of groups who are capable of protecting someone from a risk of persecution or serious harm) to the State and parties or organisations, including international organisations, controlling the State or part of a territory of a State.
- The text on “internal protection” (Article 8 of the Directive) accepts the Commission’s proposal that any assessment must ensure that the applicant can safely and legally gain admittance into that part of the country and can reasonably settle there, whilst at the same time incorporating Member State’s suggestions that any assessment must also focus on the personal circumstances of the applicant.
- Agreement has been reached for the Commission’s proposal to require refugees and those granted subsidiary protection to have equal access to employment (Article 26), education (Article 27), procedures for recognition of their qualifications (Article 28) and integration facilities (Article 34). However, it will still be possible to make a distinction between the two groups in respect of the period for which their residence permits are valid (Article 24).
- Agreement has also been reached to allow Member States to limit the level of social assistance given to those with subsidiary protection to “core” benefits, which must be provided at the same levels as nationals receive

(Article 29); however healthcare must be afforded to all beneficiaries of international protection (Article 30).

- The issue of correlation tables, which had been holding up agreement between the Parliament and Council, has been resolved by a provision (Article 39(2)) requiring Member States when they transpose the Directive to communicate to the Commission the text of the main provisions of national law they have used to do so. There is no requirement to send a formal correlation table.

As the UK has not opted in to this Directive, it will not apply to us. Article 40 makes it clear that we will instead remain bound by the existing Qualification Directive (Directive 2004/83/EC), as that Directive is only to be repealed for the Member States taking part in this one. Ireland will be in the same position as us.

We do, of course, have the right under Article 4 of our opt-in protocol, to notify our intention to take part in this Directive now that it has been adopted. However, the Government is not, in principle, attracted to further legislative harmonisation in the field of asylum and does not believe that participation in a common asylum system is right for Britain.

Furthermore, although our current practice and interpretation of the Refugee Convention is, in most respects, compatible with the new Directive, we remain concerned about the expanded definition of a family member proposed in Article 2(j). In our view, there remains a risk that the Courts will interpret this, when combined with the obligation to maintain family unity (Article 23(1)) and to trace the relatives of unaccompanied minors (Article 31(5)), as requiring us to admit the parents of unaccompanied minors whose asylum claims are granted. We share the view of the previous Government, expressed when they were considering opting in to the Directive, that this could risk encouraging more applications from unaccompanied minors than we currently receive and that this would have significant cost implications for the UK Border Agency.

We are also concerned that the approach to the issue of “internal protection” (the circumstances in which a claim for protection can be refused because there is a part of the applicant’s own country in which he or she would be safe or protected from ill treatment) taken in Article 8 of the Directive is not fully compatible with our own understanding of the Refugee Convention. The requirement that the applicant be able to gain admittance legally to the part of the country in question goes beyond the Immigration and Asylum Chamber’s own caselaw on the issue, which provided that the applicant’s inability to obtain a permit for the safe part of his or her country does not entitle him or her to international protection.

We recognise the symbolic benefit of opting in to this Directive and thus making it clear that we are committed to interpreting the Refugee Convention in the same way as our EU partners are. However, we are not persuaded that this provides sufficient reason to take part given the risks and considerations that I have just set out. I do not believe that staying out of the Directive will pose a real risk to the cooperation that we already engage in on asylum, such as our participation in the Dublin Regulation and in the practical cooperation agenda led by the European Asylum Support Office.

For these reasons, the Government does not intend to take part in the Directive “post-adoption”.

18 January 2012

#### **Letter from the Chairman to Damian Green MP**

Thank you for your letter of 18 January 2012 which Sub-Committee F (Home Affairs) of the Select Committee on the European Union considered at a meeting on 15 February 2012.

We are grateful to you for informing us about the adoption of this Directive, and the reasons why the Government did not opt in to it, and do not intend to opt in post-adoption.

We are glad that you were able to ensure that recital (50) is in the proper form and makes clear that the recast Directive does not apply to the United Kingdom. We hope you will do likewise in the negotiations on the Asylum Procedures and Reception Conditions Directives.

Like you, we note that Article 40 makes clear that the existing (2004) Qualification Directive will continue to apply to the United Kingdom after the recast Directive enters into force. This accords with the view we expressed in our report *The United Kingdom opt-in: problems with amendment and*

*codification* (7th Report of Session 2008-09, HL Paper 55), a view which was not accepted then or for some time thereafter by your legal advisers.

A related document, *Report from the Commission to the European Parliament and the Council on the application of the Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection* (Document No 11212/10), remains under scrutiny. We now clear it from scrutiny.

We do not require a reply to this letter.

*16 February 2012*