HOUSE OF LORDS
European Union Committee

House of Lords
London
SW1A 0PW
www.parliament.uk/hleue

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

This edition includes correspondence from 18 May to 30 November 2010.

JUSTICE AND INSTITUTIONS (SUB-COMMITTEE E)

CONTENTS

BELGIAN PRESIDENCY PRIORITIES FOR JUSTICE

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

I am writing to give you an overview of the Belgian Presidency's priorities in the areas of justice which the Ministry of Justice leads on. I hope that this will help in the planning of the scrutiny of dossiers that are likely to head to the Justice and Home Affairs (JHA) Council during this period. The Belgian Presidency is planning to host the following JHA Councils:

15 – 16 July (Informal Council) in Brussels

7 – 8 October in Luxembourg

8 -9 November in Brussels

2- 3 December in Brussels

Belgium took over the rotating European Union Presidency on 1 July 2010.

In the area of criminal law, the Belgian Presidency will give priority to the directive on combating sexual abuse, sexual exploitation of children and child pornography. I wrote to you on 30 June to inform you of the Government's decision to opt-in to this proposal. The Presidency hope to make progress both in the Council and the European Parliament and may schedule discussion at the JHA Council in October to agree a mandate or general approach for negotiating with the European Parliament.

The Presidency also wants to begin negotiations on a Directive on the Right to Information. This is the second measure of the "roadmap" to strengthen the procedural rights of suspected or accused persons in criminal proceedings, which is part of the Stockholm Programme. The timetable for negotiations will depend on when the Commission publishes its proposal.

The Presidency will also look at a range of cross-cutting issues, including implementation of adopted mutual recognition instruments and practical cross-border co-operation in border areas. They will also seek to conclude negotiations on the European Protection Order.

The Presidency will oversee the beginning of negotiations with the Council of Europe concerning the EU's Accession to the European Convention on Human Rights.

The Presidency will seek to gain agreement to the EU's negotiating mandate for a proposed Agreement between the European Union and United States of America concerning the protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation in criminal matters.

The main proposal under negotiation in the area of civil judicial co-operation, and on which the Presidency will concentrate its efforts, is Succession and Wills. As you will recall, the UK decided not to opt-in to this proposal.

Following the authorisation of enhanced cooperation in the area of choice of law in divorce (Rome III) by both the Council and the European Parliament, the Presidency is likely to want to conclude negotiations on the proposed implementing Regulation. The UK will not be participating in this measure.

26 July 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter dated 26 July 2010 which was considered by the Justice and Institutions Sub-Committee at its meeting of 28 July 2010.

We are grateful for the advance warning of the forthcoming Justice and Home Affairs Council meetings and look forward to scrutinising the forthcoming legislative proposals you highlight.

29 July 2010

Letter from the Chairman to James Brokenshire MP, Parliamentary Under Secretary for Crime Prevention, Home Office

Thank you for your letter dated 30 June 2010 which was considered by the Justice and Institutions Sub-Committee at its meeting of 28 July 2010.

We are grateful for the advance warning of the forthcoming Justice and Home Affairs Council meetings and look forward to scrutinising the forthcoming legislative proposals that you highlight which fall within this Sub-Committee's remit.

29 July 2010

CIVIL AND CRIMINAL JUSTICE: STOCKHOLM PROGRAMME (LEGAL ISSUES ONLY) (8895/10)

Letter from the Chairman to James Brokenshire MP, Parliamentary Under Secretary for Crime Prevention, Home Office

Thank you for your Explanatory Memorandum of 7 June 2010. The justice and general criminal law aspects of this were considered by the Justice and Institutions Sub-Committee at its meeting of 30 June. We decided to clear these parts of the Communication from scrutiny. The other aspects of the Communication have been cleared by the Home Affairs Sub-Committee and are the subject of separate correspondence.

The Committee agrees with the Council's Conclusions that the Commission has not focussed on the remit given it by the Stockholm Programme itself. In a significant number of cases, including those highlighted in your Explanatory Memorandum, the Commission contemplates moving directly to a legislative proposal in areas where the Council requested prior consideration and enquiry. In some other areas, it has failed to respond to some requests to bring forward proposals, for example under Article 70 TFEU and to amend the proposal on access to documents. Some of the actions it includes, such as the approximation of customs infringements and penalties, appear to have only a tenuous link to the objective of delivering an area of freedom, security and justice.

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

We do not require a response to this letter.

1 July 2010

CIVIL JUSTICE: CONTRACT LAW (11961/10)

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

Your Explanatory Memorandum on this Green Paper was considered by the Justice and Institutions Sub-Committee at its first meeting following the summer recess, on 6 October. We are grateful for your account of the Commission's paper and note that the Government are undertaking a consultation on the issues it raises.

As you know, the Committee published a report in June 2009 addressing many of the issues raised in the Green Paper - European Contract Law: the Draft Common Frame of Reference, 12th Report 2008-09, HL 95. The Committee's views have not changed since the publication of that report.

We remain opposed to the harmonisation of the general law of contract, considering that this area of law is best left to the Member States. We have not seen evidence that the benefits of harmonisation would outweigh the costs of the upheaval in legal relations which would inevitably follow the replacement of all the national systems of contract law by an EU framework. We understood that, in the light of the conclusions of the Council, a harmonising approach was not on the agenda but it appears that the Commission has pressed on regardless.

The Committee is sceptical of the value of an optional instrument. At the time of our report, there did not appear to be support for this among the business community or consumer organisations in the UK, and we had no evidence that there would be net benefits. We would wish to see an impact assessment before lending this option support, and will be interested in the views on it of respondents to the Government's consultation.

On present information the least objectionable option would be option 2 in the Green Paper: the transformation of the Draft Common Frame of Reference into a "toolbox" for the use of legislators.

We should be very interested to see the results of your own consultation in due course, in particular to see whether they provide evidence of the benefits and costs of an optional instrument and whether that option has received support.

Meanwhile we retain this matter under scrutiny.

8 October 2010

CIVIL JUSTICE: ROME III (8143/10, 8176/10)

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

I am writing to update your Committee on the progress of the negotiations on the proposed enhanced cooperation in the area of choice of law in divorce.

As you are aware, the Spanish Presidency has pushed hard to get agreement on these proposals and the momentum from Member States steadily increased to the point that 14 have decided to participate in the implementing Regulation. They are: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

At the Justice and Home Affairs Council on 4 June the Presidency opened the discussion by acknowledging that some Member States (which included the UK) had Parliamentary scrutiny reservations. A number of Member States intervened to support the use of enhanced cooperation in this area while others said that, while they would not participate at this stage, they would observe the negotiations with a view to possibly participating later.

I maintained the position the UK has held for some time, namely that we had decided not to participate in the original proposal in 2006 and, whilst it was highly unlikely that this position would change, we had no desire to prevent others who wished to proceed.

As there was no opposition, the proposed authorisation Decision was agreed without a vote, as was agreement to a general approach on key points in the proposed implementing Regulation.

In the European Parliament the JURI (Legal Affairs) Committee has given its unanimous support for the proposed authorisation Decision and the LIBE (Civil Liberties, Justice and Home Affairs) Committee has also indicated its approval. The Parliament confirmed its support at its plenary session on 16 June.

For your information I enclose copies of the latest texts of each of these proposals. The changes that have been agreed to the proposed authorisation Decision are mainly technical. You will see that further changes will be needed to reflect the full list of Member States that have now agreed to participate in the enhanced cooperation.

The changes to the proposed implementing Regulation are also mainly technical in nature and once again amendments will be necessary to ensure the full list of participating Member States is recorded (Recital 6). The main substantive changes are the introduction of Recital 10a which states that national law will determine how to deal with cases of multiple nationalities; Recital 21a and Article 7a which clarify that a Member State whose law does not provide for divorce or does not recognise the marriage in question will not be required to pronounce a divorce under the Regulation; Article 1(2) which clarifies the process which will allow Member States to join the enhanced cooperation later; and Article 3(2a) which stipulates that if the law of the forum allows, parties may designate the law applicable during the course of proceedings. Negotiations on this proposed Regulation will continue and are likely to conclude under the forthcoming Belgian Presidency. I shall keep your Committee informed of any significant further developments.

21 June 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your Explanatory Memorandum of 25 May 2010 and your letter of 21 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 30 June.

We note that Council has agreed the decision to authorise enhanced co-operation. Given the way in which this matter was raised in the Council, and particularly in the light of the UK's announcement

that it was not seeking to participate in enhanced co-operation, we understand the circumstances in which it was necessary to override Parliamentary scrutiny.

We have considered whether the proposals are compatible with the principle of subsidiarity and concluded that they are. However, we are disappointed that the Commission has not produced an updated Impact Assessment, given the criticisms of the Impact Assessment for its 2006 proposal set out in our report "Rome III-choice of law in divorce" (52nd Report of session 2005-06).

We are sympathetic to your policy not to participate in this initiative. However, before reaching a final decision on whether to clear this proposal from scrutiny, please can you let us know, within the usual 10 day deadline, whether the Commission will be producing a further Impact Assessment and also the outcome of the consultation mentioned in paragraph 23 of your Explanatory Memorandum.

1 July 2010

Letter from the Rt. Hon. Kenneth Clarke MP, to the Chairman

Thank you for your letter of 1 July. You asked whether the Commission will be producing a further impact assessment and also the outcome of our consultation on these proposals.

I share your disappointment that the Commission did not produce an updated impact assessment. Ever since the possibility of enhanced cooperation in this area was first raised the UK has called upon the Commission to conduct a new assessment. As you will be aware from the Commission's proposals, it considered there was no need to undertake a new assessment because it believed the one completed when the original Rome III proposal was issued in 2006 covers the same subject matter.

Irrespective of the quality of the original impact assessment the UK argued that a new assessment was necessary to take account of the different issues that arose as a result of enhanced cooperation. In particular we said there was a need to analyse specifically the effect of the proposal between those Member States who were participating and those not, the effect on external competence, and the effect on the acquis.

Unfortunately it soon became clear that the Commission had no intention of backing down and, while the UK had some support on this point, it was not enough to prevent the enhanced cooperation proceeding. Coupled with the fact that the impact on the UK of the Commission's proposals is likely to be minimal, because we do not intend to participate and our family courts do not generally apply foreign law, the Government decided not to pursue the matter here. However it will consider any future proposals for enhanced cooperation carefully and ensure that all Treaty requirements are rigorously applied including, where necessary, proper impact assessments to determine the relative impacts on participating and non-participating Member States.

With regard to consultation, the then Government consulted on the Commission's Green Paper published in 2005 and the original 2006 Proposal for a Regulation. As I understand your Committee was informed at the time, the responses supported the continuing use of the law of the forum. The current proposals on enhanced cooperation were brought to the attention of the International Family Law Committee – a group of senior judges, lawyers and academics with expertise in international family law matters – and there were no objections to the Government's proposed course of action.

19 July 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter of 19 July 2010. This was considered by the Justice and Institutions Sub-Committee at its meeting of 28 July. We are grateful for the further information you have provided and have decided to clear document 8176/10 from scrutiny.

29 July 2010

COMMERCIAL LAW: LATE PAYMENTS IN COMMERCIAL TRANSACTIONS (8969/09)

Letter from Mark Prisk MP, Minister of State for Business and Enterprise, Department for Business, Innovation and Skills, to the Chairman

Further to my predecessor's letter of 18 March, I am writing to provide an update on the current position, to provide assurances on the outstanding issues from your Committee, and consequently to seek your agreement to removing this Directive from scrutiny.

UPDATE

The Commission's revised proposal for a Late Payments Directive was published in April 2009. Your Committee retained the Directive under scrutiny, whilst being supportive of the UK's overall position and approach.

Discussions within the Council on this Directive have continued and there is now the possibility of a first reading agreement under the Belgian Presidency. Negotiations in the working group have progressed well and the current draft text represents a package which will improve the situation for UK businesses trading in Member States, whilst avoiding undue additional burdens.

The key provisions of the current draft of the Directive are:

— a 30 day upper limit on payment periods for public authorities;

— freedom to negotiate payment periods and interest rates in contracts between undertakings;

— a fixed lump sum payment for recovery costs; and

— a fixed statutory interest rate for public authorities.

The current text meets the UK's key aims of speeding up public sector payments and providing suppliers with the certainty of an upper limit on payment periods from public authorities, whilst maintaining business-to-business contractual freedoms (which can be vital for new and growing businesses seeking new markets).

The public sector in the UK generally has a good record for paying on time. Therefore I believe that our key aim should be to improve terms outside of the UK without increasing the UK regulatory burden. To this end, our overall aim in negotiations will be to:

— be flexible where possible to ensure swift agreement of the Directive which will help businesses across Europe in the current economic crisis;

— seek a balanced package which is clear and simple for businesses to understand but also provides the right incentives for public authorities to pay their invoices on time and encourages the public sector to act as an exemplar.

OUTSTANDING ISSUES

The previous Government provided evidence for scrutiny before Parliament was dissolved in April 2010. I note that you have some outstanding issues which I would like to take this opportunity to answer.

You expressed concern that previous versions of the Directive provided a third tier of financial compensation for suppliers dealing with public authorities (in addition to a fixed compensation rate and fixed interest rate). This provision has now been removed from the draft (despite the European Parliament being in favour) following unanimous opposition in Council. We believe that the penalty regime in the current draft Directive meets our objectives and it is also easy for businesses to understand and apply.

You expressed concern about the references to compensation in Articles 4 and 5. In the light of the previous point on penalties, the reference to compensation has now been removed from Article 5. It remains, however, in Article 4. I am advised that it is right to refer to 'compensation' in Article 4 as the lump sum and the additional amounts which can be claimed are intended to reimburse the creditor for actual costs incurred. The intention is that the debtor be excused from paying additional actual costs if the debtor was not responsible for the delay.

From discussions that have taken place it is now clear in the current draft that whilst Public Authorities are obliged to pay the statutory interest rate, individual businesses are able to negotiate a different interest rate in transactions between themselves, subject to this rate not being grossly unfair. This retains contractual freedom for businesses and incentivises the public sector to act as an exemplar.

Finally, some Member States would like to exempt certain Public Authorities such as Healthcare from the more stringent provisions of the Directive. The UK will aim to limit any relaxation of this provision.

I hope that you will agree that the proposed negotiating approach is the right one, and that we are right to seek to ensure that the proposal is balanced and provides certainty for businesses within a clear and simple regime. I would therefore ask you to consider clearing this document from scrutiny.

20 July 2010

Letter from the Chairman to Mark Prisk MP

Thank you for your letter of 20 July. This matter was considered by the Justice and Institutions Sub-Committee at its meeting of 28 July. We are grateful for the further information you have provided and for a copy of the Presidency text of 24 June provided by your officials.

In the light of this further information we have decided to clear this document from scrutiny.

29 July 2010

CRIMINAL JUSTICE: COMBATTING SEXUAL ABUSE, SEXUAL EXPLOITATION AND CHILD PORNOGRAPHY (8155/10, 14279/10)

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

I am writing to inform you that the United Kingdom has notified the Council of the European Union that it will be opting in to the Directive on the Combating the Sexual Abuse, Sexual Exploitation of Children and Child Pornography, repealing Framework Decision 2004/68/JHA.

As you are aware, this proposed Directive is based on the draft Framework Decision proposed by the Commission last year on which negotiations were not completed before the Lisbon Treaty came into effect.

The Directive was published on 29 March and we had our usual 3 month period to decide whether to opt in. I appreciate that due to the election period the Scrutiny Committees have not had the opportunity to consider this proposed Directive before the Government has made its decision to opt-in to the proposal.

The Directive seeks to enhance efforts to combat the sexual exploitation of children through legally binding minimum rules on offences, sanctions and victim care provisions. This measure is one that the Government wishes to support as a matter of policy, and we believe we will be far better placed to negotiate on these matters effectively by participating in the proposed measure from the start rather than by seeking to do so from the sidelines. A factual Explanatory Memorandum (EM) about this Directive was sent to the Scrutiny Committee on 25 May. A revised EM outlining our policy approach to negotiations on individual Articles in the Directive is being prepared and will be sent to you shortly.

Negotiations on this Directive are still at a relatively early stage and there is no set timetable for the adoption of this measure, although it will be a Belgian Presidency priority.

30 June 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your Explanatory Memorandum dated 25 May 2010 which was considered by the Justice and Institutions Sub-Committee at its meeting of 30 June 2010.

We have decided to retain the matter under scrutiny.

The Committee notes that the Government's Explanatory Memorandum does not express any positive or negative statements about the broader policy aims of the proposed Directive. In considering the failed Framework Decision last year this Committee expressed its "own support for the initiative behind this proposal" and welcomed the Commission's endeavours to "extend and consolidate the existing measures addressing these crimes". We trust the Government have opted in to this proposal. Do the Government share the Committee's views and welcome the wider policy aims behind this proposal?

As to the content of the proposed Directive, your main concerns appear to be either matters that require clarification as the negotiation process unfolds or the compatibility of these measures with existing national laws. In relation to the former, the Committee would like to take this opportunity to lend its support to your attempts to clarify the definitions in Article 4 of "pornographic performance" and the meaning of "long term" in Article 18. As to the latter, i.e. the compatibility of the proposal's measures with existing national law, your Explanatory Memorandum says that some of the provisions providing support to victims and witnesses are not set out in primary legislation but are "part of current practice and guidance issued by the relevant law enforcement and criminal agencies". What

solution do the Government intend to propose to the other Member States to address this issue or will the Government accept the need for implementing legislation?

Finally, in relation to the section of your Explanatory Memorandum addressing the protection of civil liberties, the Committee would like to express its support for the Government's attempts to tighten the drafting of the offences in order to avoid the criminalisation in the UK of lawful sexual activity involving those above the age of consent (16).

We look forward to considering the development of this proposal and to receiving your answers to our questions within the usual ten day deadline.

1 July 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter dated 30 June. It was considered by the Justice and Institutions Sub-Committee at its meeting of 14 July 2010. We retain this matter under scrutiny.

This Committee has repeatedly expressed support for the European Union's efforts to legislate in this field. Whilst we welcome the Government's decision to opt in to this proposal we will need to consider the final text of the proposal.

We look forward to considering the Government's latest Explanatory Memorandum in due course and request that it address the questions raised in our letter of 1 July.

15 July 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your Supplementary Explanatory Memorandum dated 19 July 2010. It was considered by the Justice and Institutions Sub-Committee at its meeting of 28 July 2010.

We have decided to retain the matter under scrutiny.

As we have said this Committee supports the European Union's efforts to legislate in this field and we welcome your clear stance expressed in this latest Explanatory Memorandum that the proposal will "ensure that there is a consistently high standard of protection available to children from sexual exploitation and abuse across the Union".

The Committee has, in its previous correspondence, already expressed its support for your attempts to clarify the definition of "pornographic performance", the requirement that treatment programmes are made available to people charged or convicted of sexual offences against children and the tightening of the offences in order to avoid the criminalisation of lawful sexual activity involving those aged above the age of consent (16). To this list we now add our endorsement to your efforts to clarify the scope of the new offence of grooming and its dependence on grooming via communication technology.

Finally, in relation to your lack of support for the provision which requires Member States to automatically recognise and enforce each Member States' disqualification orders (i.e. Article 10(4)). Whilst we recognise that the UK already has a "sophisticated" vetting and barring system we note that you intend to seek a "more flexible approach to the holding of disqualification information and the mutual recognition rules for disqualifications". However, is there a danger that too much flexibility could undermine the purpose of this provision and could you explain to the Committee how a flexible mutual recognition system would work?

We look forward in due course to considering the development of this proposal and to receiving your answer to our question.

29 July 2010

Letter from Crispin Blunt MP to the Chairman

Thank you for your letter of 29 July in response to the Explanatory Memorandum deposited by the Justice Secretary on 19 July about the draft Directive referred to above and welcoming our decision to opt-in to this Directive. I understand that the Committee have retained the document under scrutiny. I am writing as the Duty Minister for the Ministry of Justice.

In your letter you express your support for the positions outlined by the Government in our Explanatory Memorandum in respect of seeking clarity around the criminal offences, including that on grooming, whilst ensuring they do not catch legal activity amongst those above the age of consent (16

in the UK). You also expressed your support for the position we have taken in respect of the availability of sex offender treatment programmes.

As the Justice Secretary is away I am writing to respond to your queries, to update you on progress of the negotiations and seek your agreement to provisionally approve Articles 1 to13 (except Article 10) at the Justice and Home Affairs Council on 7-8 October.

Firstly, with respect to the negotiations, I am pleased to inform you that Article 8 of the draft Directive has been amended to address concerns highlighted in the Explanatory Memorandum, about how the offences in Articles 3- 5 may have inadvertently applied to legal sexual activity involving people over the age of consent. We believe that it now makes it clear that Member States may decide whether to criminalise consensual activity involving people over the age of consent where there is no abuse and expect that the exemptions will be added to Article 8. The Article also allows for Member States to decide how some of the offences are applied in cases which involve certain consensual activity between children. The amendments we have sought have a similar effect to the exemptions agreed in the 2004 Framework Decision and the 2007 Council of Europe Convention on Combating the Sexual Exploitation of Children. They are also in line with the guidelines on prosecutorial discretion used by the Crown Prosecution Service in this sensitive area.

With regard to the issue of 'pornographic performances', following on from discussions in Working Groups, we think that it is now clear that these offences will be covered by offences set out in the Sexual Offences Act 2003. In respect of the 'Solicitation' offence set out in Article 6 of the Directive, unfortunately only one other Member State supported the UK in asking for the offence to be 'technology neutral' and apply offline as well as online. The vast majority of Member States do see this as a technology offence and believe that similar offline behaviour may already be caught by their preparatory offences. While the Government regrets that it has been unable to amend the scope, we have no concerns with the offence as it now stands.

In light of the progress made during the negotiations on the Criminal Law offences (Articles 1-13, but not Article 10) the Presidency is seeking to agree a general approach at the Justice and Home Affairs Council on 7-8 October. It is taking the step of seeking a "partial" general approach in order to take forward negotiations with the European Parliament, which is examining the Directive in parallel. As our concerns on these Articles are being addressed I am seeking your Committee's agreement to our indicating provisional approval of these Articles. Negotiations on the other Articles will continue at working group level after the JHA Council and we will continue to update you on progress both in the Council and with the European Parliament.

Regarding Article 10 and your comments about our preference for a more flexible approach to the sharing of disqualification information than that initially outlined in the Directive, we do not believe that this would undermine the purpose of this provision. Existing rules within the Safeguarding Vulnerable Groups Act already allow the UK to consider foreign offences when making barring decisions. Not having automatic mutual recognition reflects the current situation where the Independent Safeguarding Authority takes decisions based on the information provided from the other state. I am sure you are also aware though that the Government has also announced a review of the Vetting and Barring Scheme.

With regard to Article 16 on extra territorial jurisdiction, there is a typographical error in paragraph 44 of the Explanatory Memorandum. I apologise for this. Article 16 does not compel Member States to apply extra-territorial jurisdiction on the basis of the residence or nationality of the victim.

29 September 2010

Letter from the Chairman to Crispin Blunt MP

Thank you for your letter of 29 September 2010 which was considered by the Justice and Institutions Sub-Committee at its meeting on 13 October. It was, regrettably, not practicable for the Committee to consider this matter at its meeting on 6 October.

We understand that the Presidency is no longer seeking a partial general approach. We therefore retain the proposal under scrutiny pending the outcome of negotiations on the outstanding parts of the draft Directive. Please keep us informed as matters develop.

14 October 2010

Letter from the Rt. Hon. Kenneth Clarke MP to the Chairman

Further to Crispin Blunt's letter of 29 September, I am writing to update you on the progress of this draft Directive, including the outcome of the discussions that took place at the JHA Council on 8 October.

To date, discussions in the official level working groups on this proposal have focused on Articles 1-9 and 11-13 and it was these Articles that were discussed at the JHA Council. The Presidency did not seek a partial general approach on this Directive as they had initially planned due to outstanding Parliamentary scrutiny reservations. Instead, they sought agreement on these limited number of Articles and concluded that there was a sufficient basis for them to open informal discussions with the European Parliament and that the formal negotiations could not commence until the remainder of the text had been discussed and agreed by the Council.

The Government also deposited the latest text of these Articles on 7 October and I have subsequently deposited an Explanatory Memorandum (EM) about it. You will see that this version of the text deals with any outstanding concerns that the Committee had in relation to Articles 1 – 9 and 11 – 13 and the Government's is explained in detail in the EM (14279/10). I hope that you will agree to lift the Parliamentary scrutiny reserve on these Articles.

Negotiations on the remaining Articles will continue at official level and we will ensure that the Committees are informed of developments as they occur.

13 October 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter of 13 October 2010 and the Explanatory Memorandum dated 14 October 2010 enclosing the latest incomplete draft of the proposal numbered 14279/10. They were both considered by the Justice and Institutions Sub-Committee at its meeting on 3 November.

LETTER DATED 13 OCTOBER

The Committee is grateful for the up-date of the proposal's progress through the Council and notes your request that the Committee lift the scrutiny reserve in relation to Articles 1–9 and 11–13. The Committee takes this opportunity to highlight the fact that there is no mechanism within Parliamentary scrutiny procedures allowing for the piecemeal lifting of the reserve.

EXPLANATORY MEMORANDUM ON DRAFT NUMBERED 14279/10

We welcome this latest text of the incomplete proposal as it addresses the concerns we have previously raised with you, in particular the exclusion from the offences of those aged above the age of consent, the clarification of the definition of the term pornographic performance and the scope of the offence of grooming.

We therefore clear from scrutiny the draft numbered 14279/10 on the understanding that this document does not represent a completed text. We retain under scrutiny the original dossier numbered 8155/10 which includes text still subject to negotiation.

We look forward to considering in due course, the proposal numbered 8155/10 as it progresses through the Council.

4 November 2010

Letter from the Rt. Hon. Kenneth Clarke MP to the Chairman

Further to my letter of 10 November, I am writing to update you on the progress of this draft Directive ahead of the JHA Council on 2/3 December. The Belgian Presidency aims to seek General Approach at the Council, which would form the basis for negotiations with the European Parliament in the new year, and I would be grateful if you would clear the proposal from scrutiny and allow me to agree to the General Approach.

After the informal agreement on Articles 1-13 (except 10) at the Justice and Home Affairs Council on 7-8 October the discussions at official level working groups on this proposal have focused on Articles 10 and 14-21. During recent discussions the Presidency has made strenuous efforts to take account of concerns expressed by the UK and other Member States about these Articles.

I am pleased to say that there has been very good progress in these discussions and all of the UK concerns, as set out in my Explanatory Memorandum of 13 July 2010 July, have been addressed.

I understand that the Committee's last meeting before the JHA Council will be on 24 November. This may mean that the Committee will not be able to scrutinise the latest text of the draft Directive that we are expecting before the Council. However, whilst I am unable to provide an updated text at this time, I hope that you will be able to clear the proposal from scrutiny based upon the information I

provide in this letter on the changes which we expect to be reflected in the new document. I will of course ensure that the final text is deposited as soon as it is available.

With regard to Article 10, concerning information on disqualification from working with children, there have been major changes. Subsections (3) and (4) were deleted, so there is no duty to recognise other Member State's disqualification decisions after failure to find a solution acceptable to a majority of Member States. However, Article 10 still obliges all Member States to set up disqualification regimes; we already have one in the UK. It no longer requires disqualification information to be put into the criminal record. The text permits Member States flexibility in where they record this information, which we support: we record this information separately. The Article also now requires Member States to ensure that employers are entitled to be informed about convictions for child sex offences as well as disqualifications. The Government supports these changes

Articles 14 and 15, which sets out measures that Member States should have in place to enable investigations and prosecutions to take place and ensure that they are not inhibited by confidentiality rules, remain substantially the same as in the original proposal. Therefore, as I indicated in the Explanatory Memorandum of 19 July, the Government is content with these Articles.

Article 16 on jurisdiction, should reflect the approach taken in the 2004 Framework Decision and Council of Europe Convention on Combating the Sexual Exploitation of Children (2007). It will require Member States to take extra-territorial jurisdiction only where their nationals commit sexual offences against children abroad. Member States can (as now) extend extraterritorial jurisdiction to residents or cases where the victim is their national should they wish to do so. The Government can support the text of this Article, as it gives us the flexibility we wish to retain.

In my Explanatory Memorandum dated 19 July I expressed the view that UK was compliant with Article 17 which contains provisions on assistance, support and protection measures for child. We noted that further clarity was needed on Article 18 and its reference to 'long and short-term support' for victims. The latest text has been amended to limit the victims' rights to those listed in the Directive and without a reference to long-term support. The Government can, therefore, support these Articles.

Article 19 contains the most important rights for children involved in the criminal justice system. They remain unchanged from the original draft, and we remain content with them. We have secured two amendments to reflect the fact that in the common law system, victims are not party to proceedings and therefore do not need legal representation or special representatives. The Government is therefore content with this article.

Article 20 will be divided into two separate Articles to cover preventative intervention and intervention available in the course of or after criminal proceedings. During negotiations it has been clarified that Member States have full flexibility to decide what sort of intervention "programmes or measures" are necessary, and when offenders or potential offenders may have access to them. Member States will not be obliged to make these measures or programmes available on request. The Government can support this flexible approach.

Article 21 on blocking and take down of websites containing images of child sexual abuse will be amended to allow for the various approaches taken by Member States towards this policy. It permits non-legislative measures such the industry self-regulation used in the UK. It will also reflect the technical limits of blocking and take-down as set out in the Explanatory Memorandum in July. The Government can now support this article.

A full copy of the text to be considered at JHA Council will be sent to you as soon as it is available along with a further Explanatory Memorandum. In light of the assurances which have been given by the Presidency and our success in negotiations, I hope that you will agree to clear these remaining Articles from scrutiny so that I can agree to the General Approach at the December JHA Council and the good progress on this important Directive can continue.

19 November 2010

CRIMINAL JUSTICE: CROSS-BORDER ENFORCEMENT IN THE FIELD OF ROAD SAFETY (7984/08)

Letter from Mike Penning MP, Parliamentary Under Secretary of State, Department for Transport, to the Chairman

I am sending this letter to accompany my Explanatory Memorandum (EM) on the above unnumbered document, in order to provide your Committee with a little more explanation of the unusual position that we are in.

As you may recall, it was expected that the long-dormant proposal for a Directive on cross-border road safety enforcement would be revived by the publication of a formal revision to the proposal by the Commission. However, the Belgian Presidency have proposed that negotiations should proceed under a Justice and Home Affairs (JHA) legal base under Title V of the Treaty on the functioning of the European Union, instead of the transport legal base preferred by the Commission. As a result, the Commission has decided not to issue a formal revision of the proposal. Negotiations are therefore currently being taken forward on the basis of the Presidency's own informal text, and the Presidency have kindly allowed us to deposit this text in Parliament to assist with Parliamentary scrutiny.

The EM notes that if the legal base of the proposal is changed to a Title V measure – which is still uncertain - the UK may choose whether it wishes to opt-in, within three months of the amended proposal being presented to the Council, and further notes that the Government is considering when the three month period should be considered to start. Possible approaches to this have been outlined, none of these is perfect, and there are a number of issues to be taken into account in considering each possibility. Discussions on this unusual situation are continuing and I am afraid that it is therefore not yet possible to give a clear indication how quickly your Committee, and indeed the Government, may need to reach an opinion on whether or not the UK should opt-in. I felt, however, that it was important to ensure that your Committee were given the opportunity to resume scrutiny of this proposal as soon as possible, rather than waiting until the position became clearer.

I will of course keep your Committee informed of developments to assist your scrutiny of this proposal.

13 September 2010

Letter from the Chairman to Mike Penning MP

Your Explanatory Memorandum covering the Presidency's informal revision of this draft Directive was considered by the Justice and Institutions Sub-Committee on 6 October. We are grateful for the explanation of recent developments in this matter following the hiatus in negotiations since 2008.

When the Committee considered the original proposal in 2008, we questioned whether it was the best way of improving road safety in the EU and we remain of the view that there should be other, more effective ways of addressing both the issue of better enforcement of fines and the wider issues of road safety. We consider the Presidency is right to amend the Treaty base to Article 87 since, although the motivation for the proposal arises from road safety concerns, the aim and content of the draft Directive concern matters of cooperation among enforcement authorities.

In 2008, the then Transport Minister told us that the relationship between this proposal and the general Framework Decision on mutual recognition of financial penalties was being studied by the Ministry of Justice. We should be grateful to know the outcome of the Ministry's review.

We retain the proposal under scrutiny and would be grateful for further information as matters develop, in particular the outcome of your consideration of the opt-in issues.

8 October 2010

Letter from Mike Penning MP to the Chairman

Thank you for your letter of 8 October on the Justice and Institutions Sub-Committee's consideration of this document. I am writing to bring your Committee up to date with the latest position on this proposal, including the prospects for its consideration at the Transport Council.

My letter and EM of 13 September 2010 explained that, in the absence of a formal revised proposal from the Commission, the Presidency were taking negotiations forward on the basis of a Justice and Home Affairs (JHA) legal base under Part Three the Title V of the Treaty on the Functioning of the European Union, instead of the transport legal base proposed by the Commission. I noted that this meant there was no conventional trigger point for the UK's three month opt-in period and that consideration was being given to several options, including taking as the trigger point the circulation of a text following the expected endorsement of the Title V legal base in COREPER on 15 September. For ease of reference I attach an annex setting out the background to the legal base position.

At the COREPER meeting, deferred to 22 September, the Commission noted the clear majority in the Council in favour of a police co-operation legal base, and indications were that it might issue a formal revised proposal on this basis. This would have automatically provided a formal trigger for the opt-in period, and Member States therefore awaited the publication of the revised proposal, which was expected to be issued in October. However, the Commission decided not to proceed in this way.

The trigger date for the opt-in is therefore still in question. As the situation is fluid, we are now considering a position on the opt-in trigger which would enable us to find a solution that is as close as possible to the trigger as described in the Title V Opt-in Protocol (which refers to a proposal being presented to the Council pursuant to Title V); which would give us the requisite time to decide whether to opt in, and which does not undermine Parliamentary scrutiny.

At the Transport Council on 2 December, the Belgian Presidency would like to seek what they are referring to as a 'conclusion on political agreement' on the draft Directive. This is unusual wording, but in practice it will consist of a political debate on the legal base (if the matter has not been resolved with the Commission prior to the Council meeting) and the policy substance of the proposal, followed by a Presidency conclusion that the general direction of travel is towards an eventual political agreement around the text as it is developing. There will be no vote taken or implied on a political agreement at this Council. Presidency conclusions are not, of course, legally or politically binding on Member States, and effectively the Presidency will be summarising and endorsing the approach taken in the negotiations whilst leaving open the possibility for further negotiation on points of detail within that overall approach.

The Presidency has given their assurances that they will also stress in their summing up that the rights of the UK and Ireland to have three months to consider whether to opt in to the proposal will be respected. Formal political agreement is therefore not expected to be reached until the Hungarian Presidency. The UK currently has a Parliamentary Scrutiny reserve on this proposal, which will not be lifted at the Council.

While a 'conclusion on political agreement' is not a standard description for a Council agenda item, I am satisfied that this format will protect the UK's rights under the Title V opt-in, as well as allowing us to complete our full Parliamentary scrutiny on both the decision on UK participation and on the substance itself before any formal political agreement is reached.

Discussions on the correct process for this dossier have been particularly complicated, and at this stage it is still not clear precisely how any change of legal base might be deemed to have taken place if the Council and Commission have not reached an agreement on this prior to 2 December. The aim of the proposal is to enable Member States to pursue fines and hence recover revenues from offenders resident in other EU states, on the same basis as they do for resident offenders, thereby improving the deterrent effect of enforcement on road safety. The Government believes that the JHA legal base is appropriate given the substance and aim of the proposal, a position which is now supported by all Member States and is also of course shared by your Committee. We would therefore wish to join other Member States in supporting the change of legal base, if Ministers should be asked at the Council for an endorsement of it, while reserving our position on the substance of the proposal. However, although we think it is unlikely that there will be a formal vote on the legal base issue, we are unsure at this point whether the form of such an endorsement would in effect constitute a decision that would fall within either the spirit or the letter of the Scrutiny Reserve Resolution, and it is unlikely that this point will be clarified in time for it to be communicated to your Committee ahead of the Council. In these circumstances, and as such a change could only be made by Member States if there is unanimous agreement, I would be grateful if your Committee could indicate that they are content for the UK to signal agreement of the legal base change to take place pending completion of scrutiny at a later date.

As far as our wider consideration of the proposal is concerned, we do not as yet have a formal policy view on whether or not we should opt in to this proposed Directive. We are, however, concerned about the set-up and implementation costs as outlined in our Impact Assessment, which I attach. There are also concerns with the implications for those countries, such as ours, where liability is on the driver rather than the vehicle owner. It is not clear how the proposed directive would cover this. We are, however, also aware of the risks of not opting in, especially since this may strain relationships with other Member States, where many road traffic offences are committed by non-resident drivers. Further consideration of these matters will be needed during the opt-in period.

In the Explanatory Memorandum I said that we would be seeking to clarify how the Directive relates to the Prüm Council Decision (2008/615/JHA). A number of EU Member States are in the early stages of developing the technical solution for exchanging information to combat serious crime and terrorism under the Prüm Council decisions and it might be possible that the system for this proposal could be an extension of that system in terms of the data sharing functionality. DVLA already exchanges information through an electronic network (European Vehicle and Driving Licence Information System - EUCARIS) for vehicle registration and driver licensing purposes. The Prüm Council decisions mandate the use of EUCARIS.

The preferred network would require the registration authorities to act as the hubs for requesting and forwarding data to ensure that appropriate safeguards and control are in place for those accessing the data. However, this would require an automated process for the enforcement agencies pursuing

the penalties, which would need full consultation with relevant UK stakeholders. Some Member States, including the UK, have argued that it should be a requirement in the Directive that the letter of notification be in the language of the person suspected of an offence, otherwise there is a danger that people will not have a proper opportunity to contest allegations or mount a defence, and that they may ignore fine notices in foreign languages until such time as enforcement through their national courts is sought.

In the sense that this proposal relates to the exchange of information taken from Vehicle Licensing Databases, there is a relation to the Prüm Decisions with this proposed Directive. However it is clear from recital 15 of the Prüm Council Decision 2008/615/JHA "that Member States may decide to give priority to combating serious crime bearing in mind the limited technical capabilities available for transmitting data". The United Kingdom intends to use this recital and, therefore, this proposal can be seen, in terms of scope, to be additional to the Prüm Council Decisions as opposed to a duplication.

In terms of subsidiarity, there is a clear justification for a proposal of this nature at EU level given the cross-border nature of the problem identified and the possibility it allows to avoid a scenario where each Member State agrees bilateral agreements with the other 26. The current proposal is clear that the principle of territoriality applies, by referring back to the national law of the Member States in the definitions of the offences and in the provision on the information letter to the vehicle holder. Therefore it in no way affects the UK's current national rules regarding road safety.

Your Committee asked about the relationship between this proposal and the Ministry of Justice's Framework Decision on mutual recognition of financial penalties. This framework came into force in England, Wales and Northern Ireland on 1 October 2009, and in Scotland on 12 October 2009 and allows for financial penalties imposed by courts in one Member State to be enforced in another, providing that they were over 70 Euros.

Therefore, any British drivers caught, for example, speeding in France and refusing to pay could have the case against them for not paying the penalty transferred for enforcement from France to a domestic court in the UK.

I will, of course, keep your Committee informed of further progress on this dossier, in particular the outcome of its consideration at the Transport Council.

23 November 2010

CRIMINAL JUSTICE: EU DIRECTIVE ON HUMAN TRAFFICKING (8157/10, 16945/10)

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

I am writing to inform you that the Government has made a decision not to opt in to the proposed EU Directive on Human Trafficking, but to review this position after implementation of the Directive, at which point the UK could apply to opt in retrospectively.

In arriving at this decision, the Government has assessed the Directive against the coalition agreement's case by case approach to European Union legislation and its commitment to combating trafficking. We have also considered whether the Directive adds value to the UK's anti-trafficking efforts, and whether or not it is affordable.

As you will be aware, this Directive seeks to enhance efforts at combating human trafficking through legally binding EU-wide minimum rules with sanctions on trafficking and victim care provisions. There is much that is positive about the Directive; it represents a significant positive development in efforts to combat human trafficking across the EU by introducing common minimum standards.

However, there are risks associated with the Directive. It is not clear that opting in provides much added value to the UK. The Directive will not make a significant practical difference to the way we combat trafficking and support victims and it does not give rise to any operational measures which the UK would benefit from or lose depending on its participation.

Additionally there may be changes to the Directive as a result of the remaining negotiations with the European Parliament which could affect UK interests, such as expanding support provisions for those who have not yet been identified as victims of trafficking, and expanding extra-territorial jurisdiction. Whilst the Directive does not affect the integrity of the criminal justice system, it does impact upon it. The Directive would make mandatory measures which are currently discretionary (e.g. appointing special representatives to support child victims during police investigations and criminal trials), thus reducing flexibility on the part of professionals to respond in a manner suited to different cases.

Furthermore, it requires primary legislation to put those parts of the Directive that create duties or rights into statute.

Whilst opting in would maximise the UK's influence or success in the remaining negotiations, negotiations may not go our way especially if we do not have sufficient support in the Council; and once we opt in, we cannot opt out.

Deciding not to opt in, but agreeing to review our position after the Directive has been finalised enables the UK to benefit from being part of the Directive if it chooses without carrying any of the risk of being bound by measure contrary to the UK interest. It allows the UK to signal its continuing commitment to combating trafficking whilst ensuring that the text of the Directive best corresponds to the UK's interests.

29 June 2010

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

Thank you for your Explanatory Memorandum dated 25 May and your letters dated 4 June and 29 June 2010. They were considered by the Justice and Institutions Sub-Committee at its meeting of 30 June.

THE LETTER DATED 29 JUNE 2010

It is with regret that the Committee notes the Government's decision not to opt in to this proposal. We should be grateful for early advice on your plans for public announcement of the Government's decision, which may provoke Parliamentary interest.

Last year, when considering the failed Framework Decision addressing this subject matter this Committee welcomed "strong and effective measures designed to combat human trafficking" and we expressed explicit support for "the inclusion [of the Article] which requires the Member States to establish extra-territorial jurisdiction over nationals who commit these offences abroad".

You offer four reasons to support your decision not to opt in to this proposal:

i. The proposal "will not make a significant practical difference to the way we combat trafficking and support victims".

ii. The fear that the Directive would "make mandatory measures which are currently discretionary" and therefore diminish professional flexibility and you cite, as an example, the mandatory appointment of special representatives to support child victims.

iii. The risk that the European Parliament will succeed in expanding the proposal, against the UK's interests.

iv. The requirement that some aspects of the Directive creating duties or rights would require primary legislation.

Reason (i) appears weak to the Committee as a reason for failing to opt in. The effect of this proposal is to impose minimum standards for these offences in Member States. It does not address situations involving more than one Member State by, for example, imposing mutual recognition, so in the Committee's view the UK does not risk much by opting in.

The Committee can see some merit in reason (ii) and we understand that there may well be circumstances where it may not be desirable for discretionary action by child protection officials to be made mandatory. However, the Committee does not feel that this reason alone, plus reason (i) are sufficient to merit a decision not to opt in to this proposal, in particular given the potential wider ramifications for the UK's position in future negotiations. The Committee fears that failing to opt in to matters which we are known to be broadly content with will become an increasingly less effective tactic the more it is used and will inevitably have a negative impact on the Government's desire as expressed in the Coalition agreement, to "play a leading role in an enlarged European Union".

In relation to arguments (iii) and (iv), leaving aside the fact that the Committee supported the expansion of extra-territorial jurisdiction included in the failed Framework Decision, we are not convinced that these two reasons offer a convincing basis for the decision not to opt in to this proposal. Is it not the case that, post the Lisbon Treaty, any proposed legislation adopted under the ordinary legislative procedure will carry the risk of expansive amendment by the European Parliament? It seems to the Committee that the UK Government may be in a better position, standing alongside the other Member States having opted in to the proposal rather than from the sidelines, to

deal with any expansive stance likely to impact negatively on the UK's interests taken by the European Parliament.

More specifically in relation to reason (iv), whilst we recognise that your Explanatory Memorandum failed to express either support or otherwise for the aims behind the proposal, it did repeatedly acknowledge that the UK is already compliant with the bulk of its measures—by way of examples you say in paragraph 22 of your Explanatory Memorandum that "[T]he measures contained in the Directive are broadly in-line with existing UK practice and legislation on human trafficking and safeguarding victims", and in paragraph 47 you say: "[W]e are largely compliant with the text of the Directive as it stands". With this in mind, the Committee cannot understand why the Government now fear the burden of primary legislation.

THE LETTER DATED 4 JUNE 2010

In relation to your letter of 4 June and the Written Ministerial Statement published in Hansard on 10 June, the Committee is unclear as to whether this proposal remains subject to Parliamentary scrutiny. On the one hand your letter warns that the Presidency will seek to secure "a general approach" to this proposal at the JHA Council on 3–4 June, the agreement of which is confirmed by your written statement. Furthermore, the general approach was also agreed before the Government had communicated whether or not it would opt in to the proposal. On the other hand, both your letter and statement indicate that the proposal remains subject to the Parliamentary scrutiny reserve.

The Committee has three issues arising out of this situation. First, should a general approach be agreed before the opportunity for the UK to opt in has expired? Second, the agreement of a general approach at the Council appears to override the scrutiny reserve and, third, if this is correct, this proposal cannot as the Government say remain subject to Parliamentary scrutiny.

We should be grateful for your views on these questions within the usual 10 day deadline.

13 July 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter dated 13 July, regarding the Government's decision not to opt in at the outset to the EU Directive on Trafficking (Doc 8157/10). The Committee posed a number of questions which I am glad to answer.

The Committee has expressed its disappointment at the Government's decision and questioned the adequacy of its underlying justifications. I would like to reassure the Committee that the Government undertook a detailed and careful consideration of the merits and risks of the Directive in makings its decision. With regards to the Committee's concerns that failure to opt in to Directives may become increasingly less effective, the Government is committed to making opt-in decisions on a case by case basis, as set out in the Coalition Agreement.

The Committee has responded to the four reasons highlighted by the Government for not opting in. I would say at the outset that none of these are, individually, reasons for not opting in. However, taken together, the risks are significant and our view is that the UK's best interests are served by not opting in at the outset, but by reviewing our position after adoption.

Taking those reasons in turn, firstly, the Committee is of the view that the UK does not risk much by opting in. However, the Government's approach was to look for what the UK would gain from opting in, and we concluded the gains were not significant (for the reasons given in my letter of 29 June).

Secondly, I welcome the Committee's acknowledgement of the need to retain professional discretion in areas such as child protection, which the Directive would erode.

Thirdly, the Committee is quite right to point out that any proposed legislation adopted under the ordinary legislative procedure will be subject to co-decision with the European Parliament. However, our assessment is that there are significant risks that the European Parliament's changes will be in areas affecting UK interests. Whilst I note the Committee's support for the extension of extra-territorial jurisdiction over nationals who commit trafficking offences abroad, the European Parliament is likely to take a more ambitious approach, extending jurisdiction to cover habitual residents who are offenders as well as nationals and habitual residents who are victims. Opting in would enhance our standing, but would not guarantee an outcome that is in the UK's interest. Not opting in would mean the UK does not have a vote in Council, but we shall continue to work with the European Parliament, the Presidency and the Commission to influence the Directive during the remaining negotiations.

Fourthly, the Committee asks why Government fears the burden of (additional) legislation. The Government sees little merit in creating new legislation in areas where its practice is already broadly

in line with the Directive. As the Committee is aware, the Government made a public commitment in the Coalition Agreement to prevent unnecessary new legislation.

The Committee has asked whether a general approach should have been adopted on 4 June, prior to the UK's opt-in decision. The Government agrees with the Committee's sentiment that adoption of text should, ideally, take part after opt-in decisions have been made. We made our views known to the Presidency. Upon consideration, the Presidency decided that adopting a general approach (as opposed to the more formal routes of political agreement or agreement of a common position) reflected the concerns of the UK whilst ensuring progress which they were keen on. The June version of the text reflected the text of the previous Framework Decision of October last year, and the Presidency was reluctant to delay progress in the Council until the next Council in October 2010. This would have resulted in a year's delay in the Council's negotiations on trafficking.

The Committee has also asked if the Government agrees that general agreement at Council appears to override the scrutiny reserve. We do not think this is the case. The Government can only override scrutiny by voting for or abstaining on a measure still under scrutiny. However, on this occasion, the UK, not having opted in to the Directive, did not have a vote. Furthermore, we reiterated our Parliamentary scrutiny reserve on the Directive. The Government therefore considers the Directive to remain under scrutiny until both Scrutiny Committees inform us otherwise.

We have sympathy for the Committee's frustration with the timetable, which is beyond the Government's control. We have taken steps to keep Parliament informed at all times. Officials alerted Committee Clerks that the Trafficking Directive was one of a number of dossiers that was likely to come up for agreement before scrutiny committees had adequate time to consider, due to Parliament not being in session because of the general election. I and Ministerial Colleagues remain fully committed to the scrutiny process.

Finally, as the Committee is aware, the Government's decision has been communicated to Parliament. We have also informed the Presidency and the Commission, and relevant corporate partners and the media are also aware. The Government will not be making any additional announcements on this.

26 July 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter dated 26 July 2010 which was considered by the Justice and Institutions Sub-Committee at its meeting of 13 October 2010.

We retain this matter under scrutiny.

We are grateful for the detailed answers you have given us explaining the Government's decision not to opt in. As you are aware this Committee has repeatedly expressed its support for the aims behind this proposal and we remain unconvinced by your reasons for not opting in. We think there is a UK interest in reducing the trafficking of people across Europe and for the UK to be seen to be taking action.

One of the purposes of this proposal is to bring the European Union's legal regime into line with the Council of Europe's 2005 Convention on Action against Trafficking in Human Beings. Given that the UK has ratified the Council of Europe Convention why is the Government opposed to this proposal?

In relation to extraterritorial jurisdiction, an aspect of this proposal this Committee has welcomed, you say that the Government fear that the European Parliament's proposed amendments will take the draft in a direction incompatible with the UK's interests. We would ask you to explain in detail why the Government are so perturbed in this instance by the extension of extraterritorial jurisdiction to "cover habitual residents who are offenders as well as nationals and habitual residents who are victims".

In addition, during the course of Prime Minister's Question Time on September 15, in response to a question on the merits of this Directive posed by Harriet Harman MP, the Prime Minister said that whilst the proposal does not add anything beyond existing law he was happy to go away and look at the Directive again. Is the Minister able to furnish the Committee with the outcome of the Prime Minister's reconsideration of the proposal?

Finally, the Committee notes your clarification of the ramifications for the process of Parliamentary scrutiny of the agreement of a general approach at the JHA Council held in June in relation to whether an override occurred.

We look forward to receiving the Minister's answers to our questions within the usual 10 days.

15 October 2010

Letter from Damian Green MP to the Chairman

Thank you for your letter dated 15 October, regarding the Government's decision not to opt in at the outset to the EU Directive on Trafficking (Doc 8157/10). The Committee posed a number of questions which I am glad to answer.

The Government has always maintained that the Directive will help improve anti-trafficking efforts across the EU, for instance by bringing Member States' anti-trafficking efforts more in line with the Council of Europe Convention on Trafficking, as the Committee suggests. We therefore do not oppose the Directive – indeed we are engaged in on-going negotiations to help shape it. The Government's decision not to opt in at the outset was based on an assessment of whether the Directive will improve the UK's own efforts at combating trafficking. In this regard, opting in would make very little practical difference to the UK. We are already broadly compliant in practice with the measures contained in the Directive (except on extra-territorial jurisdiction). There are no operational benefits, for example police or judicial co-operation that we would lose by not opting in.

The Committee has asked why the Government objects to the extension of extra-territorial jurisdiction, as proposed by the Directive. The UK already has extra-territorial jurisdiction over British Citizens (or indeed over persons of any nationality) where a person is trafficked into or out of the UK. If adopted, the Directive would require the UK to extend extra-territorial jurisdiction to cover British Citizens who commit trafficking offences abroad, even when there is no connection to the UK. Opting in to the Directive would not necessarily require further extensions of extra-territorial jurisdiction to cover habitual residents who are offenders as well as British Citizens and habitual residents who are victims. This is because these provisions are optional.

As part of the Government's decision on whether to opt in to the Directive, we will obviously want to consider the benefits and risks of the Directive, including its provisions on extra-territorial jurisdiction. Currently we know of no instances where the lack of extra-territorial jurisdiction has prevented UK authorities from mounting a prosecution. But we will obviously consider this carefully and we are willing to consider legislative change where there is a convincing case to do so.

As the Committee may be aware, the Government's position on the Directive was not to opt in at the outset, but to review our position once the Directive has been agreed. This enables the UK to benefit from being part of the Directive if it chooses without any risk of being bound by measures contrary to our interests. We still have the option of applying to opt in later. The Prime Minister's offer, made during Prime Minister's Questions on 15 September, to look again at the Directive was made in this context.

I would like to take this opportunity to inform you of the updated timetable leading to agreement of a common position on the Directive. A Council Common Position is scheduled for formal approval at Coreper on 24 November, which will be sent to the European Parliament as a basis for Council position. The European Parliament would then vote on the Council text during the week beginning 13 December, leading to adoption of the Directive without further reference to the Council.

This timetable means that if a common position were agreed by Ministers at the 2-3 December Council (as per this timetable), before the document clears Lords scrutiny, we would potentially have an override. It is of utmost importance that we avoid this situation. I would be very glad to address any specific points which require an answer to speed up the process of clearing scrutiny.

Finally, I am pleased that the Committee shares our view that the UK's participation in agreement to a general approach at Council last June did not constitute an override.

11 November 2010

Letter from the Chairman to Damian Green MP

Thank you for your letter dated 11 November 2010. It was considered by the Justice and Institutions Sub-Committee at its meeting of 24 November.

We retain this matter under scrutiny.

We are grateful to you for your answers to our questions. However, this Committee remains of the view that this measure is to be welcomed and continues to believe that the decision not to opt in is not in the UK's long term interests.

In relation to your concerns arising out of the Justice and Home Affairs Council to be held on 2-3 December, the Committee's view is that as the Government have decided not to opt in to this measure the issue of an override does not arise because the UK will not have a vote in the Council on 2-3 December. On the other hand, we do look forward to receiving an update from the Minister detailing the proposal's progress through the Council and hope that if the measure were adopted the

Government will (as the Prime Minister indicated at Prime Minister's question time on 15 September) turn their attention to the question of whether or not to opt in.

Finally, the Committee would like to take this opportunity to remind the Government that should their position change vis-à-vis opting in to this proposal post its adoption, the Committee would expect a new Explanatory Memorandum explaining the agreed text of the proposal and setting out the reasons for the Government's change of position.

We look forward to considering the Minister's update in due course.

26 November 2010

Letter from Damian Green MP to the Chairman

Many thanks for your letter dated 26 November in which you raise the issue of the EU Trafficking Directive and its passage through these late stages prior to adoption. I am writing to update you on negotiations on the Directive, and the principal ways in which it has changed following negotiations with the European Parliament since June.

On 24 November, the Committee of Permanent Representatives approved a text to form the basis of a first reading agreement with the European Parliament, which will vote in committee on 29 November and in plenary in the week commencing 13 December. Assuming the Parliament adopts the same text, we would expect adoption at a Council early in 2011.

I note that the Lords' European Union Committee have retained this proposal under scrutiny. I outline below the principal changes to the text of the Directive since the version of the text agreed at JHA Council in June:

— Article 6a is a new Article that requires Member States to ensure that items used to commit trafficking offences and the proceeds from trafficking offences can be seized and confiscated.

— Article 10 is about providing assistance and support to victims of trafficking. Paragraph (3) has been changed. It requires that Member States ensure that assistance and support for victims is not made conditional on the victim's willingness to act as a witness during the investigation, prosecution and trial.

— Article 13 seeks to ensure that the necessary support and assistance measures are provided for child victims of trafficking. Paragraph (1a), is new and, like Article 14, requires Member States to appoint a guardian or representative for the child victim of trafficking where (by national law) the child's parents or holders of parental responsibility cannot represent the child due to a conflict of interest.

— Article 14 requires competent authorities in Member States to appoint a special representative for child victims of trafficking in criminal investigations and proceedings (in accordance with the role of victims in the national justice system) when those with parental responsibility are precluded from representing the child. Paragraph (1a) is new and provides for child victims' free legal counselling and free legal representation (unless they have sufficient financial resources), in accordance with the role of children in the relevant justice system.

— • Article 14a is new and is about the assistance, support and protection for unaccompanied child victims of trafficking. It requires Member States to take account of the personal and special circumstances of each unaccompanied chid victim, to find a durable solution for the child, to appoint a guardian and to appoint a representative for the purposes of investigations and proceedings (in accordance with the national justice system) when the child is unaccompanied.

— Article 14b is new and is about compensation to victims. It asks Member States to ensure that trafficking victims have access to existing compensation schemes for victims of violent intentional crimes.

— Article 16a is new and requires Member States to supply an Anti-Trafficking Coordinator (ATC) information to facilitate a report published by the Commission every two years on progress made in the fight against trafficking.

— Article 17 provides is a measure providing for the replacement of the 2002 Framework Decision by the Directive for those Member States who participate in the Directive.

Articles not listed above remain broadly unchanged from the June version of the Directive text, as per Explanatory Memorandum 8157/10 published on 25 May.

30 November 2010

CRIMINAL JUSTICE: EUROPEAN PROTECTION ORDER (17513/09)

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

I am writing to update you on the progress of this draft Directive and to respond to the questions raised in the letter from the EU Select Committee of 8 April.

The text was presented at the Justice and Home Affairs council on 4 June in order to obtain a "general approach". The Government deposited this text in Parliament on 25 April and I have subsequently deposited an Explanatory Memorandum about it. It is unfortunate that in the post-election period the Committee did not have the opportunity to consider the text before the Council. Although the Government continues to support the overall aims of this draft Directive and the principle of the European Protection Order (EPO) to provide continuous protection to vulnerable people who move between Member States, I was unable to support the current text because of concerns that the scope, as currently drafted, is wider than the legal base that the Directive has been tabled under. A number of other Member States expressed similar concerns.

The Presidency required consensus in order to continue discussions with the European Parliament. Given the number of Member States who objected it was less than clear that they had the consensus. Surprisingly, however, they insisted that they had the majority support they needed for a general approach so that the text could be taken to the European Parliament. Unfortunately, they linked this assertion with an interpretation of the UK's opt-in protocol. Article 3(2) of that protocol states that "if after a reasonable period of time" a measure cannot be adopted with the UK or Ireland taking part, the council may adopt that measure without the participation of the UK or Ireland. The Presidency suggested that the UK could be asked again what its view is at the Council in October, in the expectation that a "reasonable time" will then have passed. I intervened to make it clear that we did not agree with this assertion and we will maintain this line in future discussions.

We have indicated to the Spanish Presidency, that we would support a narrow interpretation of the legal basis, restricting the Directive to measures taken in the context of criminal proceedings and related to a criminal offence. The Commission is exploring the option of bringing forward a mirror civil instrument to ensure that those countries that use civil protection measures will also be covered.

The Spanish Presidency ends at the end of June, it is not clear at this stage whether they will schedule further negotiations on the EPO before the end of their Presidency.

I turn now to the specific questions raised in the Committee's letter of 8 April, relating to whether the text of the Directive would be able to distinguish satisfactorily between criminal and family law matters and asking for clarification about which proceedings in the civil courts would be covered. As it is presented in the current text, proceedings in civil courts, as well as criminal courts, would be covered as long as the proceedings started with a criminal act. However, as I have stated above, following the vote at the Justice and Home Affairs Council last week, the questions surrounding the proposal's scope remain unresolved.

The Committee asked for confirmation of whether the majority of orders granted by the UK courts are civil orders and would, if this proposal remains based on Article 82 (I)(d), therefore, be excluded from its scope? Approximately 25% of UK protection orders are issued in criminal proceedings, and so would be covered. A separate instrument would be needed to capture civil protection orders, which would pick up the remaining 75% of UK orders. As you are aware, the Commission has the sole right of initiative in civil matters.

Finally, the Committee asked for clarity on the term "EU wide generic-order" and the Governments preferred option as to how the EPO will be given effect in the executing state. In the current text, the option of an "EU wide generic order" no longer applies. A 3 stage process (original domestic protection order, EPO and then a protection measure in the executing State) is the preferred option and we agree that this is the most suitable structure in this context

I will keep you informed of further developments in relation to this draft Directive.

10 June 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your Explanatory Memorandum and letter both dated 10 June, which were considered by the Justice and Institutions Sub-Committee at its meeting of 21 July 2010.

We have retained the proposal under scrutiny.

THE PROPOSAL

This Committee has repeatedly expressed its support for the aims of this proposal. As we said in our letter dated 26 February 2010, we agree "that victims of domestic violence and other crimes who have obtained protective orders in a Member State ought to be able to move freely across the EU with the confidence that they remain protected".

However, the Committee has also repeatedly raised concerns about the scope and legal base of this measure and we would like to take this opportunity to welcome the Government's clear stance on this issue and lend our voice to the Government's belief that as currently drafted this proposed Directive should be limited in its scope to orders made in the context of criminal proceedings.

We note from your letter dated 10 June that the "Commission is exploring the option of bringing forward a civil instrument to ensure that those countries that use civil protection measures will also be covered". This is an initiative this Committee would support as it seems a sensible solution to the problems caused by basing this proposal on a legal basis restricted to cooperation in criminal proceedings.

In relation to the proposal's content, the Committee is also pleased to see that the precise mechanism giving effect to the EPO has been clarified and we agree that the proposed three stage process you describe in your letter "is the most suitable structure in this context".

THE JUSTICE AND HOME AFFAIRS COUNCIL

It is with great concern that the Committee read your account of the discussion of this proposal at the Justice and Home Affairs Council held in early June. It raises two issues, the first concerns whether a general approach was in fact agreed at the Council. It appears from your letter that you are as much in the dark as the Committee as to whether agreement was reached and we would welcome any clarification of this, once the Government are in a position to furnish us with it.

The second issue concerns the operation of the UK's opt-in protocol and the interpretation of the phrase in Article 3(2) of "a reasonable period of time" which must elapse before the other Member States can proceed without the UK. Whilst this Committee recognises that the UK should not be able to use its opt-in to postpone indefinitely the adoption of measures with which we do not agree, do you consider that by October the point will have arisen at which the other Member States will be able to proceed if there is the requisite majority?

We look forward in due course to receiving from you updates on this proposal's progress.

15 July 2010

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

Thank you for your letter dated 15 July. I am writing to respond to the points raised in your letter and also to provide you with a further update on the progress of this draft Directive.

The Spanish Presidency ended at the end of June and there were no further negotiations following the JHA Council on the 4 June.

The next steps in the progress of this draft Directive have yet to be determined by the Belgian Presidency.

In my letter dated 10 June I informed you that the Spanish Presidency insisted that they had the majority support they needed for a general approach so the text could be taken to the European Parliament. This was despite the objections of a number of Member States. The position was not, however, definitive and there were no attempts to provide the Parliament with an agreed approach. The European Parliament is now considering the Directive, with a debate on the draft report scheduled for a joint meeting of the LIBE (Civil Liberties Justice and Home Affairs) Committee and the FEMM (Women's Rights and Gender Equality) Committees on 2 September. The Committees will

have an orientation vote on 29-30 September and the Belgian Presidency is likely to await the outcome of that vote before resuming negotiations in the Council.

In your letter you also refer to the UK's opt in protocol and whether other Member States will be able to proceed without the UK in October, if without the UK, there would be a majority. At this stage any suggestion of proceeding without the UK is premature. We remain willing participants in ongoing discussions about this draft Directive, the aims of which we support. The terms of article 3(2) of the Protocol do not apply at this point in time, as adoption of the instrument is not under discussion. The use of article 3(2) of the Protocol is not possible before the European Parliament has adopted its position at first reading. As the intentions of the Belgian Presidency are not yet clear we are not in a position to assess if or when a first reading deal may take place.

I will keep you informed of further developments in relation to this draft Directive.

26 July 2010

Letter from the Chairman to the Rt Hon Lord McNally

Thank you for your letter dated 26 July 2010. It was considered by the Justice and Institutions Sub-Committee at its meeting of 6 October 2010.

We retain this matter under scrutiny.

The Committee is grateful to you for the latest information you have provided and we note that negotiation of this matter will resume under the auspices of the Belgian Presidency once the relevant European Parliamentary Committees have held their discussions. We also welcome your reassurance that recourse to Article 3(2) of the UK's opt-in Protocol will not be possible at this point in time.

We look forward in due course to resuming our scrutiny of this proposal.

8 October 2010

Letter from the Rt. Hon. Kenneth Clarke MP to the Chairman

Thank you for your letter dated 8 October 2010. I am writing to provide you with a further update on the progress of this Directive.

In Lord McNally's letter to you of the 26 July he stated that the LIBE (Civil Liberties Justice and Home Affairs) and FEMM (Women's Rights and Gender Equality) Committees of the European Parliament would hold an orientation vote on the 29 September and that the Belgian Presidency would await the outcome of that vote before resuming negotiations.

The vote went ahead and formal Trilogue discussions between the European Parliament, Presidency and Commission began on 25 October. The final Trilogue is expected to take place on 16 November ahead of a vote in the LIBE and FEMM Committees at the end of November. The EP has provisionally scheduled a vote to adopt its amendments to the European Protection Order (EPO) at its plenary session on 15 December.

There are five main areas where the Rapporteurs believe amendment of the text is required which are the focus of negotiations between the institutions:

1) Scope

2) Information provided for victims related to the EPO procedure

3) Ensuring speedy processing of EPOs and simplifying procedures

4) Guaranteeing adequate protection to minors

5) Collecting basic statistical data which will be necessary to evaluate the efficiency of the EPO process.

I will deal with each of these in turn.

1) SCOPE

The Government's view on scope, that currently it is wider than that permitted by the criminal legal base this instrument has been brought under has not changed. The Committee agreed with our stance on legal base in your letter of 15 July.

The LIBE and FEMM committees in the EP voted for amendments that run contrary to this position and maintain the broad scope of the Directive to include civil orders as well as criminal ones. The

Presidency are aware that this issue is contentious and have deferred discussion about scope until the end of the Trilogue discussions.

The division in Council over the question of scope precipitated a discussion of the use of Article 3(2) of the UK's opt-in protocol. This was set out in Lord McNally's letter of 26 July. We believed it was premature to cite Article 3(2) at that time as the Council were not being asked to adopt the Directive. It amounted to a threat to eject the UK from negotiations prematurely whilst we were still willing participants in on-going discussions.

Assuming that the European Parliament adopts amendments in mid December that are acceptable to a majority in the Council, and as a consequence of standing firm on this issue, we find ourselves the "swing" vote in a blocking minority, there will come a point when the UK's ejection can be considered legitimately. We are clear that before Article 3(2) can be legitimately invoked, "adoption" of the text must be in prospect and the requirement that a "reasonable period of time" has gone by must be satisfied. However, "a reasonable period" cannot simply refer to an amount of time passing, but must also refer to there being opportunities to resolve the issue.

2) INFORMATION PROVIDED FOR VICTIMS RELATED TO THE EPO PROCEDURE

The EP has proposed an amendment that would make Member States responsible for training, education and publicity campaigns about the EPO. Whilst we have no objection in principle to such campaigns or education we believe that they should be at the discretion of Member States rather than prescribed in a directive.

There is already a provision that a person who receives a domestic protection order will be told about the EPO and the basic conditions of making a request. This is important as it will directly target those potentially eligible for an EPO and will ensure they receive the information they require. We believe that anything on top of this should be left to Member States to decide how it is most appropriate to publicise such measures.

3) ENSURING SPEEDY PROCESSING OF EPOS AND SIMPLIFYING PROCEDURES

It is vital that procedures surrounding protection measures enable timely protection of vulnerable people. Proposals from the EP suggest, however, that the issuing of an EPO should follow fast track procedures at national level. We are of the view that the issuing of an EPO should not leapfrog or take precedence over domestic protection measures. Requests for protection orders in the UK, whether as the result of an EPO or not, need to be treated in a timely way taking into account specific circumstances of the case including the urgency of the matter. We are therefore opposing the EP's suggestion of fast tracking EPO applications.

4) GUARANTEEING ADEQUATE PROTECTION TO MINORS

The EP has suggested an amendment that ensures the execution of an EPO also covers the protected person's entire family. We are content that if a family member had a protection measure granted to them in national law, or were covered by the same domestic order as the protected person, then they should be entitled to apply for an EPO or be covered by the same EPO, which we believe to be the objective of the amendment. We would therefore be able to accept it if amended.

5) COLLECTING BASIC STATISTICAL DATA WHICH WILL BE NECESSARY TO EVALUATE THE EFFICIENCY OF THE EPO PROCESS

The EP suggested an ambitious article on data collection that goes beyond the scope of the directive including the collection of data on victims of terrorism and organised crime. We oppose data collection that would increase the bureaucratic burden on Member States and be disproportionate. It would be more sensible to restrict data collection to the sort of information that would be easily obtainable from the EPO and that is relevant to the directive and its scope.

I will keep you informed of further developments in relation to this Directive and your Clerks are always welcome to contact my officials.

15 November 2010

CRIMINAL JUSTICE: INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS (11917/09, 16801/09)

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

I have today deposited an Explanatory Memorandum on the most recent version of the draft Directive on Interpretation and Translation. I would also like to provide you with an update on the recent developments regarding this draft Directive. On 27 May, the Committee of Permanent Representatives (COREPER) authorised the Presidency to confirm to the European Parliament that the current text of the draft Directive on Interpretation and Translation could form the basis for agreement at first reading. The European Parliament is expected to vote to adopt the text on 14 June. The agreed text would then be adopted at a Justice and Home Affairs Council after the summer.

It is unfortunate that in the post-election period the Committee has not had the opportunity to consider this later text and I apologise for the fact that agreement to this text was an override of the Scrutiny Reserve Resolutions. I assure you that this was purely due to the exceptional circumstances surrounding the election, allied with the speed of negotiations. Throughout the negotiation progress the UK has taken into consideration the position of the Scrutiny Committees. My officials have also provided updates to the Clerk of the Committee on the progress of the negotiations and explained that it was likely that there would be agreement to a first reading deal before the Committees met following the election.

I am now able to provide you with a substantive response on the matters of policy relating to the Rapporteur's draft amendments, which were raised in a letter from your Committee on 8 April 2010.

Relationship of the proposal with the ECHR and the Charter of Fundamental Rights

Draft amendment 19 to incorporate recital 18 into the substantive text was not pursued. There was not sufficient consensus to include it the main body of the text. With the existence of recital 18, which mirrored it and which sets out the intention behind the instrument, we are content.

You asked about other references to the Charter. Our focus in considering Charter references was simply to ensure this Directive did not create confusion as to the status or extent of the Charter. The Rapporteur's suggested amendment 2 could have caused confusion. The equivalent text in recital 5a which refers to 'development of the minimum standards set out in the ECHR and the EU Charter' is much clearer and we are content.

We do not consider the various Charter references introduce any substantive change. Article 6(1) TEU and Article 51(2) of the Charter make clear that the Charter does not confer legislative competence. The EU institutions and bodies must respect Charter rights, as must Member States when acting in the scope of EU law. We were content for reasons of clarity to recognise that the rights which underpin the Directive, and which should be respected, are found both in the ECHR and the Charter. In this area, they correspond. In short, whilst it is right to include Charter references for clarity and to focus the context for the instrument we wanted to avoid drafting that misled as to effect.

THE SCOPE OF THE LEGISLATION

The current text retains the original wording about the rights applying from the time a person is made aware by the competent authorities. It contains additional wording 'by official notification or otherwise'. We felt the Rapporteur's proposal a little vague and broader than the original text. The Commission text (`informed') in the end was not adopted. We are content with the result. Article 1 paragraph 3 of the Directive excludes cases involving the 'imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters'. In practice this means there will not be a requirement under the Directive for interpretation for such offences - for example a minor speeding offence dealt with by the police at the roadside would not be within the scope of the Directive. However if an appeal was made and court proceedings followed, the accused would have the right to interpretation and translation. The Government believes this is a sensible, pragmatic approach to the scope of this Directive.

DOCUMENTS TO BE TRANSLATED

The Government agrees with the Committee that it is helpful for the Directive to contain an illustrative list of documents that must be translated combined with a flexibility that does not impair the fairness of the trial. As such the Government is supportive of Article 3.

WAIVER OF THE RIGHT TO TRANSLATION

It is important that any waiver to the translation of documents ensures the suspect or accused is fully aware of the consequences of his actions without creating an unduly bureaucratic and impractical process. The Government believes that ensuring the suspected or accused person has 'received prior legal advice or has otherwise obtained full knowledge of the consequences of his waiver, and that the waiver was unequivocal and given voluntarily' strikes the correct balance.

APPEAL AGAINST A REFUSAL TO PROVIDE INTERPRETATION OR TRANSLATION

Article 2 paragraph 4 allows for 'the right to challenge a decision finding there is not need for interpretation'. The Rapporteur had proposed 'a right of appeal to a judicial authority' as opposed to a 'review' which had been proposed in the original Member State text. Your Committee stated its preference for a challenge to a refusal, as opposed to simply a review. The Government in fact does not see material difference in practice in this context between the words 'review' and 'challenge'. At the police stage, we would expect to provide for a challenge at police level. More generally it is envisaged that any challenge could be incorporated into existing criminal proceedings rather than a separate procedure for challenge being created and this is supported by recital (12). Article 3 paragraph 4 provides for the right to challenge a decision regarding the need for translation of documents or passages of documents.

SUSPECTS WITH PHYSICAL OR MENTAL IMPAIRMENT

Article 2 paragraph 2 concerns the provision of assistance for those persons requiring interpretation who also have a hearing or speech impediment. The Government is of the view this is flexible enough to allow for the varying needs of such persons.

QUALITY OF INTERPRETATION AND TRANSLATION, TRAINING AND ACCREDITATION

Article 2 paragraph 6 and Article 3 paragraph 8 provide for the quality of interpretation and translation to be 'sufficient to safeguard the fairness of proceedings'. Article 5 paragraph 1 places an onus on Member States to 'take concrete measures' to ensure the quality is met. Article 2 paragraph 4 allows complaints regarding the quality of interpretation if it is 'not sufficient to ensure the fairness of proceedings'.

The Government is content with Article 5a in which Member States 'request' training is provided to such groups on the subject of communicating with the assistance of an interpreter. The Government is of the view that this respects the independence of the judiciary and defence lawyers.

Article 5 paragraph 2 states that Member States must 'endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified'. The Government agrees with the Committee's assessment that the Rapporteur's amendments in these areas had the potential to extend obligations too far. The current provisions provide Member States with some flexibility, allowing Member States to establish practices and procedures that work in harmony with their national criminal justice system.

USE OF TECHNOLOGY AND DEADLINES

The use of technology for the purposes of interpretation is provided for under Article 2 paragraph 4 'unless the physical presence of the interpreter is required in order to safeguard the fairness of proceedings'. The Government agreed that this is a sensible compromise between the original Member State text and the Rapporteur's amendment.

Article 5b deals with interviews, oral translations, oral summaries and waivers. It requires that for these matters 'it will be noted that these events have occurred' rather than a recording made of the oral translation.

IMPLEMENTATION

The deadline for implementation of the Directive is now to be 36 months after publication in the Official Journal. The implementation period of 36 months reflects the need for some Member States to implement practices and procedures which they do not currently provide. This of course does not prevent Member States from implementing the Directive before the deadline.

I will be writing in due course regarding the opt in decision for the Commission proposal on Interpretation and Translation.

9 June 2010

Letter from the Rt. Hon. Kenneth Clarke MP, to the Chairman

In January 2010 the European Commission published their alternative draft Directive on the right to interpretation and translation in criminal proceedings. Your Committee previously stated that you would not object to the UK not opting in to the Commission proposal if it would have an impact on the speed at which legislation could be adopted. As you are aware from my letter to you on 10 June, there is likely to be a first reading deal with the European Parliament on the Member State draft Directive. As such I have taken the decision that the UK should not opt in to the Commission's initiative. I will be informing the Presidency this week of my decision.

16 June 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letters of 9 and 16 June and your Explanatory Memorandum covering the latest text of the draft Directive. These were considered by the Justice and Institutions Sub-Committee at its first meeting in the new Parliament on 30 June.

We are grateful for the full account of developments concerning the two proposals in this area. We note that agreement was reached among the members of the Council on the present text and we understand that the European Parliament has since agreed an identical text at first reading, thus paving the way for the formal adoption of the Directive.

Like the Government, we are content with the revised draft based on the text presented as an initiative of Member States. Indeed, in a number of respects, the changes introduced improve the provisions and make them clearer. We understand the reasons you give as to why the Government decided to give its agreement before the Committee could consider the matter. The Member States' proposal is cleared from scrutiny.

We assume that, for practical purposes, the Commission's draft is now dead but pending clarification of its fate (and the final stages of the active proposal), we retain it under scrutiny.

1 July 2010

Letter from the Rt. Hon. Kenneth Clarke MP, to the Chairman

I am writing to update you on progress on the Member State initiative for a draft Directive on the right to interpretation and translation in criminal proceedings

On 16 June the European Parliament voted in plenary for a First Reading deal on the Interpretation and Translation draft Directive. There was overwhelming support for the draft Directive, with a vote of 637 in favour to 21 against and 19 abstentions. The draft Directive will be adopted at a future Justice and Home Affairs Council.

Given the fact that the Committee has until recently not been sitting, there has not been the opportunity for the text to be released from the scrutiny process. However throughout the negotiations, the UK has taken into consideration the earlier opinions expressed by your Scrutiny Committee. My officials have also provided updates to the Clerk of the Committee on the progress of the negotiations and have explained that it was likely that there would be agreement to a first reading deal in advance of clearing scrutiny.

I would like to thank the Committee for its rigorous consideration of the draft Directive and will provide a further update when the draft Directive is adopted.

30 June 2010

Letter from the Rt. Hon. Kenneth Clarke MP, to the Chairman

Thank you for your letter of 1 July. I note that your Committee has cleared from scrutiny the Member State Directive on Interpretation and Translation in criminal proceedings although you have retained the Commission proposal under scrutiny as it has not, to date, been withdrawn.

As you may recall, the initial Framework Decision on Interpretation and Translation was originally accompanied by a Resolution. It described practical measures and action which should be taken in relation to interpretation and translation in criminal proceedings. Several Member States are very keen that the content of the Resolution should not be lost and a new proposal should be brought forward as soon as possible.

The form of such new proposal seems likely to be a Recommendation. It is not yet clear whether such Recommendation will be on the initiative of a group of Member States or the Commission. The Presidency has expressed a desire to see it adopted alongside the Directive on Interpretation and Translation. The Directive is likely to be adopted at the October Justice and Home Affairs Council meeting.

It is unlikely that any text for a Recommendation will be published until September due to the European institutions' summer recess period. If it takes the form of a Recommendation to be adopted by the Council, it would then trigger the UK's opt in protocol. The timing of this would not sit easily with the UK Parliamentary recess period and the sitting of the scrutiny committees. We will continue to update you and send any documents that are made available at the earliest possible opportunity to try and alleviate any possible difficulties.

19 July 2010

Letter from the Rt. Hon. Kenneth Clarke MP, to the Chairman

Thank you for your letter of 1 July in which you cleared the Member State initiative on the Right to Interpretation and Translation in Criminal Proceedings from scrutiny.

In my letter to you dated 30 June I promised to provide an update when the Directive on the Right to Interpretation and Translation in Criminal Proceedings was adopted. The Directive was formally adopted at the Justice and Home Affairs Council on 7-8 October,

I would like to again thank the Committee for its rigorous consideration of the Directive.

21 October 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter of 21 October which was considered by the Justice and Institutions Sub-Committee on 3 November. We note the adoption of the Directive based on the Member States' initiative and formally clear the Commission's parallel proposal from scrutiny. If a Recommendation to accompany the Directive is proposed, as indicated in your letter of 19 July, no doubt this will be deposited in the normal way, but no response to this letter is expected.

4 November 2010

CRIMINAL JUSTICE: MUTUAL RECOGNITION OF CONFISCATION ORDERS (13507/10)

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

Thank you for your Explanatory Memorandum of 22 September, which was considered by the Justice and Institutions Sub-Committee on 13 October.

Whilst the Commission's report has been cleared from scrutiny, the Committee notes that the UK has not implemented the Framework Decision some four years after it was adopted and almost two years after the agreed deadline for implementation. We would be grateful for a further explanation, within the usual 10 day deadline, of the difficulties which have given rise to such delayed implementation and the reasons why you forecast a further 12–18 month delay.

15 October 2010

Letter from James Brokenshire MP to the Chairman

Thank you for your letter of 15 October, asking about the delay in implementation of the above Framework Decision.

The Government is committed to the aims and principles set out in the Framework Decision and we are considering the most appropriate legislative vehicle.

Implementing the Framework Decision will be complex for a number of reasons, including because it will require changes to the current UK restraint and confiscation regime and changes to primary legislation. The Commission have made it clear that implementation by non-legislative means is very unlikely to constitute adequate implementation of the Framework Decision. Notably the Commission communication concludes that there are many Member States that have transposed this Framework Decision incorrectly.

The Government's approach to implementation must also take account of the future decision on whether or not to opt out en bloc from all existing pre-Lisbon "third pillar" police and criminal judicial cooperation measures in accordance with Protocol no. 36 of the Treaty on the Functioning of the European Union. That decision will be some time away and I hope to be able to update you in due course.

28 October 2010

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 28 October which was considered by the Justice and Institutions Sub-Committee at its meeting of 10 November.

We were grateful for the further information provided. Nevertheless, we regard it as unsatisfactory that the UK should have agreed, as long ago as October 2006, to implement this Framework Directive by November 2008 and then failed to do so.

We do not require a response to this letter.

12 November 2010

CRIMINAL JUSTICE: PENALTIES FOR DRUG TRAFFICKING (5200/10)

Letter from James Brokenshire MP, Parliamentary Under Secretary for Crime Prevention, Home Office, to the Chairman

I write in response to your letter of 8 April 2010 [not printed].

I note the Committee's concern regarding the UK's omission to submit a report to the European Commission on the UK's implementation of Framework Decision 2004/757/JHA.

The UK Government has now submitted a report on the transposition of the Framework Decision to the European Commission. The report confirms that the provisions of the above Framework Decision have been fully transposed into UK law, and no further legislative changes are needed. I attach a copy of the report for the Committee as requested. My officials will actively participate in further discussions to encourage other EU state to comply with the Framework Decision through the Brussels Drug Working Group.

With regards to Gibraltar, my officials have been working with officials from Gibraltar to establish what changes, if any, are required to transpose the Framework Decision. As a result of their discussions, officials of Gibraltar have advised they will be reporting separately on the transposition into local law to the Commission. We will ensure that this report is brought to your attention as well.

22 July 2010

Letter from the Chairman to James Brokenshire MP

Thank you for your letter of 22 July. We are grateful for your confirmation that the UK has transposed this Directive and has submitted a report to that effect. We look forward to hearing further as to the position in Gibraltar.

8 October 2010

CRIMINAL JUSTICE: THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS (12564/10)

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

Thank you for your Explanatory Memorandum of 27 July. This was considered by the Justice and Institutions Sub-Committee at its meeting of 6 October. We decided to retain this matter under scrutiny pending your further consideration of the policy implications, the UK Impact Assessment, and the results of your consultation.

Like you we agree that the proposal complies with the principle of subsidiarity and we support its objectives in principle. Therefore we favour the UK opting in to the proposal.

In your Explanatory Memorandum you indicate that further information will be forthcoming. In addition we would be particularly interested in the Government's views on the following:

— What constitutes a "case file" in the UK jurisdictions; how would the proposal to grant access to a case file extend or diminish the right of an accused person to prosecution disclosure under present UK laws, and how far should access to a case file include a right to be given copies of documents?

— How far the ability of a person subject to a European Arrest Warrant to agree to return be described as a "right" (as it is in Annex II of the proposal)?

— What provision should be made at the stage before arrest to ensure that children and those who do not understand the language sufficiently comprehend the information that would be provided?

8 October 2010

Letter from the Rt. Hon. Kenneth Clarke MP to the Chairman

Thank you for your letter dated 8 October in which you favour the UK opting in to the draft Directive. I can confirm that the UK opted in to the measure on 22 October.

Parliament will be informed of the Government's decision through a Written Ministerial Statement confirming that the Directive meets the criteria set out in the Coalition Agreement with regard to EU justice and home affairs measures.

The draft Directive will provide minimum standards for individuals subject to criminal proceedings. British citizens abroad will benefit under the Directive from increased confidence in procedural standards across the European Union. It will also increase security at EU level by supporting existing provisions which help combat crime and promote the rule of law.

I attach a copy of the initial Impact Assessment (Annex A), which was considered as part of the decision making process. As the Impact Assessment demonstrates, the UK already complies with many of the provisions of the draft Directive. It is important to state at the outset that full quantification of costs and benefits has not been possible at this stage, particularly given the fact that the draft Directive will change during the negotiation procedure.

I now turn to the three questions your Committee has asked regarding specific policy implications of the Directive.

CASE FILE

With regard to Article 7, we have concerns about the present drafting in the Directive, although we support the reasoning behind the Article, namely to ensure that the suspect is provided with sufficient information about the case against them to allow him to prepare his defence. This need not, and is not achieved by providing full access to the case file in all Member States. It is important that the text allows the objective to be achieved in different ways. The term 'case-file' is problematic as there is no shared understanding of what constitutes a case file throughout Member States. We believe that Article 7 should be amended so the principle is clear whilst the method for implementing the principle is left to Member States. This is a view shared by other Member States and we are not alone in trying to secure amendments.

Within the UK, the prosecutor provides the defence with the case upon which the prosecution will seek to rely, and any relevant information that might undermine that case, subject to public interest exception. The material that is provided is done so free of charge. Equally we have to take into account the differences in systems of other Member States. Moreover we do not think it right necessarily to provide copies of every document, for example our unused material is initially given by list. The primary point is that individuals should be given the right to access material.

EUROPEAN ARREST WARRANT (EAW)

The Annexes provided in the draft Directive have been included by the Commission as helpful examples for those Member States which currently do not have such letters. The Commission do not intend to make the use of the letters in the Annexes obligatory, and therefore Member States will be at liberty to use a letter which they deem to be the most appropriate.

You ask about whether agreeing to surrender is deemed to be a right. If the person subject to EAW proceedings wishes to plead guilty, for example, and simply wants to deal with the matter as quickly as possible, it would appropriate to describe this as a right. However in the Annex, the Commission also explain that the person also has a right to go before a judge if they do not consent to surrender.

PROVISIONS FOR CHILDREN AND THOSE WHO DO NOT UNDERSTAND THE LANGUAGE

According to the draft Directive, when a person is suspected or accused of committing an offence they are entitled to 'be provided promptly with information on his procedural rights in simple and accessible language.'

This provision has clear read across to the recently adopted Directive on the Right to Interpretation and Translation in Criminal Proceedings. Once the Directive is fully implemented, all Member States will be obliged to ensure that a person has the access to interpretation and translation. That right will apply 'from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence'. In practice, the police already make use of mechanisms such as Language Line to ensure that the person understands his rights.

The right to information should also be considered in the context of the Roadmap on Procedural rights. The Commission will be bringing forward a package of specific measures in a step by step, evidence based approach. Along with the Directive on Interpretation and Translation, Measure E of the Roadmap will provide special safeguards for suspected or accused persons who are vulnerable. We can expect that Measure E will include more detailed provision on children.

I have written in similar terms to the Commons European Scrutiny Committee to inform them of our opt in and I will continue to keep you informed of developments as negotiations proceed.

26 October 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter of 26 October. This was considered by the Justice and Institutions Sub-Committee at its meeting of 3 November. We decided to retain this matter under scrutiny pending information, in due course, on the outcome of the further negotiations on Article 7.

We are grateful for your helpful answers to the questions we raised and for sight of the initial Impact Assessment, and are pleased that the Government have opted in in accordance with our view.

4 November 2010

Letter from the Rt. Hon. Kenneth Clarke MP to the Chairman

I am writing to give you further information about the negotiations on the draft Directive on the Right to Information in Criminal Proceedings, ahead of the December Justice and Home Affairs Council on 2-3 December. The Belgian Presidency has announced its intention to agree a general approach on the draft Directive at the Council. I would be grateful for your Committees' agreement to lifting the Parliamentary scrutiny reserve based upon progress so far and amendments we are working hard to secure early next week. I appreciate that the speed of negotiations, which has been driven by a desire to maintain momentum on the delivery of the measures on the procedural rights "roadmap", has limited the time available for detailed scrutiny of the proposal.

The draft Directive has been discussed at a number of working groups since September. The draft has improved and is now largely acceptable to the UK.

The requirement in Article 3 to provide information on procedural rights has been clarified and it is now clearly set out that the obligation is to provide information on national law on the right of access to a lawyer, the conditions to obtain access to a lawyer free of charge the right to interpretation and translation and the right to silence. The Government is content that this accommodates the current operational practice in the UK.

Article 4 on written information on rights to be provided on arrest, and Article 5 on the information on rights to be provided where a person is arrested pursuant to a European Arrest Warrant are acceptable and would not cause the UK any difficulties given current practice in England, Wales and Northern Ireland. The Government is content.

Article 6 has changed somewhat from the previous version of the draft Directive in that it covers the right to information on arrest as well as when a person is officially accused or charged. The language now makes clear that information on the offence that a person is suspected of having committed

should be provided before police interview – a principle which we can support. It is now less specific about the precise information that should be given to the suspect about his accusation – something that we support given that we had some technical difficulties with the previous version of the text – for example we considered the phrase "degree of participation" unclear. The draft Directive now calibrates the extent of information that should given at arrest and at later stages of proceedings – a helpful clarification given that precise details of the offence may not always be known at the moment the person is first arrested. As a result of these changes, the Article is now acceptable to the Government.

Article 7 which covers the disclosure of evidence has proven, not unexpectedly, the most complex element of the proposal. Practice varies significantly between Member States, and in particular there are major differences between the common law and civil law jurisdictions. The original draft based itself on the civil law practice of allowing the defence physical access to a case file, which occurs both at the trial and, often to a more limited extent, in the pre-trial phase. Within the UK and other common law jurisdictions, the prosecutor provides the defence with the case on which he will seek to rely, plus any evidence that undermines that case and any exculpatory evidence, rather than allowing access to a case file as such. We have secured amendments to allow for both common law and civil law jurisdictions. The focus of the current text is on the obligation to grant access to at least all material evidence in the possession of the competent authorities for or against the suspected or accused person or his lawyer to safeguard the fairness of proceedings and to prepare the defence. Access to the materials will be granted in due time to allow the effective exercise of the right of defence, and at the latest upon submission of the merits of the accusation to the judgement of a court.

The one remaining question is the extent to which a Member State can withhold access to evidence. The original text only allows for two possibilities where access can be denied – where allowing access to the evidence would lead to a serious risk to the life of another person or seriously harm the internal security of the Member State in which the proceedings take place. Within the UK, as with other common law jurisdictions, the prosecutor cannot withhold the evidence on which he will rely in court, but he can apply to the judge to withhold evidence where disclosing that evidence would pose a risk of real harm to an important public interest. This is in line with ECHR case law, such as Rowe and Davis v UK. Whilst the text now allows for broader exemptions from disclosure than those provided for in the published text, including where disclosure would prejudice an ongoing investigation or present a serious risk to the fundamental rights of another person, these are on the one hand narrower than the public interest test and on the other hand broader than UK practice in that no distinction is made between used and unused material.

Both the Presidency and the Commission have announced their intention to find language on Article 7 that fits both common law and civil law jurisdictions. This point will be discussed at a senior officials' meeting on 23 November. We have support from a number of other Member States, some of which have policy concerns about the current exemptions and others which are willing to be flexible in order to accommodate the common law Member States.

If such an amendment is not secured, I would not be content to agree to the General Approach at the JHA Council. My officials will provide an update to your clerk after the senior officials' meeting next week.

We have secured changes to Article 8 which renders it less burdensome for police authorities. The current text is compatible with practice in England, Wales and Northern Ireland.

Article 9 on training now echoes the language of the Directive on Interpretation and Translation in that it makes specific reference to the independence of the judiciary and provides that Member States should request rather than require training from those responsible for the training of judges, prosecutors, police and judicial staff. The Government is content.

The remaining provisions, dealing with issues such as non-regression, transposition and entry into force, are technical and cause the UK no problems.

I hope that this letter and further information early next week will assist in your deliberations with regard to considering lifting the Parliamentary Scrutiny reserve ahead of the JHA Council. I will of course share the latest version of the draft Directive as soon as it becomes available.

18 November 2010

Letter from the Rt. Hon. Kenneth Clarke MP, to the Chairman

I am writing to give you an update on negotiations on this draft Directive following my letter to you of 18 November.

As I stated in my letter of 18 November, the provision on disclosure has changed significantly from the published text so that it reflects mechanisms of disclosure in both common law and civil law traditions. However, I informed you that there was one remaining issue with regard to public interest immunity which remained under discussion and I set out the changes we intended to secure at the senior officials' meeting of 22 and 23 November.

I am pleased to say that following the discussion at the Senior Officials meeting, the text of Article 7 is now compatible with our approach to disclosure and allows for an exemption to be made from disclosure where it is in the public interest to do so. The text builds upon ECHR and ECtHR caselaw and allows enough flexibility for the provision to be met in different ways in different Member States. As such we are hoping that the text will be agreed at the Council.

25 November 2010

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

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

Further to Meg Hillier's letters of 10 December 2009 and 26 January 2010 I am writing to update the Committee on developments to the Commission's work on the feasibility of an index of third country nationals convicted in the European Union.

The UNISYS study has now been completed. Its main recommendation is that Member States should use a decentralised exchange system of criminal records information on third country nationals (ECRIS-TCN) to find out whether third country nationals have convictions elsewhere in the EU. There is no requirement for countries to store biometric information such as fingerprints on their criminal record; instead countries would be required to store alpha-numeric information on third country nationals.

UNISYS also recommended that Member States examine the possibility of creating an integrated fingerprint search system (CRIS-FIN). Very much a test bed for now, CRIS-FIN would look at fingerprints within a wider identification context and cover all convictions and not just those on non-EU nationals. This would be a significant piece of work, not least because fingerprints are not used by the majority of Member States on their criminal conviction register. The UK is significantly ahead of the game on fingerprints because most UK convictions already have an attached fingerprint record. The UK, through the ACPO Criminal Records Office, is also already in receipt of EU funding to look at fingerprints within a criminal conviction context so may well be able to take a leading role with any CRIS-FIN project should it move forward.

The UNISYS report is not a formal legislative proposal from the Commission. The current five-year JHA work programme, the Stockholm Programme, includes an invitation for the Commission to propose a register of third –country nationals who have been convicted by the courts of the Member States. The latest timetable we have seen suggests the draft directive could be issued in 2011. Any formal proposal from the Commission will be subject to the usual scrutiny procedures.

27 September 2010

Letter from the Chairman to James Brokenshire MP

Your recent letter, which arrived on 27 September, was considered by the Justice and Institutions Sub-Committee at its meeting on 13 October. The Committee thanks you for updating it on the progress of the feasibility study.

15 October 2010

EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (15319/10)

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

Your Explanatory Memorandum on this Communication was considered by the Justice and Institutions Sub-Committee at its meeting on 24 November. Like you, we welcome the adoption by

the Commission of a strategic approach to its responsibilities in relation to the effective implementation of the Charter of Fundamental Rights. We note that this strategy builds on the approach on which the Commission reported in 2009 and which we considered would be beneficial. We acknowledge the importance of ensuring that the Charter is properly interpreted, taking account of the accompanying Explanations.

We note that the Commission asserts that the European Union should be an exemplar of respect for fundamental rights. Having regard to this Committee's consistent approach on this issue, we have no difficulty in endorsing that aspiration.

26 November 2010

EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (10817/10)

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

I am writing to you to advise you that the European Union has adopted a mandate for its negotiations with the Council of Europe regarding the European Union's accession to the European Convention on Human Rights ("the Convention"). The UK, along with other Member States agreed the negotiating mandate at the Justice and Home Affairs Council on 4 June 2010.

The Government supports EU accession to the Convention, and it is a treaty obligation under the Lisbon Treaty. The key benefits are that it will:

— close the gap in human rights protection as applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights ("the Strasbourg Court") directly against the EU and its institutions for alleged violations of Convention rights;

— enable the EU to defend itself directly before the Strasbourg Court in matters where EU law or actions of the EU have been impugned; and

— reduce the risk of divergence and ensure consistency between human rights case law between the Strasbourg and Luxembourg Courts.

The EU will be alone amongst parties to the ECHR in that it is not a state. Clearly, the modalities of accession must reflect this fact. However, there is little precedent from which to work, and it will therefore be legally and technically challenging to come up with an approach that respects the particular characteristics of both the EU and the ECHR.

In particular, it will be necessary to translate concepts that are familiar when applied to states – for example, the exhaustion of domestic remedies – to this different context. There may also be challenges relating to cases that are brought against both the EU and one of its member states. We will especially want to ensure that the EU's accession does not have an unanticipated impact on the functioning of the Strasbourg and Luxembourg Courts, and that it is practically possible for applicants to bring proceedings to hold the EU to its obligations under the Convention in the same way as they can the existing member states. We will also be alert to ensure that the UK's interests as a member of the EU or as a party to the Convention are not disadvantaged by the EU's accession.

We expect negotiations with the Council of Europe to start later this year.

The final agreement between the EU and the Council of Europe will be subject to unanimous agreement between the EU Member States, and will be subject to European Parliamentary consent. It will also need to be agreed by the 47 Member States of the Council of Europe, which are also contracting parties to the Convention. EU accession will not extend the competence of the EU or affect the position of the Member States positions in relation to the Convention.

I will write again as negotiations progress, and prior to a final accession agreement being concluded.

30 June 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter of 30 June. This was considered by the Justice and Institutions Sub-Committee at its meeting on 14 July.

We are grateful for the information on the initial steps which have been taken to fulfil the EU's ambition to accede to the Convention which raises significant constitutional issues. We look forward to keeping in touch with developments as the negotiations with the Council of Europe progress.

While we acknowledge that the Council's mandate for the negotiations is confidential, we would find it very helpful if you were able to give us an indication as to the issues which the mandate addresses.

15 July 2010

Letter from the Rt. Hon. Kenneth Clarke MP to the Chairman

Thank you for your letter of 15 July to Kenneth Clarke about the accession of the European Union (EU) to the European Convention on Human Rights. I am responding on Ken's behalf given that we are now in Recess.

Further to Ken's letter of 30 June, you asked for an indication of the topics covered in the confidential Council Decision and negotiating directives adopted on 4 June. Discussions have now started between the EU and the Council of Europe. As set out in the papers released from the first meeting, five broad categories of issues have been identified as requiring discussion, all of which will be considered for the first time between now and the end of the year. These categories are:

(a) issues around the scope of the EU's accession to the Convention, including accession to additional Protocols and ancillary agreements; and the status of reservations, declarations and derogations;

(b) technical adaptations to the provisions of the Conventions and other instruments, particularly the clarification of the application to the EU of terms in the Convention that were chosen in the context of its parties being sovereign states;

(c) the procedure before the European Court of Human Rights (ECtHR), including the participation of the EU in proceedings before the Court; the introduction of a "co-respondent" mechanism for applications that engage the responsibilities of both the EU and its member states; the prior involvement of the European Court of Justice in determining the compatibility of an EU act with the Convention; and further related technical amendments;

(d) the institutional and financial issues, including the election and participation of a judge elected in respect of the EU in the ECtHR; the participation of the European Parliament in the election of judges by the Parliamentary Assembly of the Council of Europe; the participation of the EU in the Committee of Ministers of the Council of Europe when exercising functions under the Convention; and the participation of the EU in paying the costs of the Convention system; and

(e) matters relating to the accession instrument itself, including how it will be ratified and come into force.

I hope that this outline is helpful. As Ken noted in his last letter, he will write again as negotiations progress, and prior to a final accession agreement being concluded.

29 July 2010

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

Thank you for your letter of 29 July which was considered by the Justice and Institutions Sub-Committee at its first meeting following the summer recess, on 6 October. We thank you for your summary of the issues which will be considered in the discussion between the EU and the Council of Europe, and would be grateful to be kept informed as matters develop.

8 October 2010

EU CITIZENSHIP REPORT 2010: DISMANTLING THE OBSTACLES TO EU CITIZENS' RIGHTS

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

Report from the Commission on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC).

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU on progress towards effective EU Citizenship 2007-2010.

I am writing to explain the delay that has occurred in submitting an Explanatory Memorandum on the EU Citizenship Report 2010 and its supporting annexes.

The EU Citizenship Report contains twenty-five action points that span a range of dossiers. Nine Whitehall Departments have policy responsibility for the various proposals contained in the Report which makes coordinating the input to this Explanatory Memorandum unusually complex. However, I can assure the Committee that we are doing our utmost to complete and submit the Explanatory Memorandum as soon as possible.

Each of these twenty-five action points will require a Commission proposal in due course. Each of these will be subject, of course, to the usual scrutiny procedure with your Committee.

30 November 2010

EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS (9145/10, 9288/10)

Letter from the Chairman to the Rt. Hon. Baroness Neville-Jones, Minister of State, Home Office

Your Explanatory Memorandum on this proposal was considered by the Justice and Institutions Sub-Committee at its first meeting in the new Parliament on 30 June. We are grateful for the detailed exposition of the proposal and your analysis in relation to the effects of the proposal for fundamental rights.

So far as the substance of the proposal is concerned, we welcome it in principle. The objective of creating a single system of mutual assistance in relation to evidence in criminal proceedings is one we supported when considering the Commission's Green Paper, and which we continue to support. This proposal would fulfil that objective while building in safeguards of individuals affected by an Investigation Order and offering executing states a measure of flexibility. We agree with you in finding the proposal consistent with the principle of subsidiarity.

We endorse your concerns as to points of detail in the proposal. In particular, we consider that the Directive should contain a proportionality safeguard, having regard to the reported difficulties there have been with the issuing of European Arrest Warrants in minor cases. But we would expect such detailed concerns to be capable of resolution in the course of negotiation. We therefore take the view that the UK should exercise its right to opt in to it.

We retain this matter under scrutiny and would be grateful for further information as matters develop.

1 July 2010

Letter from the Rt. Hon. Baroness Neville-Jones to the Chairman

Explanatory Memorandum 9145/10 concerning the European Investigation Order (EIO) was submitted on 25 May 2010. In paragraph 55 it stated that there were ongoing consultations on the proposal and that copies of any official responses would be provided. I am now writing to do this; I attach responses from the Child Exploitation and Online Protection Centre, the Metropolitan Police Service, the Law Society of England and Wales, Fair Trials International and Justice.

I would also like to draw your attention to an article that will be appearing in the next edition of Archbold Review. This concerns the EIO and has been written by Professor John Spencer of Cambridge University.

I would also like to thank you for your letter of 1 July regarding the EIO and the opt-in decision. The views of the House of Lords' Select Committee on the European Union are always useful and have helped inform my thinking on this matter.

I will, of course, continue to keep you updated with any further developments and provide you with any further responses.

21 July 2010

Letter from the Rt. Hon. Baroness Neville-Jones to the Chairman

As you will recall, the UK opted into the European Investigation Order (EIO) on 27 July. Prior to this, I wrote to you with the official responses to the Home Office consultation on the EIO. I am writing to you now with further responses from Justice (dated August 2010) and Fair Trials International (dated 29 July 2010).

I will, of course, continue to keep you updated with any further developments and provide you with any further responses relating to the EIO.

1 September 2010

Letter from the Chairman to the Rt. Hon. Baroness Neville-Jones

Thank you for your letter of 21 July and the undated one which we received on 21 September. These were considered by the Justice and Institutions Sub-Committee at its first meeting following the summer recess, on 6 October. We are grateful for sight of the responses to your consultation. We have noted the statement you made in Parliament on 27 July that the Government had decided to opt in to this initiative.

The Committee continues to support this proposed measure in principle. We find persuasive some of the points raised by respondents to your consultation; in particular –

— that there should be an express ground for refusing an EIO if its execution would involve a breach of fundamental rights (as well as a proportionality safeguard, as the Committee previously urged);

— that the Directive should make clear that the EIO procedure is capable of use by defence lawyers as well as investigating and prosecuting authorities;

— that the Government ought to consider whether there should be express provision for dual criminality.

We retain the matter under scrutiny and would be grateful to be kept informed as the negotiations on the initiative proceed.

8 October 2010

INSTITUTIONS: CITIZENS' INITIATIVE (8399/10)

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

Thank you for your Explanatory Memorandum dated 22 June which was considered by the Justice and Institutions Sub-Committee on 14 July. We have decided to retain this document under scrutiny.

The Committee, like the Government, accepts the principle of the Citizens' Initiative as introduced by the Lisbon Treaty but would like to draw attention to the difficulties of practical implementation. We support your intention to ensure that the proposal is not overly bureaucratic and note that you do not support the proposal for Member States to be required to authenticate and verify statements of support. We are unclear as to whether the Government primarily oppose the principle of verification or the fact that it is proposed that this should be the responsibility of Member States and would welcome clarification on this point. In addition we note your comment that the principal financial burden for the UK is likely to arise as a result of the need to verify signatures. If the proposal was to be agreed unaltered in this respect, what processes do the Government envisage implementing and what would be the estimated financial cost?

The Committee shares the Government's concern that personal data should be subject to adequate safeguards and would be grateful if you could provide the Committee with a copy of the report from the European Data Ombudsman when it becomes available.

Finally, we note with disappointment the 10 weeks between deposit of this document and the submission of the Explanatory Memorandum. This is well over the 10 working days set out in the Cabinet Office Guidelines and is particularly regrettable given the Spanish Presidency's intention to seek quick agreement. We would be grateful for an explanation including as to why no extension to the deadline was sought.

We would be grateful for a response to these matters within the usual ten days.

15 July 2010

Letter from David Lidington MP

Further to my Explanatory Memorandum (EM) of 22 June, I write to provide the Committee with an update on negotiations for the European Citizens' Initiative (ECI). As the EM highlighted, the Spanish Presidency pushed for a general approach agreement on a revised text at the June General Affairs

Council. The UK opposed this early decision by the Council, and made clear our abstention on Parliamentary scrutiny grounds, as well as on substantive policy concerns with the text. The Presidency had enough support for a General Approach, but nevertheless acknowledged UK concerns that there are a number of issues still to be resolved, a view that was also shared by a number of other Member States. It has now been confirmed that the Belgian Presidency will take forward further negotiations.

I attach the revised proposal. The key changes for the UK in the text from the original version are:

— The retention of the two-stage admissibility check (articles 4 and 8), but with the threshold of statements of support lowered from 300,000 to 100,000.

— Language in the preamble that Member States can carry out verification of statements of support on the basis of random sampling.

— Data that citizens are now obliged to provide in order to comply with the statement of support form (and so join an initiative) now varies according to the Member State. Most require inclusion of personal ID document data, as set out in Part B of Annex III (list of ID documents in original language). However, citizens from the UK, along with those from Denmark, Ireland, the Netherlands, Finland and Slovakia, are exempt from providing any other information than name, address, date of birth and nationality. This is set out in Part A of Annex III.

— Article 9 specifies that, for those Part A Member States mentioned above, the statements of support should be sent to either the Member State of residence or of nationality. Article 9 now also mentions that verification of statements of support should be 'in accordance with national law and practice, as appropriate'.

— Language in the preamble states that the Commission is 'encouraged to promote the development of an open source software which will provide the technical and security features necessary for complying with the provisions of this regulation as regards the online collect systems'. This idea is, however, not later reflected in Article 6, which still requires Member States to certify online collection systems.

Taken individually, the Government welcomes the spirit of these changes as they largely represent a step in the right direction from the original text to recognise the individual circumstances and traditions of Member States. However, the Government's original position remains unchanged: we still consider the proposal as a whole to be over-bureaucratic and burdensome on both Member States and citizens given the purpose and intent of the ECI, in particular requirements for verification. Going forward therefore, the Government will be seeking more flexibility in how Member States can approach verification, including leaving the decision to do so at Member States' discretion. The Government will also be seeking more thought and development into the idea of a single website for the collection of online signatures, with no role for the Member State in certification. We will also be seeking the merger of Articles 4 and 8, to establish a single eligibility check by the Commission before statements of support are gathered. The UK supported the French-led statement to the Council's minutes, along with the Czech Republic, Italy and Lithuania, to this effect. The UK will continue to engage closely with all relevant EU institutions.

I will continue to keep the Committees updated as discussions continue.

13 July 2010

Letter from the Chairman to David Lidington MP

Thank you for your letter dated 13 July. It was considered by the Justice and Institutions Sub-Committee on 28 July.

The Committee has previously expressed its support for the Government's efforts to ensure that the proposal is not overly bureaucratic. We therefore welcome the changes to the text. We would ask to be kept updated of any further developments and look forward to receiving a reply to the points raised in our letter of 15 July.

29 July 2010

Letter from David Lidington MP to the Chairman

Further to your recent correspondence of 15 July, I am writing to follow-up on points you raised with regard to the European Citizen's Initiative (ECI).

As I outlined in my recent update letter to the Committees on 13 July, negotiations on the proposal will be taken forward under the Belgian Presidency. The UK has made the point consistently that

there remain a number of issues still to be resolved in the dossier. As the text remains open for further change and discussion, it would be inappropriate for me to provide details on how the Government would implement a proposal that we do not support as a whole. As I mentioned in my 13 July letter, the UK will continue to engage closely with all relevant EU institutions, to secure our objectives with regard to: verification of statements of support; a single website for online collection; and the single admissibility check.

On the principle of verification, I can clarify, however, that the UK is not opposed to measures which would prevent abuse of the ECI, but rather has strong concerns on the appropriateness of the system currently proposed and the bureaucratic approach it adopts. I believe the system should be as citizen-friendly and uncomplicated as possible.

In relation to your final point regarding the timing of the deposit of the Explanatory Memorandum (EM), the timing of this dossier was particularly unfortunate. It was initially published by the Commission on 31 March 2010, which was, as you will be aware, one working day before the General Election was called, and immediately after the Easter weekend, on 6 April. My officials submitted an unnumbered EM during the Purdah period, and a formal EM was submitted before the Committees reformed following the new Parliament. I apologise for the length of time this process took, but you will appreciate that time was needed to finalise the new Government's view of the dossier proposed.

As noted in my 13 July letter, the UK opposed an early decision by the Council, and made clear our abstention on Parliamentary scrutiny grounds. I will continue to keep the Committees updated as discussions continue.

29 July 2010

Letter from the Chairman to David Lidington MP

Thank you for your letter of 29 July, which was considered by the Justice and Institutions Sub-Committee. They decided to retain the document under scrutiny.

We continue to support your intention to reduce the bureaucracy surrounding the Citizens' Initiative, but maintain our concern that respondents' personal data is adequately protected. We would appreciate updates on the progress of the negotiations.

8 October 2010

INSTITUTIONS: IMPLEMENTING POWERS (7386/10)

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

Thank you for your Explanatory Memorandum of 11 June. This was considered by the Justice and Institutions Sub-Committee at its meeting of 30 June. We decided to retain this proposal under scrutiny.

The Commission has put forward a radical proposal which gives it significantly more opportunity to adopt legislation in the face of opposition from the Member States than under the present comitology arrangements.

We look forward to considering the new Presidency text when it is available. In the meantime we should be grateful for answers to the following questions within the usual ten day deadline:

— Does Article 291 TFEU, by referring expressly to control of implementing legislation by Member States, exclude the possibility of the Council and the European Parliament playing a role, as they do in the existing comitology procedures?

— To what extent might it be beneficial to prescribe the procedure to be used in order to avoid inconsistencies and difficulties in negotiating the various measures conferring implementing powers? Should the proposal continue to prescribe the examination procedure for the adoption of "measures of general scope" what would be covered by this phrase?

— To what extent is it necessary or useful for there to be an urgency procedure?

1 July 2010

Letter from the Chairman to David Lidington MP

Thank you for your letters of 26 July and 28 September. These were considered by the Justice and Institutions Sub-Committee at its meeting of 13 October. We decided to retain this matter under scrutiny pending further developments in the negotiation.

The Committee is grateful for sight of the latest Presidency text and welcomes the rebalancing of the Commission's proposal by giving Member States more control over its original proposal.

We should be grateful for clarification of your view that Article 291 TFEU provides no role for the European Parliament. Does this preclude giving the European Parliament any role at all in relation to Commission implementing legislation?

We should be grateful for a response within the usual 10 day deadline.

14 October 2010

Letter from David Lidington MP to the Chairman

Thank you for your letter of 14 October 2010.

As you note, the Government has previously stated its view that Article 291 TFEU does not provide a role for the European Parliament (except as provided in Article 291(3) TFEU as co-legislator with the Council, to agree the new comitology Regulation). Your letter asks whether I consider that Article 291 provides any role at all for the European Parliament in relation to Commission implementing legislation.

The European Parliament has the role afforded to it by Article 263 TFEU second paragraph, as a privileged applicant, to bring a challenge before the EU Courts in respect of the legality of acts adopted by the Commission. The European Parliament will therefore be able to bring a challenge under Article 263 TFEU against an implementing act.

As you are aware, negotiations for the new comitology Regulation are ongoing. In the course of the negotiations it has been proposed that the European Parliament should have a formal scrutiny role ('droit de regard') provided in the new comitology Regulation. The current proposal is that this would provide the European Parliament (or the Council) with the possibility to indicate whether it considers that a proposed Commission act exceeds the delegation conferred on the Commission by the basic act. The Commission would then review the proposed act and inform the European Parliament (and Council) whether it intends to maintain, amend, or withdraw the proposal. The European Parliament has a more limited droit de regard for one procedure under the current comitology Decision. The text of the provision in the current Decision, and the proposal in regard to the draft Regulation is reproduced in an annex to this letter, for information.

At this stage we are seeking further information on this proposal, including an explanation as to how this is consistent with the Treaty, and in particular the wording of Article 291. Once we have received more information regarding the legal basis for this proposal we will consider the matter further. I will of course be happy to inform you of the conclusion that we reach on this point.

I will also update the committee with general developments on the proposed Regulation in the near future. As matters are now moving quickly, I may need to revert to the committee at relatively short notice once a proposal has been finalised.

1 November 2010

Letter from the Chairman to David Lidington MP

Thank you for your letter of 1 November.

We note that negotiations are proceeding swiftly on this and look forward to receiving in due course your further update on the progress of the negotiation and the results of your further consideration of whether a formal scrutiny role for the European Parliament is compatible with Article 291 TFEU.

18 November 2010

INTELLECTUAL PROPERTY: EUROPEAN UNION PATENT TRANSLATION ARRANGEMENTS (11805/10)

Letter from the Chairman to Baroness Wilcox, Parliamentary Under Secretary of State, Department for Business, Innovation and Skills

Thank you for your Explanatory Memorandum dated 15 July 2010. It was considered by the Justice and Institutions Sub-Committee at its meeting of 28 July 2010.

We have decided to retain this matter under scrutiny.

As we said in our letter of 4 December 2009 in the context of the Council Regulation on the Community patent:

"The Committee has a long history of considering European Community attempts to create a Community patent system. In addition to the numerous legislative proposals submitted for routine scrutiny, this Committee's first Report into this subject matter was published over 20 years ago and this was followed by a second Report in 1998. Over the course of this period the Committee has repeatedly expressed its desire for an effective Community patent system which is acceptable not only to the Member States' individual interests but also from industry's point of view".

COSTS

In their Explanatory Memorandum (EM) accompanying this proposal the Commission estimates that an average EP application valid in 13 countries costs about €20,000 of which nearly €14,000 constitutes translation costs. This, the Commission says, compares with the US where on average a patent costs €1850. The Commission estimates that, if adopted, this proposal would have a very significant impact on the average fees for an EUP valid in all 27 Member States. If the Commission's figures are correct the cost will be on average €6200 of which, they say, 10% will be due to translation costs. Whilst your Explanatory Memorandum highlights the cost ramifications of the deal which failed in 2003/04 you do not discuss in detail the implications for costs of this proposal. Do the Government agree with the Commission's figures?

CONSULTATION AND ENHANCED CO-OPERATION

In relation to paragraph 27 of your Explanatory Memorandum, you highlight the possibility that should the Member States fail to achieve the unanimous agreement of this proposal necessary for it to be adopted, you expect the Commission and the Presidency to proceed via enhanced cooperation. In the following paragraph addressing "Consultation" you say that because this proposal was first mooted in 2000 "stakeholder views [are] unlikely to have changed" and we therefore conclude that you do not intend to consult further. Whilst the Committee agrees with your statement on the potential shortcomings of pursuing this proposal via enhanced cooperation i.e. that "the fewer countries that are involved in any agreement, the more limited any benefits would be", we would like to know whether the Government intend to (re)consult with stakeholders on the efficacy of legislating in this area via enhanced cooperation. It is the Committee's view that once the Government have done this they would be better able to gauge the enthusiasm (or not) amongst stakeholders for enhanced cooperation in this field and therefore able to decide whether or not to advocate enhanced cooperation.

We look forward to receiving the Government's impact assessment and considering your answers to our questions in due course.

29 July 2010

Letter from to Baroness Wilcox to the Chairman

Thank you for your letter dated 29 July 2010, and for the considerable interest you have taken in this subject over the many years it has been discussed. I can answer the questions raised in your letter as follows.

COSTS

Estimating the cost of patenting, both at present and in the future, is a very difficult task. Although it is possible to calculate average costs for official fees and translations, it must be recognised that the actual cost of each individual patent application can deviate significantly from any calculated average. Of course official fees and translation costs form only part of the overall costs of obtaining a patent

since most applicants will seek professional advice in drafting a patent application and dealing with the patent authorities.

The Commission have not published the data and calculations used to obtain the figures given in their impact assessment, and we are unable to ascertain their methodology purely from the figures themselves. Following our own methodology has provided some different figures.

Under the European Patent Office (EPO) fee structure, the fees paid depend on the length of the patent document and the time taken to grant the patent among numerous other factors. That said, we agree with the Commission's estimated average pre-grant fees of 5,500 Euros. Further, the cost of translations can vary significantly depending on the subject matter of the patent, the languages being translated from and to, and the country in which the translation takes place. Our sources indicate that translations can cost anything between 20 and 150 Euros per page, but again we agree with the Commission's estimated average of 85 Euros per page.

The Commission's estimate that an average European patent validated in 13 countries would cost about 20,000 Euros, of which nearly 14,000 Euros constitutes translation costs, may have been reasonable in 2006. However, the entry into force of the London Agreement in 2009 has reduced translation costs such that our preliminary calculations indicate 9,520 Euros in translation costs for an average European patent validated in 13 countries. Pages 6-8 of the Commission's Impact Assessment include a comprehensive summary of the London Agreement.

We therefore assess that the application and translation costs, together with national validation fees (1,160 Euros for the 13 countries in figure 3 of the impact assessment), amount to 16,180 Euros for an average European patent validated in 13 countries, of which 9,520 Euros constitutes translation costs.

Again, the average patent cost in the US of 1,850 Euros comes from 2006. Today, a more realistic estimate would be 4,000 Euros due to significant fee increases. This would make the cost of a European patent valid in 13 countries around 4 times more expensive than a US patent, not 10 times. Of course these calculations do not take into account the renewal fees that must be paid, or the fees for professional representation (which in the US is compulsory).

Assuming all EPO pre-grant fees do not exceed 5,500 Euros, we agree that were the Commission's proposal to be adopted then the average fees and translation costs for an EU patent (valid in all 27 Member States) would amount to 6,180 Euros for an applicant whose native language is English, French or German, 680 Euros of this being translation costs. For other applicants, this cost would increase to 7,880 Euros, 2380 Euros being translation costs. Again, renewal and professional representation fees would be in addition to this.

We are currently working with economists to ensure that our full impact assessment is as accurate as possible, and will submit it when finalised.

CONSULTATION AND ENHANCED COOPERATION

Although we do not expect stakeholder views to have changed on the general principle of a three language arrangement for the EU patent, the proposed Regulation also includes an Article relating to translations in case of dispute. Further, the Commission's EM discusses additional reimbursement of translation costs for EU applicants not from English, French or German speaking countries. We are therefore currently consulting key stakeholders on these issues.

We intend to discuss with key stakeholders to gauge their enthusiasm for a system involving enhanced cooperation, which would presumably result in a patent with coverage of fewer than 27 EU Member States. However, we cannot consult effectively on enhanced cooperation until the essential components of any proposal are clear.

19 August 2010

Letter from Baroness Wilcox to the Chairman

I am writing to give you advance warning of the possibility that the Government may need to override parliamentary scrutiny on a proposal for a Council Regulation on the translation arrangements for the European Union patent.

Discussions on the EU (formerly Community) patent have been ongoing in Council since 2000, and in December last year political agreement was achieved on an EU patent Regulation. This regulation did not however solve the long-standing issue of how many, and which, languages EU patents must be translated into. The Commission published the present proposal for a separate regulation to govern the translation arrangements on 2 July 2010, and we submitted the required Explanatory

Memorandum on 15 July. You requested further information in your letter dated 29 July, which we responded to on 19 August. However, as Parliament was in recess, our response could not be considered until 6 October, at which point the document was not cleared.

The UK Government considers that the Commission's proposal achieves the goal of being business-friendly whilst also providing the best possible chance of reaching consensus among Member States. We intend to support progress on the proposal, which is due to be discussed at the Competiveness Council on 11 October, possibly on the basis of minor amendments which do not affect its substance. We shall of course take the necessary steps so that your Committee may clear the document as soon as possible. In the meantime I hope that you will accept my explanation.

7 October 2010

Letter from the Chairman to Baroness Wilcox

Thank you for your letter dated 19 August 2010. It was considered by the Justice and Institutions Sub-Committee at its meeting of 6 October 2010.

We have decided to retain this matter under scrutiny.

The Committee is grateful for the latest information you have provided, in particular the up to date estimates as to the costs of securing patent protection within the current European Patent Office structure and confirmation of the Commission's figures outlining the impressive savings this proposal could potentially achieve if it were adopted.

We look forward to continuing our scrutiny of this proposal and to receiving a copy of your full impact assessment in due course.

8 October 2010

Letter from Baroness Wilcox to the Chairman

I would like to update you on recent developments regarding the issue of EU patent languages, including the outcome of the EU Competitiveness Council on 11 October which I attended, and at which EU patent languages was discussed.

Since the Commission's proposal was published in July, a number of Member States, whilst supporting the general principle of a three language regime, have raised concerns over some of the details, particularly the availability of machine translations of patent applications for information purposes. These concerns were addressed in the Presidency's paper (Council doc. no. 14377/10), and a political orientation was sought on the basis of the Commission's proposal, with the amendments suggested by the Presidency's paper, at the Competitiveness Council on 11 October.

Although a large majority of delegations at the Competitiveness Council (including the UK) supported the Commission's proposal, with Presidency amendments, a political orientation was not achieved, with Spain and Italy indicating that they would block any agreement on this basis. It was therefore not necessary to override parliamentary scrutiny before your Committee as alluded to in my letter dated 7 October. A large majority of delegations also underlined that any further compromise to reach agreement must not result in significant costs for additional translations, and must not result in any legal uncertainty. The UK Government supports this view.

The prospect for further progress on this issue is currently unclear. The Presidency feels that it has enough support to intensify and accelerate work with a view to reaching a successful outcome by the end of this year. At the Competitiveness Council several delegations mentioned the possibility of using enhanced cooperation, and this is still a very real option, although the Presidency remains committed to finding a compromise acceptable to all 27 Member States. The UK Government is still considering its position on the use of enhanced cooperation for this issue. The Presidency is planning to hold an additional Competitiveness Council on 10 November to discuss the EU patent further, and we will of course keep you updated on any progress made.

Your comments regarding the Government's impact assessment are noted. However, as the prospect of agreement on the basis of the Commission's current proposal is still very uncertain, it is considered that completion of the impact assessment would be of little value at this stage. Should a proposal emerge that has a real prospect of success, under enhanced cooperation or otherwise, the Government will of course ensure that a suitable impact assessment is available.

19 October 2010

Letter from the Chairman to Baroness Wilcox

Thank you for your letters dated 7 October and 19 October which were both considered by the Justice and Institutions Sub-Committee. In light of the information you provided concerning the lack of agreement at the Competitiveness Council held on 11 October we retain this matter under scrutiny.

We note your statement that "the prospect for further progress on this issue is currently unclear". The Committee would like to make it clear that we are in favour of the simplified language regime for the European Union Patent and we support the Government in their attempts to get unanimous agreement on this proposal. The Committee also remains of the view that should it prove impossible to secure the necessary unanimous support in the Council, the Government should (re)consult with relevant stakeholders as to the viability of pursuing a European based patent protection system via enhanced cooperation.

4 November 2010

Letter from Baroness Wilcox to the Chairman

I am writing to give you advance warning of the possibility that the Government may need to override parliamentary scrutiny on a proposal for a Council Regulation on the translation arrangements for the European Union patent.

Discussions on the EU (formerly Community) patent have been ongoing in Council since 2000, and in December last year political agreement was achieved on an EU patent regulation. However, this regulation did not solve the long-standing issue of how many, and which, languages EU patents must be translated into. The Commission published the present proposal for a separate regulation to govern the translation arrangements on 2 July 2010, and we submitted the required Explanatory Memorandum on 15 July. Following our further letter on 19 August you retained the matter under scrutiny pending our full impact assessment. It has not yet been possible to complete an impact assessment as details of the proposal which affects the cost to users (namely the number of translations required) are still being discussed.

The UK Government intends to support progress on the Commission's proposal, which is due to be discussed at the Competiveness Council on 10 November, possibly on the basis of amendments which may require a further translation of EU patent documents during a transitional period. We consider that the proposal, even with the requirement of an additional translation, achieves the overall goal of providing real benefits to the economy while still being business-friendly and also providing the best possible chance of reaching consensus among Member States. We shall of course take the necessary steps so that your Committee may clear the document as soon as possible. In the meantime I hope that you will accept my explanation.

8 November 2010

Letter from Baroness Wilcox to the Chairman

I would like to update you on recent developments regarding translation arrangements for the EU patent, including the outcome of the extraordinary Competitiveness Council on 10 November which I attended, and at which EU patent languages was discussed.

Following failure to achieve a unanimous political agreement at the Competitiveness Council on 11 October, the Belgian Presidency made a final valiant effort to find a compromise which might be acceptable to all 27 Member States. The Presidency's proposed further compromise (presented in Council doc. no. 15395/10) focussed around a transitional period during which EU patents granted in French or German would have to be translated into English as well.

Although this compromise added yet more complexity to the proposed Regulation, the vast majority of Member States were prepared to accept it if it would lead to a unanimous agreement. However, Italy and Poland, whilst being prepared to negotiate, ultimately could not accept the terms of the compromise. Spain, however, continued to reject any idea of a three language regime, arguing it would be discriminatory. It was therefore not necessary to override parliamentary scrutiny before your Committee as warned in my letter dated 8 November.

In his summing up, the Belgian Minister conceded that it is now clear that unanimity on EU patent languages cannot be achieved. He added that the Presidency will now reflect on how to capitalise on the momentum created. This may of course mean the use of enhanced cooperation - an agreement by fewer than 27 to create a patent valid only in those states. The UK Government are still considering whether this is something that we should be involved in. Should a proposal emerge that has a real

prospect of success, under enhanced cooperation or otherwise, the Government will of course ensure that a suitable impact assessment is available.

17 November 2010

Letter from the Chairman to Baroness Wilcox

Thank you for your letters dated 8 and 17 November 2010. They were both considered by the Justice and Institutions Sub-Committee at its meeting of 24 November 2010.

As you are aware, this Committee has consistently expressed its support for the Government's attempts to reach the requisite unanimous agreement necessary for this proposal, so it is with disappointment that we read of the events at the Council held on 10 November.

The Committee remains of the view that if, as transpired, unanimous agreement on the EU Patent translation arrangements proved elusive, the Government should give serious consideration to pursuing agreement via the alternative route of enhanced cooperation.

If and when it emerges, the Committee looks forward to considering any viable proposal designed to clear this impasse and, as it now appears obvious that it will not be possible to reach unanimous agreement of this proposal in the Council, we clear it from scrutiny.

26 November 2010

INTELLECTUAL PROPERTY: PATENTS COURT: DRAFT AGREEMENT (7928/09)

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

The letter dated 6 April 2010 from your predecessor, David Lammy MP, was considered by the Justice and Institutions Sub-Committee at its meeting of 30 June 2010.

We retain this matter under scrutiny.

We are grateful for the answer to our question concerning the splitting of jurisdiction between the Central and Local Divisions of the Court of First Instance and the information included regarding the date of the hearing before the European Court of Justice. The Committee looks forward to considering in due course both the Court's opinion and the Government's view of it.

1 July 2010

INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (12265/09)

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

Your Committee cleared this proposal from scrutiny on 9 December 2009. For your information I am writing to update you on the subsequent developments during the negotiations.

It was agreed that the Commission's proposal should be split into two draft Council Decisions – one on the signing, on behalf of the EU, of the Hague Convention and the other on the conclusion, on behalf of the EU, of the Convention. Apart from technical changes and the issues highlighted in this letter, the content of the split proposals is in line with the Commission's original proposal.

You will be aware that one of the main issues arising from the Commission's proposal was the question of external EU competence. Questions were raised about whether the provisions on administrative cooperation and legal aid in the Convention fell within the EU's exclusive competence. As a way of moving forward the negotiations it was agreed that any reference to "exclusive" competence in the text should be removed and that the Council and the Commission should make the following joint statement to be entered in the minutes of the Council meeting at which the decision on signature is agreed:

The Council and the Commission recognise that arrangements between a Member State and a third State on administrative cooperation and on legal aid, as a general rule, do not affect Union rules or alter their scope.

However, taking into account the existence of Regulation (EC) No 4/2009, the Union has decided, in this particular case, to exercise competence over all the matters governed by the 2007 Hague Convention, i.e. also

over matters relating to administrative cooperation and legal aid, and to conclude the Convention alone. The Union should therefore, at the time of conclusion of the Convention, make the declaration provided for in Article 59(3) thereof.

The exercise by the Union of competence over matters relating to administrative cooperation and legal aid in the context of this particular Convention does not preclude that Member States may agree on arrangements on such matters with third States, provided that such arrangements do not affect Union rules or alter their scope in accordance with the case law of the Court of Justice.

The Government has recently given further consideration to this matter and has concluded that by applying the test set down in the case law of the ECJ (established most notably in the AETR case) the adoption of the Maintenance Regulation in 2008 has generated exclusive external EU competence to sign and conclude the Convention. It accepts that if Member States were permitted to sign and conclude themselves a Convention regulating the arrangements between EU Member States for recognising and enforcing child support and maintenance payments this could undermine the rules in the Maintenance Regulation which regulate the same matters. It also considers that it is clear from the AETR case law that the EU cannot acquire exclusive competence in relation to administrative cooperation and legal aid more generally (i.e. in matters unrelated to child support and maintenance) as a result of the Maintenance Regulation or the conclusion of the Hague Convention. The Government's assessment of the exclusive competence issues does not affect its support of the proposed text of either proposal, including the draft declaration.

With regard to other matters, the Commission proposed that the scope of the Convention should be extended to all maintenance obligations arising from a family relationship, parentage, marriage or affinity. This would align the scope with that of the Maintenance Regulation. However, to date, it has not proved possible to obtain agreement between Member States on this issue. As a compromise it has been suggested that Chapters II and III of the Convention should be extended to cover maintenance obligations between spouses and former spouses and that after the Convention has been working for a number of years (seven are proposed) the possibility of extending the scope to other forms of maintenance will be considered. It is proposed that a declaration is made to that effect. While the Government would prefer the greatest possible alignment in scope between the Convention and the Regulation it is prepared to accept this compromise if it proves impossible to negotiate the wider scope.

The Commission also suggested that Member States should indicate the languages in which they would accept any applications and related documents under the Convention but that all should ensure they accepted both French and English. During the negotiations it has been agreed that Member States should be able to choose French or English but will not be required to accept both. The Government can support this suggestion.

As a practical measure it has been agreed that while all notifications from Member States about, for example, the contact details of their central authorities should initially be channelled through the Commission, any subsequent amendments can be sent to the Permanent Bureau of the Hague Conference direct. There has also been clarification that day to day contact between central authorities in each Member State should be made directly. The Government believes these are helpful suggestions.

It is not yet clear when what is now the two proposals are likely to be agreed but there is a possibility the Presidency will seek agreement at the December JHA Council.

8 November 2010

Letter from the Chairman to the Rt. Hon. Kenneth Clarke MP

Thank you for your letter of 8 November. This was considered by the Justice and Institutions Sub-Committee at its meeting of 24 November.

The Committee is grateful for the update. As signalled in earlier correspondence, we agree with the position now taken by the Government that the EU has exclusive competence to enter into this agreement.

Like you, we consider it would have been better for the Convention to have covered the same forms of maintenance as those covered by Regulation 4/2009, but we understand the need for the compromise at present.

We do not require a response to this letter.

26 November 2010

MECHANISMS FOR CONTROL BY MEMBER STATES: IMPLEMENTING POWERS (137775/10)

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

Thank you for your response of 9 September to my Explanatory Memorandum of 11 June. You requested a copy of the Presidency's revised draft of the Regulation and my views on progress to date.

I enclose the latest draft Belgian Presidency proposal, dated 20 September, which should be read in conjunction with the compromise text from the Spanish Presidency (also enclosed). I should be grateful if you could please treat these documents in confidence since the text is the subject of a live negotiation within the Council working group.

The current text is a significant improvement on the Commission's first draft in the following regards:

SELECTION OF PROCEDURES

There is a presumption that the more rigorous examination procedure will apply to more sensitive areas such as taxation.

TIME LIMITS FOR CONSIDERATION OF COMMISSION DRAFT MEASURES

It is made clear that the Member States should have an early and effective opportunity to examine the Commission's proposals.

ADDITIONAL OBLIGATIONS OF THE COMMISSION

The Commission is required to take into account amendments made by the Member State representatives on the committee and to find solutions that command the widest support in the committee.

WRITTEN PROCEDURE

A Member State may ask for the written procedure to be halted and for a meeting to be called.

APPEAL COMMITTEE

An Appeal Committee comprised of Member State representatives is introduced as an extra control over the Commission. Where the main committee does not support draft measures by a qualified majority and does not oppose the measures by qualified majority, the general rule is that the Commission cannot adopt the measures. However, in specified cases it must first submit its measures to the Appeal Committee for further consideration.

URGENT MEASURES

Additional obligations are imposed on the Commission. Urgent measures cannot stay in effect for more than six months and can be terminated by the Member State committee at an earlier date.

REVIEW

The Presidency text includes an obligation on the Commission to present a report on the working of the Comitology Regulation five years after it comes into force.

However agreement has not yet been reached on measures relating to Common Commercial Policy (CCP). CCP is currently outside the comitology regime. The Commission proposes to bring these measures within the new comitology regulation and make them subject to the standard comitology voting rules (i.e. qualified majority to adopt the measures and qualified majority to block the measures). The UK together with a number of other Member States (constituting a blocking minority) is pressing for there to be the possibility of the existing CCP voting rules continuing. In some cases, this would mean having a simple majority to block a Commission measure rather than a qualified majority. But there is also a blocking minority against this and thus an impasse in the negotiations on this point. This was not resolved in COREPER I on Friday 24 September, but the UK, together with

other members of our blocking minority, made clear that the current Presidency compromise text was unacceptable for us.

The Presidency is proceeding with bilateral negotiations with key Member States. They remain keen to push for a First Reading deal with the Parliament. In order to achieve this, they would need to have a clear Council position on all issues before the European Parliament JURI Committee meets on 18 October.

I shall continue to keep you informed of significant developments on this dossier.

28 September 2010