



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

This edition includes correspondence from May to November 2008.

HOME AFFAIRS (SUB-COMMITTEE F)

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ASYLUM: DUBLIN SYSTEM (10517/07)

Letter from to Liam Byrne MP, Minister of State, Home Office to the Chairman

I do apologise for the considerable delay in responding to your letter of 26 July 2007¹ about the European Commission's Evaluation of the Dublin System.

I also apologise for the delay in responding to your letter of 26 July 2007 on subsidiary protection and the administrative errors surrounding its dispatch. I am determined to ensure, with the Department, that we respond promptly to letters from the Committee within the agreed timescales. I have discussed this matter with the Permanent Secretary and we have agreed a number of measures to ensure that delays of this kind do not occur in the future. I have asked one of my senior officials to discuss these measures with the Clerk to your Committee.

On the detailed points you raised, on the first issue, I am disappointed that the Committee found it difficult to share the positive assessment of the Dublin System, particularly as it is one that delivers benefits to the United Kingdom in terms of the identification and removal of individuals who make secondary movements within Europe. Some individuals identified by the operation of the Dublin System abuse national asylum systems by making multiple asylum claims as they move within Europe.

We think it is right that Member States work together to address this issue through the operation of the Dublin and Eurodac Regulations.

Your letter raises several issues, which the Committee suggests show that the Dublin System has failed. I will address the points in turn. Firstly you state that the Dublin System has not guaranteed effective access to asylum determination procedures and refer to the judgment in the High Court case of Nasser. Mr Nasser alleged that there was a risk of onward refoulement if he were removed to Greece and that the provisions in paragraph 3 of Schedule 3 to the Immigration and Asylum (Treatment of Claimants, etc.) Act 2004 preventing the Secretary of State from considering that risk were thus incompatible with the Human Rights Act.

The Court of Appeal allowed the Home Secretary's appeal against the declaration of incompatibility on 14th May. We welcome the decision of the Court of Appeal, which supports our view that removals to Greece under Dublin are lawful and proper. The Government does not accept that there was or is now a risk of refoulement from Greece although it is aware of the criticisms that have been made of the Greek system, criticisms that the Greek government has taken action to address. The UK Border Agency therefore continues to certify asylum claims and remove asylum seekers to Greece under the Act's provisions.

At European level we are satisfied that there are adequate mechanisms in place to ensure the lawful operation of the Dublin Regulation and application of other measures within the Common European Asylum System (such as the Directives on minimum standards for the asylum procedure 2005/85/EC and qualification for refugee status or international protection 2004/83/EC), in particular, the supervisory role of the European Commission. We do not accept that the level of protection provided by Member States is insufficient to lead to refoulement in practice.

The Committee also asked for our views on factors that account for low transfer rates on the basis that absconding behaviour may account only for a limited number of failed transfers. We do not agree that absconding plays only a minor role in this context. Absconding behaviour means that one individual can be the subject of more than one acceptance given to different "requesting" States, yet only one actual transfer can be carried out in reality, which will impact on transfer rates if the latter

¹ Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 257

are compared to numbers of acceptances and not individuals. In addition practical experience within the UK Border Agency indicates that where detention is not possible absconding behaviour reduces the number of transfers that can be properly made within the strict time limits set down in the Dublin Regulation.

The transfer deadlines, not present in the Dublin Convention, mean that failure to effect the transfer within the prescribed time limit results in responsibility reverting to the “requesting” State, at which point a transfer is no longer legally possible. The deadlines should not be seen as a negative feature of the Regulation, however, as they provide both an incentive for the authorities in Member States to deal with cases efficiently and security for applicants by guarding against them remaining in one state for long periods without access to an asylum procedure.

Your third point concerned the “annulment procedure”. We indicated in our Explanatory Memorandum that although we could see this idea was based on good intentions we were concerned that it would be difficult to rule out unfairness, but the Committee considers there could be a degree of fairness introduced. As stated in the Explanatory Memorandum we note that the proposal for such a scheme is discretionary and so other Member States might choose to apply such a scheme if agreed.

We nevertheless remain concerned about the principle, as we believe that it contradicts the objective criteria established by Dublin Regulation to determine responsibility. In that context we do not believe that it is either right or fair that the bilateral operation of such a scheme would mean that asylum seekers could obtain a second procedure simply for reasons of predetermined administrative convenience.

We also wonder how it might be possible to identify those individuals who would not be transferred by applying the scheme, a task that unless based on simple numerical quotas would require additional detailed consideration by national authorities. Finally we recall that a similar procedure was proposed by the Commission in the original draft proposal for the Dublin Regulation but was rejected by Member States during the negotiation process.

On the issue of solidarity between Member States the Committee states that the Dublin system operates at a great disadvantage for Member States at the Eastern and Southern borders. The Evaluation Report does not, however, support this view, but concludes that “contrary to a widely shared supposition that the majority of transfers are directed towards the Member States at an external border it appears that the overall allocation between border and non-border Member States is actually rather balanced” (page 12 of the Report).

The Commission also noted that the majority of transfers correspond to cases where a previous asylum application has been lodged and so for the most part transfers do not represent new asylum cases for the authorities of the responsible State. Where percentage increases in numbers of asylum applications are discussed we also feel it is important to consider the real numbers involved, for example figures recently published by the UNHCR (“Asylum levels and Trends in the Industrialised Countries, Second Quarter 2007) show that in the first six months of this year the authorities in Estonia received 6 asylum applications, compared to 13 in 2006 and 10 in 2005. In such situations, where the baseline figure is low, relatively small increases in numerical terms produce greater increases in percentage terms.

When considering the wider issue of solidarity and burden sharing the Committee will be aware that the Commission published a Green Paper on the Future Common European Asylum System, which was the subject of Explanatory Memorandum 10516/07. In the Green Paper the Commission asked whether the Dublin system should be complemented by measures that would enhance fair burden sharing, questioning whether other mechanisms could be introduced to provide a more equitable distribution of asylum seekers and those granted international protection. We have stated our position such that we are opposed to any proposals that undermine the responsibility concept in the Dublin System, such as proposals based on physical burden sharing in the form of the movement of individuals between countries. We are, however, interested in proposals based on financial burden sharing, such as those envisaged by the European Refugee Fund. Although not directly concerned with asylum, the Government believes it would be helpful if the European Integration Fund could be used to enhance the integration of European migrants as well as those who migrate from outside of the EU. Efforts made by local areas to support high numbers of European migrants can significantly impact on available resources and good will towards asylum seekers and refugees.

We do not accept that the Dublin System has failed simply because the rate of multiple applications identified has increased. We think it is important to put the increased rate into context by recognising the impact of the Eurodac database on the ability of Member States to identify multiple applications. As the Eurodac database increases in size it is reasonable to expect to identify increased “hit” rates that represent multiple applications, but at least such applications are now being rapidly identified by the Dublin System providing Member States with evidence to take action against individuals who asylum shop.

Finally, the Committee found the lack of estimates in the Commission's Report regarding the overall cost of the Dublin System deeply disturbing and was concerned that taxpayers' money might simply be wasted as a result. We cannot comment on the methodology used by the Commission in preparing the Report but note that the Commission expressed the view that it had proved difficult for most Member States to measure the costs of the Dublin System for structural reasons. Nevertheless the Commission notes that even if it is difficult to make estimates regarding the overall cost of the Dublin System most Member States consider that its application is cheaper than examining the asylum application themselves.

On the second issue, you requested an update on the state of play of negotiations on the Long Term Residence Directive. As you correctly note in your letter the proposal has been difficult to negotiate. Member States are currently divided between those who want the same qualifying conditions for long term residence to apply to both refugees and beneficiaries of subsidiary protection and those who want to exclude or impose tougher conditions for beneficiaries of subsidiary protection. The French Presidency hope to discuss the issue at the JHA Council in Brussels on 24 and 25 July but agreement is not in prospect at this stage. I will notify you further if there are significant developments in reaching an agreed position on amending the Long Term Residence Directive.

7 July 2008

Letter from the Chairman to Liam Byrne MP, Minister of State, Home Office

Thank you for your letter of 7 July 2008, which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 16 July 2008.

We accept your apologies for this year-long delay and welcome your commitment to put in place measures to ensure that delays of this kind do not occur in the future. The Clerk to the Sub-Committee will keep us informed as to the discussions that take place with your officials.

We are grateful to you for addressing all the points we raised with regard to the Commission's evaluation of the Dublin System. We have decided to clear document I0517/07 from scrutiny, since it is not a legislative proposal; in due course we will examine the Commission's proposal which will reform the current system and seek to address critical flaws. Document I0515/07 will be kept under scrutiny pending a progress report on negotiations.

16 July 2008

ATTACKS AGAINST INFORMATION SYSTEMS (I2056/08)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 15 October 2008.

The Explanatory memorandum signed by your predecessor left a number of matters unclear. However we have also seen a copy of the letter to the Commission to which reference is made in paragraph 19 of the EM, which sets out details of the implementation which might usefully have been included in the EM itself.

Paragraph 11 of the EM states that the amendments to the Computer Misuse Act 1990 "have not yet been commenced, but it is intended that they will be enacted in October 2008". Since the provisions have already been enacted, we assume that this is intended to be a reference to implementation. We would be glad to be informed at exactly what date the various provisions are implemented, and when it can be said that the Framework Decision will be fully implemented in the UK.

We also understand that, despite what is said in paragraphs 18 and 19 of the EM, there will be no need for any subsequent assessment of whether all necessary steps have been taken to implement the FD; however we would be glad to have your confirmation of this.

We clear the document from scrutiny.

16 October 2008

Letter from Alan Campbell MP to the Chairman

I am writing to clarify the points raised in your letter of 16 October 2008 relating to the Explanatory Memorandum for the above Report.

The necessary changes to the Computer Misuse Act 1990 to allow the UK to meet the requirements of the Framework Decision were implemented on 1 October 2008. We believe that these changes make the UK fully compliant with the Decision.

I can also confirm that the UK does not need to take any further assessment of our compliance with the Decision. We will be writing to formally notify the Council of the UK position.

3 November 2008

BLUE CARD: ENTRY AND RESIDENCE OF THIRD COUNTRY NATIONALS FOR THE PURPOSES OF HIGHLY QUALIFIED EMPLOYMENT (14490/07, 13748/08)

Letter from Liam Byrne MP, Minister of State, Home Office to the Chairman

Thank you for your letter of 20 February 2008² about the European Commission's proposal on the Legal Migration Directives, in particular the draft Council Directive on the entry and residence of third country nationals for the purpose of highly qualified employment.

As you know, the UK has not opted-in to this Directive and therefore its provisions are not expected to have significant effects on migration into the UK. Whilst the Directive aims to attract higher numbers of highly qualified migrants to work in the EU, this is subject to demanding threshold criteria including a job offer at 1.5 times national salary and degree level qualifications which would limit the number able to benefit from the scheme.

You have also asked why the Government considers that no question of fundamental rights arises from this proposal. This measure proposes a fast-track procedure for the admission of highly qualified third country nationals into highly qualified employment, resulting in the issue of a permit to reside and work. We have considered the effect of the Directive on the rights under Article 6(2) of the Treaty of the European Union. The common set of rights proposed in this Directive relate to employment, housing and education. It is compatible with the fundamental right to education as it places no restriction on a third country nationals' access to education. The Directive is also compatible with the fundamental right of freedom to choose and practice a trade or profession as it provides for third country nationals to enter into a chosen profession and allows for modification in the terms of their work. Although for the first two years a third party national will be restricted to paid employment this does not engage any fundamental right as provided for by the EU. Other aspects of the Directive do not in themselves relate to any fundamental rights and as such no fundamental rights are engaged. The Directive can therefore be seen to respect fundamental rights.

You have also asked to what extent the entitlements attached to the EU Blue Card are in step with international labour law standards as provided in ILO Convention 97 and the 1977 Council of Europe Convention on migrant workers, which the UK has not signed or ratified.

There is a conflict between Article 13(1) of the Directive and Article 8(2) of the Council of Europe Convention, with the former providing for restrictions on a blue card holder's access to the labour market to be lifted after two years, while the latter requires that a work permit should restrict the holder to a specific job for no more than a year.

There is also a conflict between Article 14 of the Directive and Article 9(4) of the Council of Europe Convention, the former providing for revocation of a blue card only after 3 months' unemployment while the latter insists on a minimum stay of execution of five months. The Directive does not however appear to conflict with the ILO instrument in this respect, Article 8 of which only affords such a protection to those admitted on a permanent basis.

Article 15 of the Convention does not appear to diverge from Article 6 of the ILO instrument or the relevant provisions of the Council of Europe instrument except insofar as the Directive refers to recognition of previous qualifications in accordance with national law while the Council of Europe instrument refers to the same in accordance with bilateral and multilateral agreements. The Directive includes no commitment to assist the re-employment of those that are made redundant along the lines provided for in Article 25 of the Council of Europe text.

I hope this information is helpful to the Committee and I would welcome any further queries that you may have.

19 September 2008

² Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 305

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

Sub-Committee F of the European Union Select Committee considered this proposal again at a meeting on 15 October 2008. We are grateful to your predecessor, Liam Byrne, for having sent us the compromise text presented by the French Presidency attached to an EM dated 11 July 2008, and for his letter of 19 September 2008 which responds to our request for information regarding the compatibility of the proposal with fundamental rights and international labour standards.

We understand that the text was not after all presented for agreement to the September JHA Council. This seems to us to raise two issues.

First, paragraph 3 of the EM states that the text was presented by the Presidency, "but not as a disclosable or depositable text". We take issue with the Presidency's view that the text should not be disclosed as it does run counter to efforts at achieving greater transparency in EU decision-making. Moreover, the question whether it is depositable is a matter for Government departments and this Committee, taking into account the Cabinet Office Guidance. It frequently happens that negotiations lead to major alterations of a text and, as we have said in the case of other instruments, it is only right that the Committee should have a chance to scrutinise and comment on the revised text. Is it the intention of the Presidency to release a depositable text only once this measure is agreed?

Secondly, we are grateful for your information on the conflict between some of the Directive's provisions with the 1977 Council of Europe Convention on Migrant Workers. Will this conflict be addressed before the text of the Directive is finalised?

The Committee has decided to keep this document under scrutiny pending receipt of the information requested.

16 October 2008

Letter from Phil Woolas MP to the Chairman

Thank you for your letter of 16 October concerning the above.

You have asked whether a depositable text of the draft measure will be made available before the measure is agreed. We had taken the view that the earlier text attached to the Explanatory Memorandum dated 11 July was not depositable because it set out tentative proposals by the Presidency to resolve Member States' detailed and confidential outstanding issues with the measure at working group level. I am pleased to say that a depositable text has now been produced and was discussed, without agreement, at the JHA Council on 25 September. This will be deposited and I attach it for your information. An Explanatory Memorandum will follow in due course.

The revised text does not significantly impact upon our assessment of the policy implications as set out in previous Explanatory Memoranda. There are, however, two points to which I would draw your attention. Firstly, Article 5(4) of the new text introduces a slightly diluted wage test to be used for defining shortage occupations. Despite this change, the wage parity requirements set out in this measure still sit uncomfortably with the equivalent tests under the Points Based System. Secondly, Article 9(2b) would provide for the refusal of applications where to do so would prevent "brain drain" from developing countries. We would question how far such a provision could operate in the UK without discriminating on the basis of nationality in a way that was contrary to the Race Relations Act.

You also ask whether the apparent points of conflict between the draft Directive and the European Convention on the Legal Status of Migrant Workers would be addressed before the text of the Directive is finalised. We believe these conflicts between the two instruments are still present and have indicated this to the Presidency.

24 October 2008

Letter from the Chairman to Phil Woolas MP to the Chairman

Thank you for your letter of 24 October 2008 and for the EM submitted by Meg Hillier on 6 November 2008. Sub-Committee F of the European Union Select Committee considered this proposal again at a meeting on 12 November 2008. We are grateful for the information you provide and for the comprehensive EM on the new text. The Committee has decided to clear both documents from scrutiny.

We would however be grateful for your comments on Article 5(2) and (4) of the draft. In the earlier draft 14490/07, Article 5(2) provided that the salary offered must be not less than 3 times the national minimum wage. By the time of the June 2008 draft (10398/08, which was marked LIMITE and not deposited for scrutiny), this had been amended to 1.5 times the minimum wage; and by the time of

the latest draft 13748/08 there had been added a paragraph (4) derogating from paragraph (2) and applying a factor of 1.2 in the case of professions in particular need of third country workers. We would be glad to know why these changes were made, and what categories of professions are likely to be covered by Article 5(4).

13 November 2008

BORDER SURVEILLANCE: EUROSUR AND FRONTEX (6664/08, 6665/08)

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

Thank you for your letter of 23 April 2008³ which Sub-Committee F of the European Union Select Committee considered at a meeting on 7 May 2008. We are very grateful to you for providing us with information on the Commission's thinking to date on the role of Frontex in the creation of EUROSUR. We would welcome any further information you can provide on the links between Frontex and EUROSUR and between EUROSUR and EUROCONTROL as these proposals develop, and on the arrangements the UK will make to participate in these systems.

12 May 2008

Letter from Meg Hillier to the Chairman

Thank you for your letter of 12 May 2008 in which you requested further information about the links between Frontex and EUROSUR and EUROSUR and EUROCONTROL respectively, and on the arrangements that the UK will make to participate in these systems. The Commission's work in respect of EUROSUR and EUROCONTROL remains at a very early stage of development and unfortunately this limits the information I can provide you with at this time. However, I have delayed my response to you on these matters in order that I could update you on the outcome of the EUROSUR experts meeting of 23 June, chaired by the Commission, and the European Council Presidency Conclusions on the Commission's Triple Borders Package and I hope that this information is helpful.

With regard to the links between Frontex and EUROSUR and EUROSUR and EUROCONTROL respectively, the European Council Presidency Conclusions acknowledged the importance of the forthcoming studies and possible legislative proposals on the creation of a European Border Surveillance System in the context of the continuing work on the further development of the integrated border management strategy. The Council also stated that it looks forward to the circulation of these studies and proposals; I referred to these documents in my previous letter to you and will update you further once they become available. The Government welcomes the Council's interest in these initiatives and the continued will to co-ordinate Member States' efforts to tackle illegal immigration at the EU's external border.

Regarding UK participation in these systems, I previously advised that general provisions on border surveillance are contained in Article 12 in the Schengen Borders Code, and, as a result, the UK may need to consider carefully the nature of its participation in EUROSUR as its remit is clarified. In the absence of definitive advice about the remit of EUROSUR, the UK will remain closely involved in discussions at official level. On 23 June, the UK was represented at the inaugural EUROSUR expert meeting in Brussels. This provided an excellent opportunity to highlight surveillance expertise held by UK Border Agency officials, both in respect of international surveillance and knowledge of the technical aids being considered, and particularly in the maritime arena. This group will now initiate further consultation with representatives from the Member States, via a questionnaire, in order to explore issues such as the nature of information to be exchanged between neighbouring and non-neighbouring national co-ordination centres and with Frontex; the development of an information management strategy; and the role of co-ordination centres in respect of land and maritime borders and borders with high and low threat levels, in addition to the development of a common operational picture. At least three further EUROSUR expert meetings are planned to take place later this year which will see those issues explored in greater depth.

I would like to take this opportunity to note that although the UK Border Agency shares strategic intelligence with Frontex via monthly statistics requests, and situation reports every two months, it does not specifically gather surveillance material or share it with Frontex; this would fall within the remit of the Ministry of Defence.

³ Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 287

I look forward to providing you with subsequent updates on Frontex, EUROSUR and EUROCONTROL as these become available.

15 July 2008

CONDITIONS OF ENTRY AND RESIDENCE OF THIRD-COUNTRY NATIONALS FOR THE PURPOSES OF HIGHLY QUALIFIED EMPLOYMENT (14490/07)

Letter from Phil Woolas MP to the Chairman

Thank you for your letter of 16 October in which you indicated that the European Union Select Committee intended to keep the above draft Directive under scrutiny but asked for an update on the progress of the measure.

The proposal has recently been considered further by the Migration and Expulsion Working group and by the Strategic Committee on Immigration, Frontiers and Asylum. The Presidency intends to report to the JHA Council on 27-28 November on the progress of negotiations so far. Agreement on the Directive is not in prospect at the moment.

Much of the discussion of the Directive so far has focused on its scope and definitions relating to its application. It is now proposed that the scope of its application should extend not merely to those third country nationals admitted or resident for the purpose of work but to any third country national issued with a uniform format residence permit and allowed to work. This means that the scope of the Directive, including rights of equal treatment, potentially extends to, for example, students, working holidaymakers and those admitted for reasons of family reunion (other than family members of those exercising rights of free movement). This means that the Directive potentially undermines the ability of educational establishments to charge higher fees not only to third country nationals admitted for the purpose of work but also to those admitted for the purpose of study. A number of Member States have reservations on the scope of the proposal, including whether it should cover those present for temporary or seasonal work.

24 October 2008

CRITICAL INFRASTRUCTURE PROTECTION (13534/07, 16932/06, 16933/06)

Letter from the Rt Hon Tony McNulty MP, Minister of State, Home Office to the Chairman

Thank you for your letter of 6 March 2008⁴ relating to the above documents.

I write to advise you that the negotiations on EPCIP have progressed very well over recent weeks, with significant movement of the Commission's original position, and that I believe we have obtained satisfactory resolution on all our outstanding concerns.

The Directive is now limited in scope to European infrastructures in the energy and transport sectors only. The process for identification and designation of European Critical Infrastructure (ECI) will use sectoral and cross-cutting criteria, which will form part of the implementing guidelines. Indicative thresholds will be included in these guidelines, and are currently in line with the UK national thresholds. The precise thresholds are to be determined and agreed by the Member States involved, and designation cannot occur without the consent of the Member State on whose territory the infrastructure is located. On this basis, I expect that the number of ECI designated within the UK will be very small.

There will be no lists of ECI, and the Commission not be advised of any specific information relating to ECI designated within the UK.

There is no jurisdiction in the Directive to issues relating to critical national infrastructure, and the Commission will not have any ability to influence what protective security measures should apply to any ECI. Critical national infrastructure remains the responsibility for individual Member States.

Member States will need to require operators of designated ECI to produce Operator Security Plans (OSPs) and Security Liaison Officers (SLOs), with the Directive now recognising that existing mechanisms (binding or nonbinding) will be acceptable. This is a very welcome approach for the UK, as we believe that OSPs and SLOs are very sensible measures, and indeed these already exist for the

⁴ Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 274

more critical infrastructure locations in the UK. The amended proposals in the Directive avoid the need for the UK to introduce unnecessary legislation where such measures are already in place.

Member States will be required to provide a summary report on any sectors in which ECI is designated. This information will be generic and will not include any sensitive information that might jeopardise national security. A review of the value of this Directive will be initiated three years after its adoption, and will assess what further critical infrastructure protection measures, if any, are to be proposed to Council.

You ask in your letter for the latest document to be deposited. Although it is not usual to provide LIMITE documents, I believe it will be helpful to you in this case, and I therefore attach the latest text from the Council 526/08.

The Presidency plans to seek political agreement to the Directive in its revised form at the JHA Council on 5 June. I would therefore welcome your views in advance of that meeting.

19 May 2008

CROSS BORDER COOPERATION: INDEX OF THIRD COUNTRY NATIONALS CONVICTED IN THE EUROPEAN UNION (11453/06)

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

Thank you for your letter of 4 April 2008⁵ which was considered by Sub-Committee E at its meeting of 30 April 2008.

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

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

We have decided to clear the working paper from scrutiny.

1 May 2008

DATA PROTECTION: PROTECTION OF PERSONAL DATA PROCESSED IN THE COURSE OF ACTIVITIES OF POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS (11929/05, 16069/07)

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

Thank you for your letter of 29 April 2008 which Sub-Committee F of the House of Lords Select Committee on the European Union considered at a meeting on 21 May 2008.

We are grateful to you for explaining the state of play with regard to this dossier and providing your views on what we consider to be extremely weak aspects of the proposal. We have to agree to disagree on the effectiveness of this instrument in providing adequate data protection safeguards and ensuring that the data exchanged are accurate and reliable for effective law enforcement cooperation. We believe that current negotiations on the EU-PNR Framework Decision are already proving the limited use of this instrument in providing EU-wide protection for data exchanged for law enforcement purposes.

⁵ Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 229

You mention that the UK is one of five Member States to have maintained a parliamentary scrutiny reservation, but that this will have to be lifted by the time final agreement is given. So far as this House is concerned it is unnecessary to maintain a scrutiny reservation, since we regard scrutiny as having been overridden when a general approach was reached, in November 2007, on a text we had not been given an opportunity to examine or comment upon.

22 May 2008

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

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

Thank you for your response of 22 May 2008 to Bridget Prentice's letter of 29 April. Bridget mentioned that the European Parliament had been asked to deliver an opinion on the DPF by April 2008. It finally adopted its opinion on 23 September 2008.

However, with the current text having already been discussed and agreed in juris-linguist (in June 2008), the Council is likely to adopt the text without further amendment. The Government intends to support the Framework Decision if, as expected, the Council moves to adopt it formally before the end of the year.

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

5 November 2008

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

Thank you for your letter of 5 November 2008 which Sub-Committee F (Home Affairs) of the House of Lords Select Committee on the European Union considered at a meeting on 26 November 2008. We are grateful to you for informing us that, now that the European Parliament has delivered its Opinion, the Council will move to adopt the Framework Decision formally before the end of the year.

However, we would like reiterate that we are disappointed with the text that the Council is to adopt, which we believe, for the reasons we have given in earlier correspondence, leaves serious gaps in the third pillar data protection framework. We would like to put on the record again that this important dossier was subject to a scrutiny override when a general approach was reached in November 2007 on a text we had not been given an opportunity to examine. We note with regret that the Council has deemed it appropriate likewise to disregard the Opinion delivered by the European Parliament, which has also been very critical of the standards agreed.

26 November 2008

DRUGS ACTION PLAN (13407/08)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 29 October 2008 and cleared it from scrutiny.

At the same time the Committee were disappointed that the draft Action Plan shows no evidence of any positive new thinking. There is no doubt that the priorities listed on page 5 of the draft are the right ones, but the 52 proposed actions give no great confidence that these results will be achieved. We note that the draft is still under discussion, and we hope that the Government will encourage the Commission to embark on some radical re-thinking. We look forward to hearing the outcome of these discussions, and to seeing the final draft before it is adopted by the Council.

31 October 2008

EUROPOL (EUROPEAN POLICE OFFICE) CHAPTER V (6424/08, 6427/08)

Letter from the Chairman to Rt Hon Tony McNulty MP, Minister of State, Home Office

Thank you very much for your helpful letter of 27 March 2008⁶ which Sub-Committee F of the European Union Select Committee considered at a meeting on 30 April.

It is very useful to know, for the purposes of the inquiry into Europol, the progress which has been made in the negotiations on both the data protection issues and the budgetary issues. We are glad to see that political agreement on the draft Decision was reached at the Council on 18 April.

1 May 2008

EUROPEAN POLICE STATIONS

Letter from the Rt Hon Tony McNulty MP, Minister of State, Home Office to the Chairman

I am writing to make you aware of this police co-operation proposal, which was raised at EU working group level by the French Presidency earlier this month, and which was mentioned by the Presidency during the JHA Informal in Cannes recently, as a result of which there was a significant degree of UK press interest.

The proposal is based on the Presidency's view that a tourist who runs into difficulties while on holiday in a main tourist area of another Member State (such as becoming a victim of crime, or losing his or her passport) could overcome language and cultural problems when visiting a police station, and therefore be more easily reassured, if they found a police officer of their own nationality there. The Presidency are therefore running a number of pilot schemes in 5 police stations in Paris, together with Eurodisney, Versailles, Lourdes, and during Le Mans races. These will be evaluated with a view to taking the proposal to the Article 36 meeting in October.

The Netherlands, Germany and Spain have already signed up to the scheme and are deploying officers in Paris during this month. The UK are not participating.

When this issue was raised at Cannes the Home Secretary reminded colleagues that combating terrorism remained a top priority at home and in the EU, and that while EU police stations were not a priority we would be content to explore the idea if the Presidency wished us to do so.

As you know, the UK have experience of sending officers abroad to act as liaison officers - chiefly in respect of policing international football matches. However, such deployments are invariably organised on the basis of detailed bilateral agreements which address a range of operational, logistical, and funding considerations. We would not envisage any deployment being on an operational basis, and will therefore await the evaluation of the pilot with interest. I will keep you informed of progress.

22 July 2008

EUROPOL: PRIVILEGES AND IMMUNITIES: DETERMINING THE CATEGORIES OF OFFICIALS AND OTHER SERVANTS OF THE EUROPEAN COMMUNITIES (10082/08)

Letter from the Chairman to the Rt Hon Tony McNulty MP, Minister of State, Home Office

Sub Committee F of the European Union Select Committee considered this document at a meeting on 9 July 2008.

Like you, we could not see why Europol officials participating in joint investigation teams should enjoy an immunity from criminal (and civil) proceedings not enjoyed by police officers in those teams. We believe this derogation from the Protocol on Privileges and Immunities is a satisfactory outcome.

We note that the main Council Decision establishing Europol, and presumably also this Regulation, are likely to be adopted in October and November. As you know, the Decision is being kept under scrutiny pending the conclusion of the Committee's inquiry into Europol, but in reliance on paragraph 3 (b) of the House of Lords Scrutiny Reserve we were content that you should give your agreement to

⁶ Correspondence with Ministers, 2nd Report of Session 2009-10, HL Paper 29, p 280

the proposal at the April Council, and we are content that you should agree to its adoption. We will similarly keep this draft Regulation under scrutiny, since it is part of the same package, but again are content that you should agree to its adoption.

9 July 2008

FUTURE GROUP ON HOME AFFAIRS (11657/08, 7315/07)

Letter from Rt Hon the Baroness Scotland QC to the Chairman

I would like to take this opportunity, in conjunction with my Home Office colleagues, to send you the final report of the EU's Future Group on Home Affairs.

The Future Group on Home Affairs was a German Presidency initiative. It consisted of current and forthcoming Presidencies - Germany, Portugal, Slovenia, France, Czech Republic, Sweden and Spain - plus the European Commission. Its mandate was to provide an informal setting for the discussion of ideas for the future direction of EU Justice and Home Affairs policy. I had a seat on the group as observer in personam, representing the UK and the other common law states, and I attended the Ministerial meetings of the group. Other observers were the President of the LISE Committee of the European Parliament and a representative of the General Secretariat of the Council.

The Group has now completed its work and I am sending you a copy of the report for your information. It was presented to all Member States at the informal JHA Council on 7-8 July. The report will be one of several influences on the Commission as it develops its Communication on the future JHA work programme (expected in early 2009), and I now hope that there will be scope for all Member States to contribute to the shape that the new work programme takes.

Simultaneously, a Justice Future Group met to discuss the justice elements of the future JHA work programme. The Irish Attorney General had a seat on that group as observer representing the common law states. I understand that the Justice Secretary will also be sending you a copy of the justice report for your information.

17 July 2008

IMMIGRATION AND ASYLUM PACT (12626/08)

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

I wanted to send you a copy of the European Pact on Immigration and Asylum [not printed] which is a major feature of the French Presidency, along with a summary of its contents before recess. I am sure this will be of interest. The document is, of course, in confidence as its contents are not in the public domain and remain subject to negotiation.

Overall we welcome the high profile that the pact gives to migration issues in the EU. It is clear across the EU that this is one of the major challenges affecting all Member States.

The Pact seeks to set out five basic commitments for the EU: to organise legal immigration to take account of Member State needs, and to encourage integration; to control irregular immigration including ensuring the return of illegal immigrants; to make border controls more effective; to construct a Europe of asylum; and to create partnerships with the countries of origin and transit.

The pact also makes clear that it is for each Member State to decide on the conditions of admission of legal migrants to its territory and that member states have the right to apply immigration policy according to their labour market needs, bearing in mind the impact on other member states.

The Pact reaffirms a European determination to control irregular immigration building on all three basic principles: a necessity for greater cooperation between Member States and the countries of origin and transit; illegal immigrants on Member States' territory must leave and that Member States will recognise each other's decisions in this regard and all countries are required to readmit their own nationals.

It emphasises that external border controls are the responsibility of each Member State but recognises that granting visas and border control have a particular impact on other Member States. To this end, border controls need to be reinforced not least by sharing resources and the use of technology and biometrics.

On asylum it observes that considerable disparities continue between Member States concerning the grant of protection and the forms this protection takes. While making clear the grant of protection and refugee status is the responsibility of each Member State, the pact recommends further action including in establishing a European support office.

Finally the pact reiterates many of the principles of the Global Approach to Migration agreed under the UK Presidency in December 2005.

We particularly support references within the Pact to practical cooperation measures, the greater use of technology and the high priority given to strengthening the external border, including further development of Frontex.

We support the work so far on a Common European Asylum System. We welcome the emphasis on practical cooperation and on resettlement that is contained in the Pact. We believe the priority is to implement and evaluate the current EU legislation on common minimum standards for asylum.

In terms of the next step the detail of the text was negotiated at a "Friends of the Presidency" official level meeting on 17 July. The French Presidency aims for agreement on the key political elements of the text at the JHA Council of 24-25 July and high level agreement on the Pact at the European Council on 15 October.

23 July 2008

Letter Meg Hillier MP to the Chairman

I am writing to let you know our intentions regarding discussion and possible agreement of the European Migration Pact at the JHA Council on 25 September. Unfortunately it has not been possible for your Committee to meet to consider the text of the European Migration Pact and clear it from scrutiny. However the Pact is an important political statement on the need to strengthen European co-operation on migration and asylum. We support the key messages it contains and provided that we are satisfied with the wording of the final text presented to the Council this week, I consider that it would not be in the UK's interest to delay agreement on it. I realise that this is a departure from the normal scrutiny procedures and I apologise for this.

Agreement on the Pact is one of the major aims of the French Presidency, which as you know began on 1 July. Because of the urgency which they attach to this agreement, it has been difficult for us to inform you as fully as I would have liked about this proposal.

However I was able to write to you on 23 July summarising the contents of the Pact and enclosing a confidential copy of the document after receiving clearance from the French Presidency that the Pact could be shared with you on that basis. The French Presidency issued an updated and depositable version of the Pact which we received in the English version on 8 September. It was deposited on 10 September, allowing the official scrutiny process to begin. The Presidency plans to seek approval of the Pact at the European Council in October and it is therefore consulting JHA Ministers at their Council meeting on 25 September and seeking, at their level, political agreement on the text. I am aware that the Committee's next meeting is on 8 October, after the Council.

I appreciate that this is an important document and that the Committee may have wished to have the opportunity to give their views on it before its agreement. However it is not a legislative text and has no direct implications for UK immigration controls or other domestic law. Any subsequent proposals for legislation resulting from the Pact will be submitted for scrutiny in the normal way.

There have been a number of changes in the detail of the text since the version sent to you on 23 July, but the structure and key messages have not changed significantly. The Government welcomes the high profile which the Pact gives to migration and asylum and its tough messages on returns, border control and illegal immigration. The text is carefully balanced and a number of key UK concerns have been met.

I will of course inform the Committees after the Council meeting on the outcome of the discussion.

24 September 2008

Letter from Meg Hillier MP to the Chairman

I am writing to you about the JHA Council on 25 September since it is not possible to make my usual written statement to the House due to the timing of recess. The Council will be held in Brussels and Liam Byrne and the Scottish Solicitor General Frank Mulholland will attend. As the provisional agenda stands, the following items will be discussed.

The Council will focus on asylum and immigration business, chaired by the French Immigration Minister, Brice Hortefeux. The Presidency will commence the Council by trying to get an agreement on the Migration Pact. The Pact covers 5 areas: legal migration of third country nationals, illegal immigration and returns; border controls; asylum; and partnership with countries of origin and transit (the "Global Approach"). We support the strong focus on immigration and asylum issues under the French Presidency and will use this as a basis for stronger practical co-operation in the EU. The Government is generally content with the Pact but will continue to work with the Presidency on the detail of the final document. We welcome the tough messages on returns, strong borders and combating illegal immigration.

There will follow a discussion on the Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (commonly known as the EU Blue Card), which aims to set admission conditions for highly skilled migrants. It also proposes to determine the conditions in which third country nationals who are legally residing in a Member State under the proposal may reside with their family members in other Member States. The French Presidency is aiming for political agreement at this Council. The UK has not opted-in to this measure since it does not fit with the UK's Points Based System.

Under the heading of Asylum, there will be a report from the EU Ministerial Conference on Asylum which the UK attended on 8-9 September in Paris.

The Council is also scheduled to return to the issue of the resettlement of Iraqi refugees where it will be asked to agree conclusions on the taking of Iraqi refugees by Member States. The Government strongly agrees that Member States should be able to determine their own resettlement policies. The UK will continue to resettle Iraqi refugees under our established policies and selection criteria and do not consider common resettlement criteria to be feasible. We support sharing good practice. We further support the Commission's initiative to conduct a joint mission to Syria and Jordan to explore the feasibility for a joint EU effort in the resettlement of refugees but note that we will not be in a position to provide additional spaces for Iraqi refugees under this initiative.

The UK supports the involvement of more EU Member States in resettlement, working in partnership with the UNHCR. We have already committed to resettling 1000 Iraqi refugees over the next two financial years. We are also supportive of the Commission proposal to look into voluntary participation in an EU resettlement programme, maintaining control over who is granted entry and to consider in further detail more structured and substantial financial support which would enable more Member States to participate in resettlement.

The Presidency would like to reach a general approach on the Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection. The UK has chosen not to opt-in to the proposed Directive as we believe it is not in line with our Frontiers Protocol. We want to determine the status of third country nationals via the UK's Immigration Rules.

At the request of the Danes, the Presidency has scheduled a discussion of the consequences of the recent Metack judgement on the free movement of persons. The European Court of Justice ruled in July that Member States may no longer require family members of EEA nationals to have been previously lawfully resident in a Member State before they can benefit from EU free movement rights by virtue of their relationship with that EEA national. The UK is carefully considering the impact of the judgment on domestic practice, along with the wider implications of Denmark's call to reopen the Free Movement Directive.

24 September 2008

Letter from the Chairman to Meg Hillier MP

Sub-Committee F of the European Union Select Committee considered the European Pact on Immigration and Asylum at a meeting on 8 October 2008. We are grateful to you for depositing this document and for writing to us on 23 July and 24 September 2008 about it.

The Committee was not very impressed by the way this initiative was carried forward at the level of national governments without any wider involvement of civil society or national parliaments. This is an influential document which, as you say, will shape the future of EU policy on asylum and immigration. However, the development of the common EU policy in this area is to a great extent dictated by previous commitments undertaken by Member States and subject to specific legal provisions. We note in this respect the statement in the document that the "full implementation of the Pact is likely in certain areas to require changes to the legal framework and in particular to the treaty bases" (page 4). We assume that the Government in signing up to this Pact has given due consideration to this. We would be grateful if you could share with us your views on which areas and which legal provisions are likely to be affected by implementation of the Pact, both in respect of the current legal framework and that which is envisaged under the Lisbon Treaty.

We understand that the Pact is going to be adopted at the 15-16 October European Council meeting. The Committee has decided to clear this document from scrutiny but would welcome information on the changes to the legal framework mentioned above, along with a copy of the final text adopted by the Council.

The Committee also wondered about the implications for EU immigration and asylum policy of the growing problem of piracy in the Mediterranean and elsewhere; a particular issue is the right of those involved to apply for asylum. We would be glad to know what the EU proposes to do about this problem.

9 October 2008

Letter from Phil Woolas MP, Home Office to the Chairman

Thank you for your letter of 9 October 2008 about the European Pact on Immigration and Asylum. I have enclosed a copy of the Migration Pact agreed at the European Council on 15th/16th October.

You have requested further information on which legal provisions are likely to be affected by implementation of the Pact, both in respect of the current legal framework and that which is envisaged under the Lisbon Treaty. The commitments within the Pact are to do with Member States national systems and how they can work better towards EU objectives. The Pact is not a legislative text and has no direct implications for UK immigration controls or other domestic law. Any subsequent proposals for legislation resulting from the Pact will be subject to the UK's Opt In protocol, whether under the current framework or the Lisbon Treaty, and will be submitted for scrutiny in the normal way. The asylum section of the Pact was discussed with NGOs and civil society at an asylum conference in Paris in early September.

You have also raised whether there are implications for EU immigration and asylum policy due to the growing problem of piracy in the Mediterranean and elsewhere. We remain concerned by the smuggling and trafficking rings that facilitate movement across the Mediterranean but have not identified a specific threat to immigration control from piracy. The European Border Management Agency (Frontex) coordinated three joint operations in the Mediterranean this year to target illegal migration much of it controlled by organised criminal networks. The UK deployed experts on an advisory basis to Joint Operation Nautilus in Malta and Joint Operation Poseidon in the Greek Islands. The need to respect individuals' human rights is emphasised by the Agency in its operational plans and in the briefing of staff. Section 15 of the Nautilus operational plan states that 'all operational actions taken shall ensure the principle of Human Rights and prevention of loss of lives has overall priority.' Further reference to Community and International Law and the relevant national legislation are detailed within both plans.

The UK has also supported the Commission-chaired working group in Brussels that was set up to develop a set of guidelines on the law of the sea for Frontex joint maritime operations, by sending representatives from the UK Border Agency to participate in this group. We understand that the Commission does not intend to call a further meeting of this group and we await their further proposals.

24 October 2008

Letter from the Chairman to Phil Woolas MP

Thank you for your letter of 24 October 2008 and for enclosing a copy of the Migration Pact as agreed at the European Council on 15 and 16 October. Sub-Committee F of the European Union Select Committee considered this dossier again at a meeting on 12 November 2008.

The Committee is aware that the Pact is not a legislative text and that subsequent proposals for legislation will be subject to the UK Opt In Protocol and submitted to scrutiny in the normal way. However, the statement it contains that "full implementation of the Pact is likely in certain areas to require changes to the legal framework, and in particular to the treaty bases" suggests more than just that. Could you clarify the thinking behind this statement to us?

With regard to the issue of EU level activity to tackle the growing problem of piracy, we understand from information released by Javier Solana's office that on 14 October the Political and Security Committee decided to nominate Northwood as headquarters of the EU counter-piracy naval operation off the coast of Somalia. Rear-Admiral Philip Jones was proposed as the Operation Commander and he will start operational planning with the aim of launching the operation in December. We assume that you are aware of this and would be grateful if you could keep us informed on developments.

13 November 2008

JUSTICE AND HOME AFFAIRS (JHA): FRENCH PRESIDENCY PRIORITIES

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

I am writing to give you an overview of the French Presidency's priorities for JHA issues over the next six months in terms of those dossiers covered by the Home Office. My colleagues at the Ministry of Justice will be writing to you separately on their dossiers. I hope that this will assist in the planning of your scrutiny of dossiers heading to the JHA Council in this period.

When the French take over the Presidency of the EU Council on 1 July it will be with a view to the possible entry into force of the Lisbon Treaty on 1 January 2009, and we would expect their agenda therefore to be focused on finalising as much as possible of the inherited agenda, including adopting those measures which have been agreed but remain subject to parliamentary scrutiny in other Member States. With this in mind, they have scheduled an extra formal JHA Council for July, such that the timetable for consideration of dossiers at JHA Council meetings is as follows:

- 7-8 July, informal, Cannes;
- 24-25 July, Brussels (expected to focus on the EU Migration Pact, and possibly conclude work on the Eurojust Council Decision);
- 25-26 September, Brussels;
- 24 October, Luxembourg;
- 27-8 November, Brussels.

Among their priorities on the home affairs agenda are continued negotiations on Passenger Name Records (PNR). They will also propose a European Pact on Migration and will lead the development of a new EU Action Plan on Drugs (on the basis of a draft offered by the Commission). In addition, Communications are expected during the French Presidency on the second phase of the Common European Asylum System (CEAS) and on counter-radicalisation.

The proposal for the collection and sharing of Passenger Name Records remains a UK priority. We have discussed areas of common interest with our French colleagues and will continue to work closely with them during their Presidency.

The UK fully supports the French initiative to bring forward a European Pact on Migration during their Presidency, and welcomes co-ordinated EU efforts to tackle the challenges posed by migration. The Pact will cover a range of migration issues including returns, illegal/legal migration, working with third countries to enhance the development contribution of migration, and asylum. We will work closely with the French on the detail of the proposal. Most of the negotiations on the Pact will be undertaken at the late July formal JHA Council, with a view to reaching agreement at the October European Council.

The EU Action Plan on Drugs will be the second of two within the EU Drugs strategy 2005-12. An initial draft will be prepared by the Commission in the light of an evaluation, currently underway, of the first, that covered the period 2005-08. A final version will then be developed by the horizontal drugs Council working group under French chairmanship. Like us, the French wish to see a plan that is shorter and more concise than its predecessor and that focuses on specific actions where the EU can add clear value.

Regarding the Common European Asylum System, we expect the Commission to publish its Policy Plan on the second stage of the CEAS and to bring forward proposals to amend the Reception Conditions Directive and the Dublin II and Eurodac Regulations.

On counter terrorism, we will build on the outcomes of the March Anglo-French Summit to ensure that the French Presidency gives a real impetus to re-invigorated and refreshed focus on counter-radicalisation. We will lead a workstream on counter terrorism communications during the Presidency and contribute to other European work on policing and imams training, to deliver a more coherent European response to the challenge of violent radicalisation both within Europe and beyond its borders by the end of the year.

On the justice side, French Presidency priorities include completion of the negotiations on the new legal base for Eurojust. The Slovenians have made quick progress with the draft Council Decision on strengthening Eurojust and the French will wish to complete negotiations. It is likely that they will seek agreement on the entire instrument as soon as July.

The other criminal justice priority is criminal records, where the French hope to make good progress on a second phase of legislation setting out the technical format for the electronic exchange of

criminal records, building on the Framework Decision on the organisation and content of the exchange of information extracted from criminal records. The proposal has just emerged from the Commission and an EM is being prepared for your consideration.

Finally, as you may be aware, the JHA Hague work programme is due to expire in a little over a year, and we would expect the French Presidency to pursue discussions on its possible replacement.

16 June 2008

JUSTICE AND HOME AFFAIRS (JHA): FRENCH PRESIDENCY PRIORITIES, COUNCIL 25 SEPTEMBER 2008

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

I am writing to you about the JHA Council on 25 September 2008 since it is not possible to make my usual written statement to the House due to the timing of recess. The Council will be held in Brussels and Liam Byrne and the Scottish Solicitor General Frank Mulholland will attend. As the provisional agenda stands, the following items will be discussed.

The Council will focus on asylum and immigration business, chaired by the French Immigration Minister, Brice Hortefeux. The Presidency will commence the Council by trying to get an agreement on the Migration Pact. The Pact covers 5 areas: legal migration of third country nationals, illegal immigration and returns; border controls; asylum; and partnership with countries of origin and transit (the "Global Approach"). We support the strong focus on immigration and asylum issues under the French Presidency and will use this as a basis for stronger practical co-operation in the EU. The Government is generally content with the Pact but will continue to work with the Presidency on the detail of the final document. We welcome the tough messages on returns, strong borders and combating illegal immigration.

There will follow a discussion on the Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (commonly known as the EU Blue Card), which aims to set admission conditions for highly skilled migrants. It also proposes to determine the conditions in which third country nationals who are legally residing in a Member State under the proposal may reside with their family members in other Member States. The French Presidency is aiming for political agreement at this Council. The UK has not opted-in to this measure since it does not fit with the UK's Points Based System.

Under the heading of Asylum, there will be a report from the EU Ministerial Conference on Asylum which the UK attended on 8-9 September in Paris.

The Council is also scheduled to return to the issue of the resettlement of Iraqi refugees where it will be asked to agree conclusions on the taking of Iraqi refugees by Member States. The Government strongly agrees that Member States should be able to determine their own resettlement policies. The UK will continue to resettle Iraqi refugees under our established policies and selection criteria and do not consider common resettlement criteria to be feasible. We support sharing good practice. We further support the Commission's initiative to conduct a joint mission to Syria and Jordan to explore the feasibility for a joint EU effort in the resettlement of refugees but note that we will not be in a position to provide additional spaces for Iraqi refugees under this initiative.

The UK supports the involvement of more EU Member States in resettlement, working in partnership with the UNHCR. We have already committed to resettling 1000 Iraqi refugees over the next two financial years. We are also supportive of the Commission proposal to look into voluntary participation in an EU resettlement programme, maintaining control over who is granted entry and to consider in further detail more structured and substantial financial support which would enable more Member States to participate in resettlement.

The Presidency would like to reach a general approach on the Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection. The UK has chosen not to opt-in to the proposed Directive as we believe it is not in line with our Frontiers Protocol. We want to determine the status of third country nationals via the UK's Immigration Rules.

At the request of the Danes, the Presidency has scheduled a discussion of the consequences of the recent Metack judgement on the free movement of persons. The European Court of Justice ruled in July that Member States may no longer require family members of EEA nationals to have been previously lawfully resident in a Member State before they can benefit from EU free movement rights by virtue of their relationship with that EEA national. The UK is carefully considering the impact of the judgment on domestic practice, along with the wider implications of Denmark's call to reopen the Free Movement Directive.

24 September 2008

Letter from Liam Byrne MP, Minister of State, Home Office to the Chairman

I am writing to you about the JHA Council on 25 September since it is not possible to make the usual written statement to the House due to the timing of recess. The Council was held in Brussels. The UK was represented by myself and by Frank Mulholland, the Solicitor General for Scotland.

This Council took immigration and asylum matters and was chaired by the French Minister for Immigration, Integration, National Identity and Cooperative Development, Brice Hortefeux. The Council began by agreeing the European Pact on Immigration and Asylum. The Presidency explained the amendments made since Ministers discussed a draft text at the Informal meeting on 7 July and emphasised the importance of the Pact in developing a genuine common European policy on immigration and asylum. The Pact will be submitted in its current form [13189/08 ASIM 68] for adoption at the 15-16 October European Council.

During the discussion I commended the Presidency's resolve in keeping migration at the top of the political agenda. I welcomed the tough messages on returns, strong borders and illegal immigration in the Pact. Finally I emphasised that the challenge was to make the Pact a reality and offered to support the Presidency in communicating the messages contained in the Pact to third country partners.

At the request of Denmark, the Presidency led a discussion on the recent European Court of Justice judgment in the case of Metock [C-127/08]. I underlined our concern that the ruling could have implications for efforts to tackle false marriages and create greater opportunities for trafficking and smuggling. I said that the options for tackling false marriages, illegal immigration, preventing crime and pursuing deportation should be assessed as part of the review of the Directive.

The Council welcomed the Commission's intention to present an evaluation report on the implementation of the Free Movement Directive by the end of 2008 and noted that the Commission was ready to come forward with any guidelines or proposals that might be necessary, in particular to counteract abuses and crimes.

There followed a discussion on the Directive on the Conditions of Entry and Residence of Third-country Nationals for the Purposes of Highly Qualified Employment, commonly known as the EU Blue Card. The UK has not opted in to this measure. The Presidency noted wide agreement on the text and that previous reservations by some Member States on salary levels and further access to the labour market had been lifted. Full agreement was not possible due to an outstanding substantial reservation by one Member State. COREPER was given the task of securing agreement before the next JHA Council.

During lunch the Council discussed the issue of the resettlement of Iraqi Refugees. The Commission elaborated further on their plans for a technical mission to Syria and Jordan to identify Iraqi refugees suitable for resettlement. Some Member States wanted to follow-up the technical mission with a high profile political visit. Ministers agreed to offer protection to those for whom there was no other solution, but to manage sustainable returns as part of a 'co-development' agenda for reconstructing Iraq.

The next JHA Council will take place on 24 October in Luxembourg.

3 October 2008

LONG-TERM RESIDENTS DIRECTIVE (10515/07)

Letter from Liam Byrne MP, Minister of State, Home Office to the Chairman

Firstly I would like to apologise for the delay in responding to your letter of 26 July 2007⁷, which is due to an administrative error. I am grateful for the opportunity to provide you with further detail on our consideration of whether to opt-in to the long term residence directive.

As you will be aware, the Government chose not to opt-in to Council Directive 2003/109/EC. As Baroness Ashton commented on 25 July 2007 further consideration was given to the long term residence directive following the publication of the Commission's amending measure. Following this consideration the Government maintained its decision not to opt in to this measure.

The provisions within the Directive are, in some respects, broader than our current conditions in that it will warrant us to grant long-term residence to a third-country national, refugee or beneficiary of subsidiary protection after 5 years' legal and continuous residence. In August 2005 we ceased to grant indefinite leave to remain (ILR) immediately in those categories, granting an initial 5 years' limited leave instead. We will be reviewing grants of asylum and subsidiary protection after a 5 year period to ascertain whether the claimant is still in need of international protection in light of changing country conditions and whether the fear of persecution continues. The Directive, however, would require us to grant ILR after the 5 year period, undermining the 2005 change of policy.

Additionally it would not be possible for us to opt-in to the amending Directive without also opting-in to the original Directive. In other words, we would have to grant leave to most third country nationals (other than visitors and students) who have resided in the UK legally and continuously for 5 years. This would cut across our current approach, which is to grant ILR after 5 years if the applicant qualifies under the Immigration Rules or published policies. Additionally, a person who is granted discretionary leave in the UK is normally expected to spend six years on that status before being considered for ILR. Discretionary Leave is granted where a person does not qualify as a refugee and is not eligible for humanitarian protection but where they establish that removal to the country of origin would result in a breach of Article 3 of the ECHR for medical reasons, for Article 8 for Private/Family life or if they are an unaccompanied minor.

Changing this would erode the distinction between protection-related leave and leave granted for other exceptional reasons.

Our policy position not to opt-in to the original directive reflected our view that its provisions were not in line with our frontiers protocol as we wished to determine the status of third country nationals via the Immigration Rules. This approach gives third country nationals a route to qualify for the benefits set out in the Directive, but allows us to regulate their stay through our own legislation. Opting-in to this Directive would be inconsistent with that approach and would impact on our current policy.

30 May 2008

Letter from the Chairman to Liam Byrne MP

Thank you for your letters of 30 May and 2 June 2008 [not printed], in reply to mine of 26 July 2007. Sub-Committee F of the European Union Select Committee considered them at a meeting on 18 June 2008.

The Committee is mystified by the receipt on the same day of two letters signed by you which are identical but for a footnote. It is unfortunate that both came ten months too late. You attribute the delay to administrative error. We find it hard to understand how this can have come about, given that we have repeatedly reminded your officials about the delay in replying. It may be that you sometimes regard the Parliamentary scrutiny of draft EU legislation as a tiresome or intrusive formality which can be disregarded at will, but we take it very seriously indeed.

The substance of our query concerned your decision as to whether you would opt in. You inform us now that you have decided not to opt in to this amending measure, which would have had implications also for the opt out from the original measure. Your decision would have been taken within the three-month time limit provided in the Protocol, i.e. by the beginning of September 2007. We should like to know why we were not notified of this decision at the time.

You will be aware that the Government, during the Report Stage of the European Union (Amendment) Bill in the House of Lords, committed itself to a new procedure for the scrutiny of opt-in decisions in the field of justice and home affairs. It is vital that the new timetable should be strictly

⁷ Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 258

adhered to, especially since the Government has undertaken to take the views of this Committee into account only if formulated within 8 weeks of publication. In such cases replies to correspondence are needed within days, not weeks, let alone months.

We also find it difficult to understand why you did not think it necessary to update the Committee on the progress of the negotiations over this measure. We understand that the proposal has been very difficult to negotiate in the Council and that unanimous agreement has not yet been reached. We would be grateful if you could inform us of the state of play of negotiations, and what your views are with regard to the different positions Member States are taking in the Council.

The Committee will continue to keep the document under scrutiny pending receipt of the information requested.

24 June 2008

Letter from to Liam Byrne MP, Minister of State, Home Office to the Chairman

I do apologise for the considerable delay in responding to your letter of 26 July 2007 about the European Commission's Evaluation of the Dublin System.

I also apologise for the delay in responding to your letter of 26 July 2007 on subsidiary protection and the administrative errors surrounding its dispatch. I am determined to ensure, with the Department, that we respond promptly to letters from the Committee within the agreed timescales. I have discussed this matter with the Permanent Secretary and we have agreed a number of measures to ensure that delays of this kind do not occur in the future. I have asked one of my senior officials to discuss these measures with the Clerk to your Committee.

On the detailed points you raised, on the first issue, I am disappointed that the Committee found it difficult to share the positive assessment of the Dublin System, particularly as it is one that delivers benefits to the United Kingdom in terms of the identification and removal of individuals who make secondary movements within Europe. Some individuals identified by the operation of the Dublin System abuse national asylum systems by making multiple asylum claims as they move within Europe.

We think it is right that Member States work together to address this issue through the operation of the Dublin and Eurodac Regulations.

Your letter raises several issues, which the Committee suggests show that the Dublin System has failed. I will address the points in turn. Firstly you state that the Dublin System has not guaranteed effective access to asylum determination procedures and refer to the judgment in the High Court case of Nasser. Mr Nasser alleged that there was a risk of onward refoulement if he were removed to Greece and that the provisions in paragraph 3 of Schedule 3 to the Immigration and Asylum (Treatment of Claimants, etc.) Act 2004 preventing the Secretary of State from considering that risk were thus incompatible with the Human Rights Act.

The Court of Appeal allowed the Home Secretary's appeal against the declaration of incompatibility on 14th May. We welcome the decision of the Court of Appeal, which supports our view that removals to Greece under Dublin are lawful and proper. The Government does not accept that there was or is now a risk of refoulement from Greece although it is aware of the criticisms that have been made of the Greek system, criticisms that the Greek government has taken action to address. The UK Border Agency therefore continues to certify asylum claims and remove asylum seekers to Greece under the Act's provisions.

At European level we are satisfied that there are adequate mechanisms in place to ensure the lawful operation of the Dublin Regulation and application of other measures within the Common European Asylum System (such as the Directives on minimum standards for the asylum procedure 2005/85/EC and qualification for refugee status or international protection 2004/83/EC), in particular, the supervisory role of the European Commission. We do not accept that the level of protection provided by Member States is insufficient to lead to refoulement in practice.

The Committee also asked for our views on factors that account for low transfer rates on the basis that absconding behaviour may account only for a limited number of failed transfers. We do not agree that absconding plays only a minor role in this context. Absconding behaviour means that one individual can be the subject of more than one acceptance given to different "requesting" States, yet only one actual transfer can be carried out in reality, which will impact on transfer rates if the latter are compared to numbers of acceptances and not individuals. In addition practical experience within the UK Border Agency indicates that where detention is not possible absconding behaviour reduces the number of transfers that can be properly made within the strict time limits set down in the Dublin Regulation.

The transfer deadlines, not present in the Dublin Convention, mean that failure to effect the transfer within the prescribed time limit results in responsibility reverting to the “requesting” State, at which point a transfer is no longer legally possible. The deadlines should not be seen as a negative feature’ of the Regulation, however, as they provide both an incentive for the authorities in Member States to deal with cases efficiently and security for applicants by guarding against them remaining in one state for long periods without access to an asylum procedure.

Your third point concerned the “annulment procedure”. We indicated in our Explanatory Memorandum that although we could see this idea was based on good intentions we were concerned that it would be difficult to rule out unfairness, but the Committee considers there could be a degree of fairness introduced. As stated in the Explanatory Memorandum we note that the proposal for such a scheme is discretionary and so other Member States might choose to apply such a scheme if agreed.

We nevertheless remain concerned about the principle, as we believe that it contradicts the objective criteria established by Dublin Regulation to determine responsibility. In that context we do not believe that it is either right or fair that the bilateral operation of such a scheme would mean that asylum shoppers could obtain a second procedure simply for reasons of predetermined administrative convenience.

We also wonder how it might be possible to identify those individuals who would not be transferred by applying the scheme, a task that unless based on simple numerical quotas would require additional detailed consideration by national authorities. Finally we recall that a similar procedure was proposed by the Commission in the original draft proposal for the Dublin Regulation but was rejected by Member States during the negotiation process.

On the issue of solidarity between Member States the Committee states that the Dublin system operates at a great disadvantage for Member States at the Eastern and Southern borders. The Evaluation Report does not, however, support this view, but concludes that “contrary to a Widely shared supposition that the majority of transfers are directed towards the Member States at an external border it appears that the overall allocation between border and non-border Member States is actually rather balanced” (page 12 of the Report).

The Commission also noted that the majority of transfers correspond to cases where a previous asylum application has been lodged and so for the most part transfers do not represent new asylum cases for the authorities of the responsible State. Where percentage increases in numbers of asylum applications are discussed we also feel it is important to consider the real numbers involved, for example figures recently published by the UNHCR (“Asylum levels and Trends in the Industrialised Countries, Second Quarter 2007) show that in the first six months of this year the authorities in Estonia received 6 asylum applications, compared to 13 in 2006 and 10 in 2005. In such situations, where the baseline figure is low, relatively small increases in numerical terms produce greater increases in percentage terms.

When considering the wider issue of solidarity and burden sharing the Committee will be aware that the Commission published a Green Paper on the Future Common European Asylum System, which was the subject of Explanatory Memorandum 10516/07. In the Green Paper the Commission asked whether the Dublin system should be complimented by measures that would enhance fair burden sharing, questioning whether other mechanisms could be introduced to provide a more equitable distribution of asylum seekers and those granted international protection. We have stated our position such that we are opposed to any proposals that undermine the responsibility concept in the Dublin System, such as proposals based on physical burden sharing in the form of the movement of individuals between countries. We are, however, interested in proposals based on financial burden sharing, such as those envisaged by the European Refugee Fund. Although not directly concerned with asylum, the Government believes it would be helpful if the European Integration Fund could be used to enhance the integration of European migrants as well as those who migrate from outside of the EU. Efforts made by local areas to support high numbers of European migrants can significantly impact on available resources and good will towards asylum seekers and refugees.

We do not accept that the Dublin System has failed simply because the rate of multiple applications identified has increased. We think it is important to put the increased rate into context by recognising the impact of the Eurodac database on the ability of Member States to identify multiple applications. As the Eurodac database increases in size it is reasonable to expect to identify increased “hit” rates that represent multiple applications, but at least such applications are now being rapidly identified by the Dublin System providing Member States with evidence to take action against individuals who asylum shop.

Finally, the Committee found the lack of estimates in the Commission’s Report regarding the overall cost of the Dublin System deeply disturbing and was concerned that taxpayers’ money might simply be wasted as a result. We cannot comment on the methodology used by the Commission in preparing the Report but note that the Commission expressed the view that it had proved difficult for

most Member States to measure the costs of the Dublin System for structural reasons. Nevertheless the Commission notes that even if it is difficult to make estimates regarding the overall cost of the Dublin System most Member States consider that its application is cheaper than examining the asylum application themselves.

On the second issue, you requested an update on the state of play of negotiations on the Long Term Residence Directive. As you correctly note in your letter the proposal has been difficult to negotiate. Member States are currently divided between those who want the same qualifying conditions for long term residence to apply to both refugees and beneficiaries of subsidiary protection and those who want to exclude or impose tougher conditions for beneficiaries of subsidiary protection. The French Presidency hope to discuss the issue at the JHA Council in Brussels on 24 and 25 July but agreement is not in prospect at this stage. I will notify you further if there are significant developments in reaching an agreed position on amending the Long Term Residence Directive.

7 July 2008

Letter from the Chairman to Liam Byrne MP

Thank you for your letter of 7 July 2008, which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 16 July 2008.

We accept your apologies for this year-long delay and welcome your commitment to put in place measures to ensure that delays of this kind do not occur in the future. The Clerk to the Sub-Committee will keep us informed as to the discussions that take place with your officials.

We are grateful to you for addressing all the points we raised with regard to the Commission's evaluation of the Dublin System. We have decided to clear document I0517/07 from scrutiny, since it is not a legislative proposal; in due course we will examine the Commission's proposal which will reform the current system and seek to address critical flaws. Document I0515/07 will be kept under scrutiny pending a progress report on negotiations.

16 July 2008

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

Thank you for your letter of 16 July that cleared document I0517/07 concerning the Commission's Report on the Evaluation of the Dublin System from scrutiny and also advised that the Committee would keep the above proposal on the beneficiaries of international protection under scrutiny pending a progress report on negotiations.

You will recall the UK has not opted into this proposal and it therefore has no implications for UK immigration control but we have been following the discussions. As noted previously this proposal has been difficult to negotiate. Member States have been strongly divided between two opposing camps: those who want the same qualifying conditions for long term residence to apply to both refugees and beneficiaries of subsidiary protection and those who want to exclude or impose tougher conditions for beneficiaries of subsidiary protection. The French Presidency continues to work hard with the Member States concerned to reach a compromise and the dossier is currently on the agenda for discussion at the Justice and Home Affairs Council on 27th - 28th November.

26 November 2008

MIGRATION: STRENGTHENING THE GLOBAL APPROACH (I14003/08)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 12 November 2008, and cleared it from scrutiny. They were very grateful for the full and clear Explanatory Memorandum.

Paragraph 17 of the EM states that the Government is "broadly happy with the content of the Communication". The Committee does not share this view. It may be that the progress of the Global Approach is satisfactory, but this is hard to tell from the text of the Communication, which we regard as uninformative. It would, for example, be useful to know:

- why Mali has been singled out for the setting up of a migration information and management centre, as opposed to more populous neighbouring countries;

- what this means in terms of manpower and cost;
- why Moldova and Cape Verde were singled out for the Mobility Partnerships, and what these partnerships imply in terms of “certain advantages” and “preferential treatment on legal migration”; and
- which countries participate in the EU – Africa Partnership on Migration, Mobility and Employment, and when and where meetings of the Partnership have taken place.

Finally we would be grateful to have the Government’s views on the significance of these initiatives, an estimate of their total cost, and what measurable impact there is on immigration patterns from the region.

The Conclusions on page 14 are a statement of the obvious, and seem designed to reassure the European Parliament and the Council that all is proceeding satisfactorily. Given the problems raised by migration from third countries, this seems unlikely. We would be glad to be kept informed of the contribution made by this Communication to discussions in the JHA Council in December.

17 November 2008

PASSENGER NAME RECORD (PNR): EU-AUSTRALIA AGREEMENT

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

Following contact between my officials and the clerk of the EU sub-committee F, I understand that the Committee would welcome the Government’s views on the EU-Australia PNR Agreement and the reasons for its divergences from other PNR agreements. I have enclosed a copy of the EU-Australia Agreement signed in June 2008 for your information [not printed].

The Government welcomed the Agreement with Australia on the processing of PNR data. It provides legal clarity for our carriers and ensures that any processing of UK citizens’ data is carried out in line with an appropriate level of data protection. As you will be aware, there are some differences between the EU-Australia Agreement and other agreements between the EU and third countries. In the case of each Agreement, the third country involved has come to the table with its own particular requirements and experience of PNR processing has also increased. Therefore, while certain principles are common to all of the agreements, it is inevitable that the final text of the agreements differ in certain respects.

Some of the differences are to be expected, for example, references to compliance with the relevant third country’s national law and access to data by different law enforcement authorities. Perhaps more significantly, the Canadian Agreement has a first pillar legal base while the Agreements with the US and Australia are both third pillar instruments. Review periods differ too between the texts: arrangements with Australia are to be reviewed in four years time; on an annual basis with Canada; and the US text provides for joint and regular reviews. Data retention periods also vary across the texts, as do the numbers of data fields and the permitted methods of data capture by the third country.

The texts of all three Agreements are now available to the Committee. I would be very happy to provide further information on any specific matters where you would welcome more detailed discussion.

You will be interested to note that my officials are currently reviewing how we might share with Parliament restricted EU negotiating mandates and draft texts. This review is being conducted with a view to sharing such documents with you at an early stage where possible.

12 November 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 12 November 2008 which Sub-Committee F (Home Affairs) of the Select Committee on the European Union considered at a meeting on 26 November 2008.

We were also grateful for the copy you enclosed of the PNR agreement with Australia as published in the Official Journal on 8 August 2008. We have considered the agreement in the light of the comments in your letter, and regard it as more satisfactory than the agreement with the US.

What you did not enclose was Council Decision 2008/651/CFSP/JHA approving the agreement on behalf of the EU and authorising its signature. The agreement was published in the OJ as an attachment to that Decision. The Decision is significant since it is EU legislation which should have been deposited in draft for scrutiny, like any other proposal for legislation. It was not, so that this Committee had no opportunity to consider the draft Decision or the agreement with Australia while they were still in draft. We were not even aware that the negotiations with Australia had resulted in an agreement until the Decision and agreement were published in the OJ five weeks after the agreement came into force.

When our Clerk first enquired why the Decision and agreement had not been deposited and an Explanatory Memorandum supplied, he was told that your officials had been advised (by whom we do not know) that "the EU-Australia PNR Agreement was not subject to Parliamentary scrutiny because the Ponsonby Rule did not apply, ie. the EU-AUS PNR Agreement was a treaty not subject to ratification and entered into force on signature." There seems to us to be some confusion on the part of the adviser. The Ponsonby rule deals with the scrutiny by Parliament of treaties to which the United Kingdom is a party. What is at issue here is scrutiny by this Committee of draft EU legislation. It happens that the legislation in question has annexed to it a draft of a treaty to which the EU is a party, though the United Kingdom as such is not. The Ponsonby rule seems to us to be irrelevant.

Paragraph 2.3.9 of the Cabinet Office Guidance to departments on Parliamentary scrutiny of EU documents is absolutely clear: "... a proposal for conclusion of an external agreement must be deposited" [emphasis in the original]. Departments have followed this rule in the case of earlier PNR agreements.

The first (2004) agreement with the US was deposited in draft, with the draft Decision authorising its conclusion, and with an EM signed by Lord Filkin (the Department for Constitutional Affairs was then responsible for PNR matters). It was first considered by Sub-Committees E and F jointly on 11 February 2004 and not cleared from scrutiny. Correspondence ensued, and the document was still under scrutiny when the Decision was adopted and the agreement signed on 17 May 2004.

The draft Decision authorising the conclusion of an agreement with Canada, and the draft agreement itself, were deposited for scrutiny on 8 June 2005. An EM was signed by Baroness Ashton of Upholland on 21 June 2005, and the documents were cleared from scrutiny on 13 July 2005. The agreement was signed on 3 October 2005.

In 2006 the second (interim) agreement with the US was deposited in draft, with the draft Decision, and an EM was signed by Baroness Ashton of Upholland on 24 October 2006. The documents were cleared from scrutiny on 22 November 2006.

The third (2007) US Agreement was, when in draft, the subject of our inquiry which led to the report *The EU/US Passenger Name Record (PNR) Agreement* (Session 2006-07, 21st Report, HL Paper 108). It was cleared from scrutiny when that report was debated on 6 December 2007. The agreement signed on 26 July 2007 and applied from that date.

In none of these four cases was it ever suggested that the draft legislation should not be deposited for scrutiny in the usual way. We do not understand why it should have been thought that anything different applied in the case of the draft agreement with Australia.

We appreciate that negotiations with third countries can move fast, and that there may be problems about the Committee having time to consider drafts before the intended date of signature. The negotiations may proceed on a confidential basis, so that it is only shortly before that date that the draft Decision and agreement can be made available to Parliament. Where such issues arise (as they also have in the parallel case of Readmission Agreements) it may well be helpful for your officials to discuss them with our Clerk. We welcome your statement that your officials are reviewing the possibility of restricted negotiating mandates and restricted draft texts being shared with us at an early stage, and we look forward to hearing the outcome of this review.

We do not however see that there is ever any justification for draft Decisions authorising the conclusion and signature of an international agreement not being deposited for scrutiny in the usual way, together with the draft agreement to which they relate. We would be grateful for your assurance that this is what will happen in the case of future such agreements.

In this case, if the draft Decision had been deposited for scrutiny, it might well have been cleared from scrutiny before being agreed by the Minister. As it is, the Minister who agreed the Decision in June was agreeing to legislation which, because it had not been deposited, had inevitably not been cleared from scrutiny. We are treating this as a scrutiny override.

26 November 2008

PASSPORTS AND TRAVEL DOCUMENTS ISSUED BY MEMBER STATES: STANDARDS
FOR SECURITY FEATURES AND BIOMETRICS (14217/07)

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

I wrote to you in February 2008⁸ in response to your letters on the above Regulation and undertook to provide you with a substantive reply once cross departmental issues on the provision of a Fundamental Rights Analysis (FRA) had been discussed by officials. A supplementary EM (4217/07) [not printed] is now attached that contains an FRA in relation to this Regulation.

I am sorry that it has taken so long to provide you with a substantive reply.

6 November 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 6 November 2008 enclosing a supplementary EM in relation to this proposal. Sub-Committee F of the House of Lords Select Committee on the European Union examined this EM at a meeting on 26 November 2008.

The Committee is very disappointed with the delay in receiving the supplementary EM, for which you offer no explanation, and does not consider it to provide the substantive reply you mention in your letter. We do not believe this to be an adequate fundamental rights analysis: you do not explain how the interference with Article 8 ECHR (right to privacy) is justified in relation to personal information in circumstances involving children and, in particular, how this measure meets the requirements of necessity and proportionality. While we can see that securer identification of young people can contribute to the prevention of child trafficking, it is not acceptable that to date no serious balancing exercise has been undertaken to consider the benefits and risks associated with fingerprinting at a lower age.

We remain concerned that setting the age limit for exemption at 6 will lead to a generalised fingerprinting of children in the absence of persuasive evidence that fingerprinting of children at such a young age can provide reliable identification. Could you tell us what studies are currently under way to determine the reliability and usefulness of fingerprints taken from children? We understand that there is likely to be consensus between the Council and the European Parliament on the 6-year age limit. Could you detail to us the specific safeguards and fallback procedures that will be in place to deal with what could amount to a substantial number of unreliable matches?

The Committee has decided to keep the document under scrutiny pending receipt of the information requested and a progress report on negotiations.

26 November 2008

**PRÜM DECISION: CROSS BORDER COOPERATION: COMBATING TERRORISM AND
CROSS-BORDER CRIME (11045/07, 11045/1/07)**

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

Sub-Committee F of the European Union Select Committee considered your letter of 25 March 2008⁹ at a meeting on 30 April 2008. They were grateful for the explanation you gave of the points raised in my letter of 20 February 2008.

Towards the end of your letter you wrote: "We were the only Member State to maintain our parliamentary scrutiny reserve. All other Member States indicated that they could now agree the text as proposed." The Clerk explained to your officials on 1 April that this Committee had cleared the Prüm Implementing Decision from scrutiny by debate on 6 December 2007, and that the Technical Annex was cleared by the Sub-Committee on 20 February, as I stated in my letter. The Commons European Scrutiny Committee confirmed that they too had cleared both documents, so that there was no need to maintain a parliamentary scrutiny reserve which would prevent these documents being agreed by the United Kingdom at the Council on 17-18 April. However although this was on the agenda for the Council there is no mention of it in the Conclusions. Perhaps you could let us

⁸ Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 262

⁹ Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 294

know why the Prüm Decision and the subsidiary documents were not agreed, and when they are likely to be adopted.

1 May 2008

Letter from Meg Hillier MP to the Chairman

I am writing in response to your letter dated 1 May 2008 in which you wished to ascertain why the Prüm Council Decision was not adopted at the 17-18 April Justice and Home Affairs Council.

The Prüm item was removed from the Council agenda as not all Member States were in a position to lift their Parliamentary Scrutiny Reserves. It is anticipated that the Prüm Council Decision will be agreed and adopted at the June Council subject to Member States lifting their Parliamentary Scrutiny Reservations, and that the subsidiary documents; the Implementing Decision and Technical Annex will be adopted later in the year.

I am grateful to the Committee Clerk for the clarification on clearance of the Technical Annex from the scrutiny process.

As the Prüm Council Decision is, as stated above, likely to be adopted at the June Council, I would like inform you that on 7 May Member State's experts carefully considered the formal European Parliament opinion on Prüm and agreed to accept the recommendation that the term "mean" be replaced with "shall mean" in a limited number of Articles in the Council Decision.

I would like to make you aware that at the same meeting an amendment was proposed that has the effect of aligning the process for amending the Prüm texts. At present the Council Decision can only be amended via consultation with the European Parliament but the Technical Annex can be amended solely by the Council acting on by qualified majority. The amendment will result in a change to Article 33 of the Prüm Council Decision and Article 18(1) of the Implementing Agreement so that amendments to the Technical Annex will also require consultation with the European Parliament.

15 May 2008

READMISSION AGREEMENTS (ECRA) (13019/05, 13246/06)

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

Thank you very much for your letter of 8 April 2008¹⁰ which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 30 April 2008. We much appreciate the trouble you are taking to keep us informed about the position and to satisfy the scrutiny process.

You will recall from our earlier correspondence about the parallel agreements with Ukraine, Moldova and the West Balkan States that this Committee regrets the tactic adopted by the Government of voting against agreements which it supports, and which it knows that we also support for all the reasons given in my earlier letters. I understand that the Commons European Scrutiny Committee takes a different view, and that this puts you in a difficult position.

We understand that you cannot tell us about the terms of the draft agreement with Pakistan until the negotiations are completed, and that thereafter matters are likely to move fast. In the past, some of the difficulties have been caused by the fact that the House has been in recess at the relevant time. Unless this again occurs, ideally the solution would be for you to let us have the text of the agreement and an explanatory memorandum as soon as possible, and we would try to clear the Decision before signature. But if this is not possible then, provided that there are no significant differences between this agreement and earlier agreements – an important proviso – our view remains that the United Kingdom should agree to the Decision. Although it would not have been cleared from scrutiny we would, in reliance on paragraph 3(b) of the House of Lords Scrutiny Reserve, be content that you should give your agreement to the proposal in the Council.

1 May 2008

Letter from Meg Hillier MP to the Chairman

Thank you for your letter, and your constructive suggestion as to how we can approach scrutiny of these agreements.

¹⁰ Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 298

I have noted your concerns, which I share, regarding the scrutiny process of the EC Readmission Agreements with the Ukraine, West Balkans (Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia (FYROM), Montenegro and Serbia) and Moldova.

Whilst my officials take the scrutiny process seriously, regrettably there have been occasions when this cannot be completed prior to a vote. In the case of the West Balkans agreement these were to be voted on while your committee was not sitting. In Moldova's case, we had to act to avoid embarrassment due to a Moldovan delegation visiting Brussels with the intention of signing the agreement. We had already delayed a vote on this agreement, but, given the circumstances, a further delay would not have been justified. Negotiations on the Pakistan EC Readmission Agreement are now at an advanced stage. It is possible therefore that this problem may reoccur, given the tight time limit that we have for deciding whether to opt-in.

I fully accept that this is unsatisfactory, and would like to propose a modification in our approach, which you may find helpful. As you know currently your committee only receives these agreements' Explanatory Memoranda (EM), after clearance has been granted by the National Security, International Relations and Development Sub-Committee on Europe (NSID (EU)). There seems to be no reason why you cannot have an EM at the same time as NSID (EU) clearance is sought, for information only. Naturally while these documents remain classified, due to ongoing negotiations, it would not be normal practice to consult more widely. However once a proposal for a decision has been issued, we would be able to forward you an EM; and, provided it is not classified, a copy of the proposed agreement. This document could then be placed in the public domain, and you could be advised of the outcome of NSID (EU)'s consideration in due course. In my view this would not inhibit your ability to scrutinise EU business, would not adversely effect your decision making process, or limit your freedom to take any action that you deem appropriate; and it may, as is intended, assist you.

I hope you will find this suggestion acceptable, and would welcome your opinion.

6 June 2008

Letter from the Chairman to Meg Hillier MP

Thank you very much for your letter of 6 June 2008 which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 18 June 2008.

We much appreciate your suggestion for improving the scrutiny of readmission agreements. You will appreciate that draft legislation can be cleared from scrutiny only once the Committee is in a position to consider the legislation itself, together with an Explanatory Memorandum signed by the Minister. But if these documents can be seen in draft at an earlier stage this may help in getting them before the Committee at the earliest possible stage, which would be of benefit to all of us.

You mention that once a proposal for a decision has been issued you would be able to send us an EM and, provided it is not classified, a copy of the proposed agreement. What has happened in the past is that two draft Decisions have been deposited: one authorising the approval of the agreement, and one authorising its signature. The agreement is annexed to the first Decision, since there would otherwise be no indication of what was being approved. We do not recall in the past having received a draft Decision without the relevant agreement annexed; if this happened, we would not of course be in a position to clear it from scrutiny.

Otherwise however our position remains as I stated in my letter of 1 May: provided that there are no significant differences between a readmission agreement and earlier agreements, the United Kingdom should agree to the Decisions. If they have not been cleared from scrutiny we would nevertheless, in reliance on paragraph 3(b) of the House of Lords Scrutiny Reserve, be content that you should give your agreement to the Decisions in the Council

23 June 2008

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 23 June 2008. I am pleased that you found it of assistance.

I am sorry if my earlier letter was unclear, and hope that the explanation below provides some clarification.

The change to the process I am proposing to make is that in the majority of cases the Explanatory Memorandum (EM) is accompanied by the document to which it refers (the proposed Readmission Agreement) at the point at which it is submitted to the committee for scrutiny. At this stage most proposals are declassified. They contain the full text of the proposed agreement.

Provided current procedural requirements remain unchanged, and we have no reason to believe that it will alter, we should be able to proceed as outlined in my letter of 18 June 2008; which I believe, from your reply, is broadly acceptable to you.

16 July 2008

Letter from Meg Hillier MP to the Chairman

I am writing to advise you of the progress of the five outstanding ECRA mandates, following a review of current dossiers and future planning.

The ECRA negotiating mandate with Pakistan is at an advanced stage and a final agreement could be concluded later this year or early next. At present it is unknown when it will be concluded, and my concerns are that this may impact on the scrutiny timetable. My officials are aware of the need to take scrutiny forward in a timely manner and they will advise you of any developments at the earliest opportunity.

There has been little progress on the negotiating mandates with Algeria, Morocco, China and Turkey. I am satisfied that the EU Commission has attempted to take these forward to the best of its ability, but the delays reflect the difficulties in negotiating such multilateral agreements.

As you are aware ECRA's are Subject to complex and involved negotiations, and that their terms remain confidential while under discussion. Within these constraints, we will seek to advise you of progress in a timely manner.

You will also wish to be aware that the EU is looking at a range of measures to assist Georgia, and it is possible that this will include some form of readmission agreement. As yet we have little detailed information on the content of this package. We will be monitoring this, and will advise you should there be anything that comes under the scrutiny of your Committee.

I hope that you find this helpful. My officials will continue to closely monitor progress on all five outstanding mandates and will inform you of any significant developments.

7 October 2008

Letter from the Chairman to Meg Hillier MP

Thank you very much for your letter of 16 July 2008 which Sub-Committee F of the Select Committee on the European Union considered on 8 October 2008 at its first meeting after the recess.

Your letter does indeed make clear that, unless procedural requirements change, EMs will be accompanied by the draft Agreement in question. That procedure, outlined in your letter to me of 6 June, is indeed entirely acceptable, and very helpful. (You refer to a letter of 18 June, but that was the date on which the Sub-Committee considered your letter of 6 June).

We are very grateful to you for your help with this.

9 October 2008

Letter from the Chairman to Meg Hillier MP

Thank you very much for your letter of 7 October 2008. Sub-Committee F of the Select Committee on the European Union considered it on 29 October 2008.

We much appreciate your keeping us informed of the progress of negotiations (or, in most cases, lack of progress). We do indeed find this helpful, and are most grateful to you and to your officials.

We are glad that negotiations with Pakistan are making progress. You will remember from our earlier correspondence that we would of course if possible like to see the text of the agreement, its covering Decision and an explanatory memorandum as soon as possible, and we would try to clear the Decision and agreement before signature. But if this is not possible then, provided that there are no significant differences between this agreement and earlier agreements, our view (unlike the Commons Scrutiny Committee) remains that the United Kingdom should agree to the Decision even though this technically constitutes a breach of the scrutiny reserve.

31 October 2008

RETURNING ILLEGALLY STAYING THIRD COUNTRY NATIONALS (10737/08)

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

I am writing with reference to the above Directive, which was subject of an Explanatory Memorandum dated 26 October 2005.

I enclose a redacted copy of the latest draft of this Directive, which is LIMITE due to the Member States' positions recorded across the text, and these I have had to remove. I understand that a compromise text has been prepared which follows the form of the discussion draft. This text has yet to be debated by Member States, and this is likely to be available for release once they have taken a view on the content.

In the event that this Directive is agreed I will provide you with a copy of the agreed text, and any other information that may assist you.

30 May 2008

Letter from the Chairman to Phil Woolas MP to the Chairman

Sub-Committee F of the European Union Select Committee considered the text of this proposal, as agreed by the European Parliament at first reading, at a meeting on 8 October 2008. It was not possible to consider the proposal before the Summer recess, as suggested in paragraph 23 of the EM, because this was signed by your predecessor and received only the day after the recess began.

The Committee notes that the agreed proposal departs significantly from the original draft presented by the Commission in September 2005, on which we undertook an inquiry and published a report on 9 May 2006 (*Illegal Migrants: proposals for a common EU returns policy*, 32nd Report of Session 2005-06, HL Paper 166). We were given no opportunity to express our views on the amended text before agreement was reached on it in Council and in the European Parliament. We would like once again to register our disappointment for not having been placed in a position to undertake meaningful scrutiny of a proposal which has significant implications for Member States' immigration policies and which has been widely criticised.

The Committee is aware that the measure is unlikely to have any impact in the UK as the Government has not opted in to it. However, it may have an impact in the future, should the position on the UK's participation change. We seek your assurance that if the Government should, after adoption of the Directive, change its views on opting in, any proposal to do so should itself be subject to scrutiny, and an EM provided.

The Committee has decided to clear this document from scrutiny.

9 October 2008

SINGLE PERMIT FOR THIRD COUNTRY NATIONALS TO RESIDE AND WORK IN THE TERRITORY OF A MEMBER STATE AND ON A COMMON SET OF RIGHTS (14491/07)

Letter from Liam Byrne MP, Minister of State, Home Office to the Chairman

Thank you for your letter of 20 February 2008¹¹ about the European Commission's proposal on the Legal Migration Directives, in particular the single application procedure and common set of rights draft Council Directive. I am grateful for the opportunity to provide you with further detail.

You raised the question of other categories of worker being excluded from this Directive. The Commission proposal excludes certain categories of people from this measure on the grounds that they are covered by other Directives. For example, third country nationals who are posted workers in accordance with Council Directive 1996/71/EC are excluded from the scope as they are not considered part of the labour market of the Member State to which they are posted. Intra-corporate transferees, contractual service suppliers and graduate trainees under the European Community's GATS commitments are not included following the same principle. Seasonal workers are also not covered by the proposal given the specificities and temporary nature of their status. Third-country nationals who have acquired long-term resident status are also excluded from the scope of the proposal given their more privileged status and their specific type of residence permit. Exclusion from this Directive would not lead to less favourable conditions for these categories of workers as they are covered through other directives.

¹¹ Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 305

You also asked for a detailed analysis of the proposal's impact on border controls and to what extent the equal treatment provisions would impact on the policy that persons subject to immigration control should not have access to public funds.

The proposal creates a single application procedure for a single permit for third-country nationals seeking to reside and work in the territory of a Member State. Third-country nationals using this procedure would still be subject to border controls when entering the UK. However, a significant amendment to these provisions could lead to incompatibility with the Points Based System. Certain provisions in Article 12 would also create "pull" factors in that persons seeking to enter the UK for employment would be entitled to avail themselves of social security benefits, education and training, as explained below. This would put extra pressure on border controls, including pre-entry and after entry controls.

The UK's general position is that migrant workers subject to immigration control enjoy the same employment protections under employment law as resident workers. Accordingly, Articles 12(1) (a) and (b) are acceptable.

Article 12(1) (c) would provide non-EEA workers with equal treatment in respect of access to education and vocational training. This is at odds with the conditions under which non-EEA migrant workers are admitted. These conditions link their stay to undertaking the employment for which they sought entry and that stay may be curtailed if they cease to continue in that employment. If they wish to stay for some other purpose i.e. study then they will need to seek a variation of their leave accordingly and their immigration status may no longer be that of a person admitted for the purpose of employment. Under the existing system there are also separate arrangements for those seeking to enter or remain for the purpose of vocational training.

The equal treatment in social security provisions at Article 12(1) (e) may prevent the UK from imposing the "no access to public funds" rule on relevant third country nationals. This proposed Directive would require the UK to change domestic legislation to ensure that third country nationals, who were covered by the equal treatment provisions in Article 12 of the proposal, would have access to relevant benefits under the same terms as UK nationals.

Article 12 (1) (e) gives equal treatment with nationals at least with regard to all those social security benefits covered by EC Regulation 1408/71. This includes all UK contributory benefits, healthcare, child benefit and child tax credits and non contributory benefits including income support, Disability Living Allowance, Jobseekers allowance (income based). This article would have an impact on benefits that do not depend on the payment of contributions and would mean that third country nationals could access benefits from which they are currently excluded. It is Government policy that persons subject to immigration control cannot have access to public funds.

You have also asked why the Government considers that no question of fundamental rights arises from this proposal. This measure proposes a single application procedure for third country nationals, resulting in the issue of a permit to reside and work, and to grant a common set of rights to the third country workers legally residing in a Member State. We have considered the effect of the Directive on the rights under Article 6(2) of the Treaty of the European Union. The common set of rights proposed in this Directive relate to employment, housing and education. It is compatible with the fundamental right to education as it places no restriction on a third country nationals' access to education. The Directive is also compatible with the fundamental right of freedom to choose and practice a trade or profession as it provides for third country nationals to enter into a chosen profession and allows them to change into new employment once in the EU. Other aspects of the Directive do not in themselves relate to any fundamental rights as provided by the EU and as such no fundamental rights are engaged. The Directive can therefore be seen to respect fundamental rights.

I hope this information is helpful to the Committee and I would welcome any further queries that you may have.

19 September 2008

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

Thank you for the letter of 19 September 2008, which your predecessor sent in reply to my letter of 20 February 2008, nearly seven months previously. Sub-Committee F of the European Union Select Committee considered your letter at a meeting on 15 October 2008. We are grateful for the very detailed reply to our questions. There are no further issues we would like to raise at this stage. However, we would be grateful for information on the state of play in Council with regard to this proposal.

The Committee decided to keep the document under scrutiny pending a progress report on negotiations.

16 October 2008

Letter from Phil Woolas MP to the Chairman

Thank you for your letter of 16 October in which you indicated that the European Union Select Committee intended to keep the above draft Directive under scrutiny but asked for an update on the progress of the measure.

The proposal has recently been considered further by the Migration and Expulsion Working group and by the Strategic Committee on Immigration, Frontiers and Asylum. The Presidency intends to report to the JHA Council on 27-28 November on the progress of negotiations so far. Agreement on the Directive is not in prospect at the moment.

Much of the discussion of the Directive so far has focused on its scope and definitions relating to its application. It is now proposed that the scope of its application should extend not merely to those third country nationals admitted or resident for the purpose of work but to any third country national issued with a uniform format residence permit and allowed to work. This means that the scope of the Directive, including rights of equal treatment, potentially extends to, for example, students, working holidaymakers and those admitted for reasons of family reunion (other than family members of those exercising rights of free movement). This means that the Directive potentially undermines the ability of educational establishments to charge higher fees not only to third country nationals admitted for the purpose of work but also to those admitted for the purpose of study. A number of Member States have reservations on the scope of the proposal, including whether it should cover those present for temporary or seasonal work.

24 November 2008

UNIFORM FORMAT FOR THE NUMBERING OF VISAS (8595/08)

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

Sub-Committee F of the Select Committee on the European Union considered this document at a meeting on 18 June 2008.

The Committee believe that both the timing and the content of the Explanatory Memorandum are unsatisfactory. As to the timing, the Commission document is dated 14 April 2008, and the Council document 18 April. Publication must have been between these two dates. The document was deposited in Parliament on 23 April. The Cabinet Office Guidance currently requires that EMs should be submitted within 10 working days of the deposit. This would have taken us to 8 May. In fact it was only on 28 May that you signed the EM: 24 working days after deposit of the document, and some 6 weeks after its publication.

You will be aware that the Government, during the Report Stage of the European Union (Amendment) Bill in the House of Lords, committed itself to EMs relating to opt-in decisions being provided in future within 10 working days, not of deposit, but of publication of the document. It is vital that this timetable should be strictly adhered to, especially since the Government has undertaken to take the views of this Committee into account only if formulated within 8 weeks of publication.

I turn now to the content of the EM on the issue of opting in. Paragraph 13(iv) says only: "HM Government is considering whether to opt-in to this proposal. We seek further legal advice to clarify our position." This gives no indication as to whether the doubts about opting in are on policy grounds, or legal grounds, or both. The United Kingdom is already governed by the 1995 Regulation. If there are policy grounds for doubting that the UK should be party to a Regulation simply amending the format of numbering of visas, we should like to know what they are.

There are respectable legal grounds for arguing that an instrument amending a measure already binding on the UK is itself binding on the UK without any need for a formal opt-in. If this is the issue on which legal advice is being sought, it would surely have been possible for the EM to say so, and to explain the arguments. We believe that unless there is agreement between all the EU institutions and the UK that no formal opt-in is required for the UK to be bound, then the only safe course is for the Council to be notified that the UK does indeed wish to be bound by the Regulation.

We will keep this document under scrutiny until we know the Government's views on the policy and legal arguments for and against the United Kingdom opting in to the proposal, and have had an opportunity to comment on them. In this connection we draw attention to the time constraints. Paragraph 13(iv) of the EM states: "If we decide to opt-in, we will need to complete.....Parliamentary

scrutiny clearances before 23 July". We doubt whether this is correct. The Protocol on the position of the UK states that opting in must be done "within three months after a proposal or initiative has been presented to the Council", which would take us to a date between 14 and 18 July. I therefore look forward to receiving an early reply to this letter to give us time to consider the legal issues well before the end of the three-month period.

23 June 2008

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 23 June seeking clarification on several issues arising out of the recently deposited Explanatory Memorandum (EM) on the above named Commission proposal.

On the question of depositing the EM with the Committees, although the original deadline for deposit was 8 May, an extension to that date was agreed with the Clerks to both your Committee and the European Scrutiny Committee on 28 April. This was requested in order to give officials time to take a view on the Commission assertion that, as the UK was participating in the parent Regulation, it had automatically opted in to the amending Regulation. The revised deadline was set for 29 May, with the EM deposited on 28 May. I have instructed my officials that we must meet agreed deadlines.

Your letter states that the EM could also have provided more detail on the issues under consideration in relation to the use of the opt-in. At the time of drafting the EM, cross-Whitehall opinions were being canvassed to provide information on which to base a recommendation to Ministers to either opt-in or not to opt-in to the amending Regulation. Information was incomplete, and it was not possible to provide specific details on the UK's opt-in options. In considering whether or not to opt-in HM Government looks at the implications for UK sovereignty; consistency with UK policy and practice; wider political implications; the wider financial or economic implications and operational practical implications and costs.

As regards the legal position, even though the UK participates in the parent Regulation, it is the UK's position that we do not automatically opt-in to amending Regulations, and it is for the UK to take individual decisions as to whether it will or will not opt-in to an amending Regulation. The application of the current Title IV TEC opt-in Protocol to amending measures would be clarified under the Lisbon Treaty. In the meantime, if and when we wish formally to notify the Council of our decision whether to opt-in to this measure, our notification will preserve the Government's position. This position is supported by the Council Legal Service.

The Government continues to investigate the impact on the UK if a decision is taken to opt-in to this amending Regulation. Once all the necessary information and views are received from other departments and the data analysed, a letter will be forwarded to the National Security, International Relations & Development (EU) Ministerial Committee seeking other Ministers' agreement to the proposed decision. When a decision has been taken it will be conveyed to both the European Union Committee and the European Scrutiny Committee.

Finally, the Committee raises the deadline for opting-in to this measure. We have until 23 July - the three month period measured from the date of the last official translation of the dossier - to convey our decision to the Council to opt in or not to opt-in to this amending Regulation. The proposal concerning the amending Regulation is due to be considered by the European Parliament during the July plenary, probably on 8 July.

7 July 2008

Letter from the Chairman to Meg Hillier MP

Thank you for your letter of 7 July 2008 which Sub-Committee F of the Select Committee on the European Union considered at a meeting on 16 July 2008.

In my letter of 23 June I explained that the Sub-Committee was critical of the fact that the Explanatory Memorandum was dated 28 May, 24 working days after the deposit of the document. You point out in your reply that the Clerk to the Sub-Committee had agreed an extension to 29 May. The Clerk has confirmed that this is the case, and has explained that he overlooked this when informing the Committee about the relevant dates. He has asked me to convey to you his apologies for his mistake, which led to the Committee making criticisms which were unjustified.

Thank you for explaining why the deadline for the United Kingdom opting in is 23 July. We have today been told by officials that Ministers have decided that the United Kingdom will not be opting in. Officials have also today informed us that, given that the UK is not party to the Schengen system, and hence not part of VIS, there will be no disadvantage if visas issued by the UK to nationals of third

countries are not machine-readable if those nationals wish to travel from the UK to Schengen States. We are told that there would also be financial repercussions if the UK opted in.

The EM gave no indication of this. In my letter of 23 June I explained that we would keep the document under scrutiny until we knew the Government's views on the policy arguments, and it would have been helpful if your letter of 7 July had dealt with this. Now however that we have been made aware of these points, we are prepared to clear the document from scrutiny.

16 July 2008

VISA INFORMATION SYSTEM (VIS) (6970/08)

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

Thank you for your letter of 27 March 2008¹² on the Explanatory Memorandum on the Commission's proposal to amend the Schengen Borders Code regarding the use of the Visa Information System.

In your response, you queried the Home Office's position regarding the lack of a fundamental rights analysis in the Explanatory Memorandum. As you are aware, the Commission's Communication outlines the proposal to issue a Regulation to amend the Schengen Borders Code (SBC) by establishing common rules on the circumstances in which the Visa Information System (VIS) should be accessed at the external borders. The Communication itself is not a legislative proposal and therefore does not require a Fundamental Rights Analysis.

20 May 2008

Letter from the Chairman to Meg Hillier MP

On 27 March I wrote to you to say that Sub-Committee F of the European Union Select Committee had considered this proposal at a meeting the previous day and regretted the lack of a fundamental rights analysis. I explained that we did not accept your argument that this need not be provided for proposals which the UK does not participate in, and that the Committee would keep this document under scrutiny until it was in a position to look at the substance of the proposal.

On 14 May you replied to me that the Home Office had not carried out a fundamental rights analysis for this proposal "while the wider issue of Fundamental Rights Analysis remains under review". The Clerk got in touch with your officials to point out that the position was no longer under review, but had been decided the previous week. He sent them a copy of a letter of 8 May from Michael Wills MP, the Minister of State at the Ministry of Justice, to the Chairman of the Commons European Scrutiny Committee, copied to me, stating on behalf of the Government that "Government Departments should continue to provide a complete explanatory memorandum, inclusive of the fundamental rights analysis in respect of Article 6(2) of the Treaty on European Union, for all EU legislative proposals submitted for scrutiny."

On 20 May you wrote to me a second letter. This is headed "Doc 6970/08: Commission Communication on the Proposal to issue a Regulation....", and you state that, because the document is a Communication and not a legislative proposal, no FRA is needed. This would be true if the document was indeed a Communication. However the Clerk again got in touch with your officials to point out that the heading of the letter was erroneous, and that the document was a proposal for a Regulation, and not a Communication, as was clear from the document itself and from your own EM. He was told by your Private Secretary that you wanted to write a third letter. Despite reminders this has not however been received; nor has the revised EM which we hoped would accompany it.

The Sub-Committee considered the situation at their meeting on 16 July, the last before the Summer recess. They note that you have been making strenuous efforts to improve the scrutiny process, and much appreciate this. They felt therefore that they should draw your attention to this very unfortunate exception. They hope that by the time Parliament resumes they will be able to consider the document again, this time with a full EM, including a fundamental rights analysis. Meanwhile they continue to keep it under scrutiny.

16 July 2008

¹² Correspondence with Ministers, 11th Report of Session 2008-09, HL Paper 92, p 309

Letter from Meg Hillier MP to the Chairman

Thank you for your letter of 16 July 2008. I am very sorry for the delay in responding to you on the subject of a Fundamental Rights Analysis with regard to the above Proposal.

I would like to bring to your attention the requested revised EM, deposited today through normal procedures as a Supplemental EM to 6970/08.

The amendments to the VIS put forward in the Proposal do not in themselves raise any fundamental rights issues. However, we have examined the right to respect for private and family life and the right to the protection of personal data as these rights are arguably engaged as a result of the proposed obligation on participating states to make certain use of those personal data held in the VIS. We believe that the Regulation to which the amendments relate respects the rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The UK is not participating in the adoption of this Proposal and has no intention of participating in the foreseeable future. Consequently, the rights noted above will not be engaged by the Proposal as a result of UK law or policy.

As ever, I would be very happy to discuss this matter further with you if that would be helpful.

31 July 2008

Letter from the Chairman to Meg Hillier MP

At a meeting on 8 October Sub-Committee F of the European Union Select Committee considered this proposal, together with your letter of 31 July and the Supplementary Explanatory Memorandum. We are grateful for the fundamental rights analysis included in the revised EM, and accept your apology for the delay in supplying it. I need not repeat the reasons given both to you and to Liam Byrne in previous correspondence explaining why in our view a FRA is important whether or not the instrument in question will be binding on the United Kingdom.

We note that, since your EM, the European Parliament has considered the proposal and made an amendment derogating from the strict requirements of the original proposal, and that this amendment is likely to be agreed by the Council.

We clear the document from scrutiny.

9 October 2008