House of Commons

European Scrutiny Committee

# Seventh Report of Session 2012–13

**Documents considered by the Committee on 4 July 2012, including the following recommendations for debate:**

Global satellite navigation systems

Establishing a new Schengen evaluation mechanism

EURODAC

HC 86-vii

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# Notes

## Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

## Abbreviations used in the headnotes and footnotes

| | |
|---|---|
| EC | (in "*Legal base*") Treaty establishing the European Community |
| EM | Explanatory Memorandum (submitted by the Government to the Committee)* |
| EP | European Parliament |
| EU | (in "*Legal base*") Treaty on European Union |
| GAERC | General Affairs and External Relations Council |
| JHA | Justice and Home Affairs |
| OJ | Official Journal of the European Communities |
| QMV | Qualified majority voting |
| RIA | Regulatory Impact Assessment |
| SEM | Supplementary Explanatory Memorandum |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

## Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

## Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) can be downloaded from the Cabinet Office website: http://europeanmemorandum.cabinetoffice.gov.uk/search.aspx.

Letters sent by Ministers to the Committee relating to European documents are available for the public to inspect; anyone wishing to do so should contact the staff of the Committee ("Contacts" below).

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## Report

# 1 Global satellite navigation systems

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|---|---|
| (33511)<br>17844/11<br>+ ADDs 1–2<br>COM(11) 814 | Draft Regulation on the implementation and exploitation of European satellite navigation systems |

| | |
|---|---|
| *Legal base* | Article 172 TFEU; co-decision; QMV |
| *Department* | Business, Innovation and Skills |
| *Basis of consideration* | Minister's letter of 27 June 2012 |
| *Previous Committee Reports* | HC 428–xlviii (2010–12), chapter 5 (25 January 2012) and HC 86–ii (2012–13), chapter 1 (16 May 2012) |
| *Discussion in Council* | 7–8 June 2012 |
| *Committee's assessment* | Politically important |
| *Committee's decision* | For debate in European Committee C (decision reported on 16 May 2012) |

## Background

1.1 The EU has a two-phase policy for developing a global navigation satellite system (GNSS). The first phase, GNSS 1, is the European Geostationary Navigation Overlay System (EGNOS) programme. The second phase, GNSS 2, is the programme, named Galileo, to establish a new satellite navigation constellation with appropriate ground infrastructure.

1.2 Galileo is based on the presumption that Europe ought not to rely indefinitely on the GPS (the US Global Positioning System) and GLONASS (the Russian Global Navigation Satellite System) systems, augmented by EGNOS. Galileo is being carried out in conjunction with the European Space Agency (ESA)[1] and there are a number of agreements in place or being negotiated with third countries about cooperation in the project.

1.3 The Galileo and EGNOS programmes have three phases:

- the validation phase is already complete for EGNOS;
- the validation phase of the Galileo programme is due for completion in 2013;
- the deployment phase for EGNOS is already complete;
- the deployment phase where the systems are built and tested is now underway for Galileo and the Commission estimates that it will be completed in 2020;

1 See http://www.esa.int/SPECIALS/About_ESA/SEMW16ARR1F_0.html and http://www.esa.int/esaNA/index.html.

- EGNOS is already in the exploitation phase, as services are already offered — an open service, a service for the dissemination and development of data for the development of commercial applications and a safety of life service; and

- the exploitation phase for Galileo, where services are offered, is scheduled to begin in 2014 and to be complete by 2020.

1.4 It is intended that Galileo will allow provision of five services. These are known as the:

- Open Service, free of charge at the point of use — a basic service, but it is expected to potentially offer greater accuracy and coverage than GPS;

- Commercial Service, offering for a fee added value for more demanding uses — that is expected to be professional users who need superior accuracy and guaranteed service;

- Safety of Life Service, for safety-critical applications that require high integrity — this will have the same accuracy as the Open Signal, but with a service guarantee providing high reliability;

- Search and Rescue Service, to complement the current COSPAS-SARSAT system (International Satellite Search and Rescue System founded by Canada, France, the former USSR and the USA in 1988 and with 33 countries now participating) — the service is more advanced than any comparable existing service: it relays the distress signal and location to the nearest rescue centre and informs the sender that that signal has been received and that help is on its way; and

- Public Regulated Service (PRS), a high-performance, encrypted service for authorised civil government applications — such as for such as national security, law enforcement agencies, customs and excise. The potential users will need a service which is useable, available, reliable and secure. The main benefit of this service will be its greater resistance to jamming and interference than the other four services, the fact that it will remain operational if other services are turned off or locally denied (jammed) in times of crisis and the ability to deny signals to specific receivers and user groups.

1.5 This draft Regulation is to define the governance and financing framework for the Galileo and EGNOS programmes for the period 2014–20. It would replace the current Regulation (EC) No 683/2008, which sets out the governance and financing arrangements until 2014. It would enter into force on 1 January 2014.

1.6 In presenting this proposal the Commission:

- recalled that, as required by the current Regulation, in January 2011 it published a mid-term review of the programmes' progress, which set out the implementation status of the programmes, recommendations to address risks to the programme and cost estimates to deliver and operate both programmes from 2014 onwards;[2]

2 (32460) 5530/11: see HC 428–xvii (2010–11), chapter 2 (16 February 2011) and *Gen Co Debs*, European Committee A, 21 March 2011, cols. 3–16.

- recalled also that the March 2011 Competitiveness Council reiterated its support for the programmes, whilst recommending that the Commission submit a proposal to improve future governance of the programmes and that in June 2011 the European Parliament called on the Commission to improve its risk and cost management processes for the programmes; and

- acknowledged that the programmes have been subject to delays and cost overruns in the past and that the timescale set out in the current Regulation has not been met.

1.7 The proposed Regulation sets out a new governance structure to address these concerns, based on what the Commission calls a strict division of tasks between itself, the European GNSS Agency (GSA) and the ESA. Member States and observers would continue to form the Programme Committee which advises the Commission on the management of the programmes. The draft Regulation would also provide that the funding for the two programmes for the period 2014–20 would be €7,897 million (£6,318 million), that is the Commission's proposal of €7,000 million (£5,668 million) in its draft Multiannual Financial Framework (MFF) for 2014–2020[3] inflated to current prices.

1.8 When we first considered this proposal, last January, we heard, subject to the need for some amendments and clarifications, that:

- the Government supports the Galileo and EGNOS programmes and wishes to see Galileo services begin as quickly as possible; and

- launch of initial services by 2014–15, as reiterated in the draft Regulation, would provide industry with the confidence to invest in downstream uses of the systems so that the greatest benefits could be realised from tax-payer investment made in the programmes.

But we heard also that:

- this support must be seen, however, in the context of the Government's top priority in the next MFF — budgetary restraint;

- the Government is committed to ensuring that the EU budget contributes to domestic fiscal consolidation;

- the Prime Minister has stated, jointly with his EU counterparts, that the maximum acceptable expenditure increase in spend through the next MFF is a real freeze in payments; and

- the Government does not support the increase in funding proposed for Galileo in the next MFF and will be seeking to reduce this.

1.9 We said that clearly adoption of this draft Regulation would mark the start of the next significant steps in the EU's global navigation satellite programme. However, before

3 (32987) 12474/11 (32994) 12475/11: see HC 428–xxxv (2010–12), chapter 1 (7 September 2011) and *HC Debs*, 8 November 2011), cols 170–195.

considering the document further we asked to hear about the Government's progress in securing the amendments and clarifications mentioned to us.

1.10 When we considered the matter again, in May, we heard that negotiations on the draft Regulation had gone well with many amendments to the text, which respond to the Government's concerns. However our attention was drawn to one significant remaining area — how the Galileo Security Accreditation Board should be serviced by a secretariat of staff. We learnt that:

- to ensure true independence, the Government wants the secretariat to be functionally separate from the agency, the GSA, tasked with operating the system and providing services;
- the Government would rather establish that in the Regulation now, but it seemed unlikely given the remaining time that it would be able to secure that; and
- so the Government's goal was to ensure that the Regulation does not clearly weaken and harm the independence of the Board.

1.11 We also heard that it was the Danish Presidency's intention to secure agreement on a partial general approach on the draft Regulation at the Transport Council on 7–8 June and we were asked for a waiver, in terms of paragraph 3 of the Scrutiny Reserve Resolution of 17 November 1998, to allow the Government to support such a partial general approach.

1.12 We said that we were not prepared to give such a waiver. This was for two reasons. First, despite the assurances that such a partial general approach would leave the funding issue to be decided in the light of the outcome of the negotiation of the overall MFF, we were concerned that the Danish Presidency's desire to agree an accumulation of similar partial general approaches threatened to undermine efforts to cap the overall size of the MFF before allocation of funding for individual programmes. This was particularly the case in programmes such as this, where the activity proposed for agreement clearly implied, as the Government noted, a given amount of finance.[4] Our second reason was that we had wanted to consider the possibility of a debate on the proposal before the Transport Council in June, which the untimeliness of the Government's report to us would not now allow. Nevertheless we recommended that the document be debated in European Committee C, to consider the acceptability of the revised text of the draft Regulation, particularly in relation to the issue of the secretariat for the Galileo Security Accreditation Board.[5] That debate has yet to take place, but we understand that it is now scheduled for 11 July.

4 Our concern about the cumulative effect of these partial general approaches and the need for clarification of the Government's position is set out in our recommendation for a debate, which has yet to take place, on the Commission Communication, *A simplification agenda for the MFF (2014–2020),* (33697) 6708/12: see HC 428–lv (2010–12), chapter 1 (21 March 2012).

5 See headnote.

## The Minister's letter

1.13 The Minister for Universities and Science, Department for Business, Innovation and Skills (Mr David Willetts) now writes with an account of the June Transport Council. He says that:

- having considered our concerns about the possible implications for the wider negotiations on the MFF the Government decided not to agree to a partial general approach at the June Transport Council;
- the Government tabled a formal statement to the minutes of the Council explaining its position;[6]
- on the issue of the secretariat for the Security Accreditation Board, the Council as a whole recognised that a solution must be found to avoid a conflict of interest within the GSA once the proposed Regulation enters into force on 1 January 2014;
- after that date, the GSA would be responsible for both the implementation of the Galileo and EGNOS systems as well as certifying that these systems met the necessary security requirements;
- the Council made a statement calling for these tasks to be performed in a strictly independent manner and invited the Commission to bring forward a proposal to amend EC Regulation No 912/2010 establishing the GSA and any other necessary measures; and
- the Government understands that the Commission intends to bring forward a proposal in the autumn.

## Conclusion

1.14 **We are grateful to the Minister for this information, which will, of course, be relevant to the debate we have already recommended on the draft Regulation.**

6 The statement, enclosed with the Minister's letter, can be seen at http://europeanmemorandum.cabinetoffice.gov.uk/.

# 2 Establishing a new Schengen evaluation mechanism

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|---|---|
| (a)<br>(33953)<br>5754/6/12<br>— | Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* |
| (b)<br>(34045)<br>11846/12<br>— | Draft Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen *acquis* |

| | |
|---|---|
| *Legal base* | (a) and (b) Article 70 TFEU; QMV |
| *Document originated* | (a) 4 June 2012<br>(b) 25 June 2012 |
| *Deposited in Parliament* | (a) 7 June 2012<br>(b) 27 June 2012 |
| *Department* | Home Office |
| *Basis of consideration* | EM of 20 June 2012 |
| *Previous Committee Reports* | HC 428–xviii (2010–11), chapter 5 (2 March 2011)<br>HC 428–xxxviii (2012–13), chapter 2 (19 October 2011) |
| *Discussion in Council* | Agreed 7 June 2012 |
| *Committee's assessment* | Politically important |
| *Committee's decision* | Not cleared; further information requested; opt-out decision for debate in European Committee B |

## Background

2.1 Currently, 22 of the 27 EU Member States are full participants in the Schengen free movement area,[7] and Iceland, Norway, Switzerland and Liechtenstein have entered into agreements with the EU associating them with the development and implementation of the Schengen *acquis* — that is, the body of laws and policies which are designed to strengthen mutual trust between Schengen States and make it possible for them to remove internal border controls. Although the UK has chosen to remain outside the Schengen free movement area, it does participate in some elements of the Schengen *acquis* dealing with policing and law enforcement.

2.2 Increased migratory pressures at the EU's external borders have raised concerns about the adequacy of existing Schengen controls to stem the influx of migrants and have damaged mutual trust in the ability of Schengen States to apply Schengen rules effectively to an agreed common standard. In June 2011, the European Council called for the governance of the Schengen area to be strengthened. It envisaged the establishment of a

7 The exceptions are Cyprus, Bulgaria, Romania, Ireland and the UK.

more effective mechanism to monitor and evaluate the application of the Schengen *acquis* and a new safeguard clause providing for the reintroduction of internal border controls, as a last resort, "in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules." [8]

2.3 Shortly afterwards, the Commission proposed a package of measures to take forward these suggestions and which we recommended for debate. The debate took place in European Committee B on 21 November 2011. The package included a draft Regulation establishing an evaluation and monitoring mechanism which made provision for a rolling programme of evaluation based on written questionnaires and/or on-site visits by teams of experts. All Schengen States would be evaluated at least once every five years, but there would be more intensive scrutiny of those States which, on the basis of risk analyses prepared by Frontex, appeared to face particular challenges in applying Schengen rules. The Commission would produce evaluation reports identifying areas of weakness and recommending appropriate remedial action.[9]

2.4 A later, amended version of the draft Regulation introduced two new provisions which would apply where an evaluation report identified serious deficiencies in carrying out external border controls or in implementing EU procedures for the return of illegal immigrants. In the first instance, the Commission could recommend a number of measures, such as the deployment of European Border Guard Teams (acting under the auspices of Frontex) or the temporary closure of specific border crossing points. However, in a critical situation constituting a serious threat to public policy or internal security, the Commission could decide to reintroduce internal border controls for a temporary period of up to six months.[10] The procedures for doing so were set out in a separate, but linked draft Regulation proposing changes to the Schengen Borders Code.[11]

2.5 The Government supported efforts to strengthen the mechanism for monitoring and evaluating the application of the Schengen *acquis*, but opposed the legal base proposed by the Commission — Article 77(2)(e) of the Treaty on the Functioning of the European Union (TFEU) — on the grounds that it only covers the border control elements of the Schengen *acquis* in which the UK does not participate. As a consequence, the UK would be excluded from participating in the adoption of the draft Regulation and would not take part in any Schengen evaluations, even those which concern policing and law enforcement. The Government feared that UK exclusion would have a serious impact on the UK's future participation in SIS II (the enhanced successor to the existing Schengen Information System) as there would be no mechanism to evaluate the UK's preparedness for, and use of, SIS II. Nor would the UK be able to take part in the evaluation of other States using SIS II and cooperating on policing matters.

2.6 We agreed with the Government's assessment that Article 70 TFEU, which expressly provides for "objective and impartial evaluation" of the implementation by Member States of EU policies in the justice and home affairs field, was a more suitable legal base and

8 Para 22 of the European Council Conclusions, June 2011.

9 See (32216); HC 428–xviii (2010–11), chapter 5 (2 March 2011).

10 See (33153); HC 428– xxxviii (2012–13), chapter 2 (19 October 2011).

11 See (33154); HC 428– xxxviii (2012–13), chapter 3 (19 October 2011).

would ensure that UK participation in the evaluation mechanism was commensurate with its limited participation in the Schengen *acquis*.

2.7 Shortly before the Justice and Home Affairs Council on 7/8 June 2012, the Parliamentary Under-Secretary for Crime and Security (James Brokenshire) wrote to inform us that the Danish Presidency had proposed a compromise text for political agreement at the Council.[12] This text was not available for deposit in Parliament because it was marked *limité* (meaning that its content may not be disclosed). His letter therefore set out in some detail the main changes likely to be proposed. The most significant, and contentious, concerned the legal base. The Minister noted the Commission's reluctance to amend the legal base to cite Article 70 TFEU, as this would entail the loss of any power of co-decision for the European Parliament, but he thought that a change could be achieved "as part of a wider compromise package." Other possible changes included:

- an extension of the scope of the new evaluation mechanism to encompass not only the application of the Schengen *acquis* in existing Schengen States, but also the readiness of countries not yet applying the *acquis* to do so;
- greater Member State oversight of the Commission, with its actions subject to approval by an Evaluation Committee composed of Member State representatives, and all political decisions to be taken by the Council;
- the possible extension of the evaluation mechanism to verify the absence of internal border controls and to include evaluations of institutions responsible for executing the Schengen *acquis*; and
- the inclusion of a review clause so that the mechanism could be revised periodically.

2.8 The Minister added:

> "If the Presidency's compromise is brought to fruition without significant change from that indicated, then it will ensure that the UK can continue its work to join SIS II, restrict Commission powers within existing competence under the Treaties and ensure the Council's retention of political power over Schengen. These are significant gains for the UK and the Council and we believe that this opportunity should not be lost."

2.9 The Minister noted that the use of Article 70 TFEU would be subject to Article 5 of the Schengen Protocol which gives the UK a period of three months to decide whether it wishes to opt out of a Schengen-building measure. He continued:

> "Normal consideration of the opt-out is not only impeded by the lack of time available but also by the fact that we expect all texts to be classified as LIMITE until the final Presidency compromise is tabled for agreement at the Council. The Government is therefore considering a pre-emptive position on the opt-out, so that the UK can take an active rather than an interested party part in preparing the

12 See letter of 17 May 2012 to the Chairman of the European Scrutiny Committee.

Council's position so that it delivers UK objectives and can deliver a positive vote to secure the Council's and the UK's significant gains in the envisaged compromise..."

2.10 The Minister reiterated the potential gains for the UK:

- UK participation in the new evaluation mechanism would ensure that UK participation in SIS II would remain on track (the mechanism would apply to determine whether the UK has fulfilled all the requirements needed to participate in SIS II);
- the UK would be an active participant in the Schengen evaluation process to the extent that it applies the *acquis*; and
- the UK would maintain its support for practical cooperation to strengthen Schengen and the EU's external border, and protect its wider influence, reputation and relationships.

2.11 In our response, we welcomed the proposal to cite Article 70 TFEU as the legal base for the evaluation mechanism but added that the absence of a text which could be deposited in Parliament meant that we were unable to assess the significance or impact of the totality of the changes proposed. We interpreted the suggestion that the Government should take "a pre-emptive position" at the June JHA Council as meaning that it would waive the UK's right, under Article 5 of the Schengen Protocol, to a three month period in which to determine whether or not to opt out of a Schengen-building measure. We thought that this would set a worrying precedent, not least because it would put the Government in breach of the Ashton undertakings which expressly envisage that the Scrutiny Committees should have eight weeks in which to express a view on the advantages or disadvantages of a decision to opt in or out of Title V (JHA) proposals before the Government reaches a definitive view. We added that we could see no grounds for urgency in this case, other than the desire of the Presidency to secure a political agreement before the end of its term. We asked the Minister to inform us of the outcome of the Council and to deposit a revised text of the draft Regulation.

## The amended draft Regulations

2.12 Two amended proposals for a Regulation establishing a Schengen evaluation mechanism have been deposited for scrutiny. The first, document (a), is the Presidency compromise text considered at the June Justice and Home Affairs Council. It has been superseded by the second, document (b), which reflects the content of the political agreement reached at the Council. The remainder of this chapter therefore refers only to document (b).

2.13 As foreseen by the Minister before the JHA Council, the legal base for the draft Regulation has been changed to Article 70 TFEU. Other significant changes made to the text debated last November include:

- clarification that the mechanism is intended to monitor and evaluate the application of the Schengen *acquis* in Member States applying the whole of the Schengen *acquis*, as well as those (the UK and Ireland) applying only part of it, and

to verify whether Member States wishing to apply the *acquis* are ready to do so (Article 1);[13]

- the Commission no longer has the primary responsibility for implementing the mechanism — it will be implemented jointly by Member States and the Commission (Article 3);

- clarification that evaluations cover all aspects of the Schengen *acquis*, and that those concerning the management of borders should focus primarily on external border controls, but may also include the abolition of internal border controls (Article 4 and recital 10);

- a clearer division of powers between the Council and the Commission, with the Commission assuming responsibility for the planning and preparation of evaluations (subject to Member State oversight) and the Council retaining the power to agree the content of evaluation reports as well as any accompanying recommendations to address deficiencies in implementation (Articles 5, 6, 7 and 13);

- inclusion of a provision enabling the Commission to request a risk analysis from other EU bodies involved in the implementation of the Schengen *acquis* (such as Europol), in addition to the risk analyses produced by Frontex (Article 7A);

- clarification that teams conducting evaluation visits will mainly comprise experts designated by Member States (up to eight for announced on-site visits and six for unannounced visits) plus two Commission experts (Article 9);

- greater Member State involvement in overseeing and monitoring national action plans to address deficiencies revealed in the evaluation reports (Article 13A);

- removal of the possibility to make public parts of the reports drawn up after on-site evaluation visits — the reports will be classified as "EU Restricted" (Article 16);

- inclusion of a new provision setting out the conditions in which the UK (and Ireland) may participate in the evaluation mechanism: UK experts may only participate in evaluations of elements of the *acquis* in which the UK takes part; evaluations of the UK only cover the application of the *acquis* in areas in which the UK has been authorised to take part; and the UK may only take part in the adoption of evaluation reports to the extent that they cover elements of the *acquis* in which the UK participates (Article 16A);

- inclusion of a new requirement to inform national Parliaments (as well as the European Parliament) of the content and results of evaluations, including any recommendations made to Member States to address deficiencies in their application of the *acquis,* and to forward an annual report (produced by the Commission) summarising evaluations carried out in the previous year and the effect of any remedial action taken (Articles 19 and 20); and

13 The evaluation mechanism established by the draft Regulation will not, however, apply to Bulgaria and Romania, as their evaluation under existing procedures has been completed; it will only apply to Cyprus from 1 January 2016.

- inclusion of a new review clause, with the first review to take place after the completion of the evaluations proposed in the first multiannual programme (Article 22A).

## The Government's position

2.14 The Parliamentary Under-Secretary for Crime and Security (James Brokenshire) welcomes the unanimous decision by Member States to amend the legal base and notes that, as a consequence, the UK has a three month period in which to determine whether it wishes to remain bound by the draft Regulation or to opt out. He says that the Presidency compromise text secures all the UK's negotiating objectives, brings to a close years of negotiation, and mitigates legal complexities arising from the UK's partial participation in the Schengen *acquis*. He therefore indicates that the Government's recommendation is to remain bound by the draft Regulation and not to exercise its right to opt out. He adds that, as the draft Regulation will repeal and replace an earlier (intergovernmental) mechanism for evaluating the application of the Schengen *acquis*, set out in a Council Decision adopted in 1998, the 1998 Decision will no longer form part of the pre-Lisbon police and criminal judicial cooperation measures falling within the scope of the UK's "block opt-out" decision to be taken no later than the end of May 2013.

2.15 The Minister says that the Presidency compromise text re-adjusts the balance between the Commission and the Member States. Whereas the Commission's original proposal envisaged that the Commission would play the leading role in implementing the evaluation mechanism, the compromise text gives the Commission limited implementing powers and ensures that the Council retains "political control of decisions which make recommendations for action on their peers."[14] The Minister continues:

> "In welcoming the substance of the compromise, the Government considers that it now reflects the correct balance of competencies and roles between the Commission and Member States. Working together, they can better ensure that the Schengen *acquis* is correctly applied and supported. The change to Article 70 does have the unfortunate effect of removing co-decision with the EP, yet the Government supports their involvement and envisages a scrutiny role for them as part of the SEMM [Schengen evaluation and monitoring mechanism] process itself. We also support the Council's wish to consult the EP on a voluntary basis under the Council's Rules of Procedure to confirm that they are content with their practical involvement in the Mechanism and associated changes to the SBC [Schengen Borders Code]."[15]

2.16 The Minister notes that the Presidency compromise text omits the two provisions (described above in paragraph 2.4) on the practical measures to be taken if an evaluation reveals serious deficiencies, including the possible temporary reintroduction of internal border controls. He expects these provisions to be included instead in the draft Regulation proposing changes to the Schengen Borders Code but adds that, as the draft Regulation is subject to co-decision and negotiations are continuing, he cannot exclude the possibility of further changes. The intention, however, is that evaluation reports revealing serious

14 See para 5 of the Minister's Explanatory Memorandum.

15 See para 23 of the Minister's Explanatory Memorandum.

deficiencies in applying the Schengen *acquis* would be a material factor in determining what form of action should be taken under the amended Schengen Borders Code. The Minister adds:

> "We support the process within the SEMM that identifies and facilitates assistance to a Member State facing heavy pressure at the external borders. Schengen evaluation visits alongside other technical and financial support, such as assistance, coordination and intervention from Frontex are logical developments. We agree with other Member States that the binding nature of further action, such as the temporary re-introduction of border controls, will need to be delivered through the Schengen Borders Code due to its borders legal base. This will also ensure close working between all institutions, such that decisions are properly considered and are transparent."[16]

2.17 The Minister considers that the new Schengen evaluation mechanism and revised Schengen Borders Code will address weaknesses in the governance of the Schengen area and strengthen security, adding:

> "Strengthening the EU's external border and complementary policing measures will help to reduce illegal immigration and identify and locate quickly those wanted for crimes, forming part of organised crime, or moving people or goods illegally across the Schengen area; while law abiding citizens will still be able to move freely throughout the Schengen area and to and from the UK."[17]

2.18 The evaluation mechanism will apply to determine whether the UK is ready to take part in SIS II, an important priority for the Government. The Minister describes the wider benefits of UK participation in the evaluation mechanism:

> "Active partial participation means that the UK can instigate the evaluation process, arrange evaluation visits to the UK, take part in our own evaluations (on police cooperation, data protection, and SIS system operation), be scrutinised and be able to challenge the findings, present progress reports, vote on our own success, and discuss and agree system link up dates."[18]

2.19 The Minister highlights the potential cost implications if the UK were to decide not to participate in the draft Regulation:

> "Non-participation jeopardises our future participation in SIS II. To date, £59.14 million has been invested in SIS II's implementation and it is currently in Stage 4 (Development) of 7 stages. The Programme's re-forecasted whole life cash costs are now £168.172 million against an estimated £465 million in net benefits to the UK in the first ten years of live operation. If the UK is not allowed to join up to live SIS II data or the join up is delayed, these net benefits will be significantly reduced."[19]

16 See para 25 of the Minister's Explanatory Memorandum.
17 See para 26 of the Minister's Explanatory Memorandum.
18 See para 27 of the Minister's Explanatory Memorandum.
19 See para 32 of the Minister's Explanatory Memorandum.

2.20 Finally, the Minister notes that "the package" was agreed at the JHA Council on 7 June and reported to the House in the Home Secretary's Written Ministerial Statement of 14 June. He adds:

> "The UK made clear that the text remained subject to domestic parliamentary processes and, separately, has secured confirmation from the Danish Presidency that the text will not be submitted for adoption pending the three months permitted for us to consider our participation in the adoption and application of the text. We consider the opt-out deadline to be 7 September 2012."[20]

## Conclusion

2.21 **During our consideration of earlier versions of the draft Regulation establishing a Schengen evaluation mechanism, we expressed our support for the Government's position that Article 70 TFEU is the correct legal base and we therefore accept that the agreement reached by Member States at the June JHA Council unanimously to amend the legal base proposed by the Commission represents a significant and welcome gain for the UK.**

2.22 **Nevertheless, the political agreement reached at the June Council represents a clear breach of our Scrutiny Reserve Resolution. We acknowledge the efforts made by the Minister to provide us with a comprehensive account of the changes likely to be included in the Presidency compromise text in advance of the Council but, as our response to the Minister's letter made clear, the absence of a publicly available text which can be deposited in Parliament undermines our ability to report significant changes to the House in advance of a political agreement.**

2.23 **We note that the Minister's Explanatory Memorandum "recommends that the UK remains bound" by the draft Regulation. By contrast, the Home Secretary's Written Ministerial Statement of 14 June 2012 on the outcome of the JHA Council states that, "While the UK had yet to complete its domestic Parliamentary processes, the Government position was not to opt out."**

2.24 **We think that the Home Secretary's statement more accurately reflects the reality of the Government's position and that it has already determined that the UK will not exercise its opt-out. Given that reality, the undertaking given by the Presidency to refrain from adopting the draft Regulation before the expiry of the three month deadline for notifying the UK's opt-out decision appears hollow and meaningless; so, too, does the Government's undertaking to allow an eight-week scrutiny period in which to consider the substance of a proposal and to take account of our views before reaching a final decision on whether or not (in this case) the UK should remain bound by, or exercise its right to opt out of, a Schengen-building measure. We think that the Minister's letter in advance of the June JHA Council, and his Explanatory Memorandum submitted afterwards, make a strong case for the desirability of reaching a political agreement on the basis of the Presidency compromise text, but fall short of**

20 See para 34 of the Minister's Explanatory Memorandum.

**establishing the necessity to override scrutiny. Our view is strengthened by the knowledge that the prospect of rapid progress appears to be slight, as the European Parliament intends to withdraw further cooperation with the Danish Presidency on the draft Regulation, and the associated Regulation amending the Schengen Borders Code, because it opposes the change to the legal base. We therefore ask the Minister to explain why he considered that a breach of the Scrutiny Reserve was necessary (and not merely desirable) in this case.**

2.25 **Turning to the substance of the draft Regulation, we note that Article 70 TFEU requires that the European Parliament and national Parliaments shall be informed of the content and results of evaluations. This is reflected in Article 19 of the draft Regulation. However, Article 16 provides that reports drawn up following on-site evaluation visits shall be classified as "EU Restricted." We ask the Minister to explain whether, and how, the transparency envisaged in Article 19 of the draft Regulation and Article 70 TFEU can be reconciled with the blanket security classification imposed by Article 16 and whether it is envisaged that national Parliaments will merely have sight of heavily redacted reports.**

2.26 **Finally, the Minister suggests that there remains some fluidity in the negotiations on the draft Regulation amending the Schengen Borders Code, particularly with regard to the proposed safeguard clause on the temporary reintroduction of internal border controls. Given the close connection between the draft Regulations establishing the Schengen evaluation mechanism and amending the Schengen Borders Code, we ask the Minister to provide a further update once the relationship between both instruments has been clarified.**

2.27 **We think that the Government's decision whether or not to opt out of the draft Regulation should be debated in European Committee B. Meanwhile, the draft Regulation remains under scrutiny and we look forward to receiving the Minister's response to the questions we have raised.**

# 3 EURODAC

| | |
|---|---|
| (33956)<br>10638/12<br>COM(12) 254 | Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No [.../...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person) and to request comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Recast version) |

| | |
|---|---|
| *Legal base* | Articles 78(2)(e), 87(2)(a) and 88(2)(a) TFEU; QMV; co-decision |
| *Document originated* | 30 May 2012 |
| *Deposited in Parliament* | 7 June 2012 |
| *Department* | Home Office |
| *Basis of consideration* | EM of 18 June 2012 |
| *Previous Committee Reports* | None; but see HC 428–xiii (2010–11), chapter 18 (19 January 2011), HC 428–x (2010–11), chapter 10 (8 December 2010) and HC 428–vii (2010–11), chapter 6 (10 November 2010) |
| *Discussion in Council* | No date set |
| *Committee's assessment* | Politically important |
| *Committee's decision* | Not cleared; further information requested; opt-in decision for debate in European Committee B |

## Background

3.1 EURODAC is an EU database which forms part of the so-called "Dublin system" for determining which Member State is responsible for examining a claim for asylum. It contains the fingerprints of third country nationals or stateless people aged at least 14 years old who:

- have applied for asylum in an EU Member State; or
- have been apprehended in connection with an irregular crossing of a Member State's external border; or
- have been found to be illegally present within a Member State.

3.2 EURODAC is intended to reduce the risk of multiple claims for asylum being lodged in different Member States or of asylum seekers being shuttled between Member States,

without any one taking responsibility for the asylum application. Each set of fingerprint data may be compared with fingerprint data already stored in EURODAC to see if an asylum seeker has previously lodged an asylum claim in one or more other Member States or has entered EU territory unlawfully.

3.3 The Regulation establishing EURODAC was adopted in 2000 and the EURODAC system became operational in January 2003. The UK participates in EURODAC and the wider Dublin system of which it forms part. In 2007, the Commission produced a report evaluating the Dublin system and concluded that a number of changes were needed to make it more effective. Two of the more significant changes proposed were to include deadlines for the transmission of fingerprint data to EURODAC's Central Unit so as to reduce any unnecessary delay, and to consider making provision for access to EURODAC data for wider law enforcement purposes.

3.4 In December 2008, the Commission proposed repealing the 2000 EURODAC Regulation and replacing it with a new Regulation which would contain some new provisions while re-enacting, with some amendments, the substance of the 2000 Regulation.[21] The main changes proposed included the extension of the scope of EURODAC to cover applications for subsidiary protection,[22] provision for the operational management of EURODAC to be undertaken by a new IT Management Agency, the introduction of deadlines for transmitting fingerprint data to the EURODAC Central Unit, and the inclusion of additional data protection safeguards. Our predecessors recommended the draft Regulation for debate, along with proposed changes to the Dublin Regulation. The debate was held on 10 February 2009. In March 2009, the previous Government decided to opt into the draft EURODAC Regulation.

3.5 In September 2009, the Commission proposed an amended draft Regulation which included provision for Europol and national law enforcement authorities to seek access to fingerprint data stored in the EURODAC Central Unit if there were reasonable grounds for believing that the data would contribute substantially to the prevention, detection or investigation of terrorist or other serious criminal offences. It also proposed a new draft Council Decision, with a legal base in the then intergovernmental Third Pillar of the Treaty on European Union (TEU) concerning police and judicial co-operation in criminal matters, which set out the conditions under which Europol and designated national law enforcement authorities would be able to request access to fingerprint data stored in EURODAC. The previous Government decided to opt into both instruments, but in the expectation that they would have to be replaced by a single consolidated legal instrument once the Lisbon Treaty entered into force on 1 December 2009 and that, as a result, a fresh opt-in decision would be required.

3.6 The Commission published a new, post-Lisbon amended draft Regulation in October 2010, which was based on Article 78(2)(e) of the Treaty on the Functioning of the European Union (TFEU).[23] This Article provides for the adoption of EU measures to

21 (30256) 16934/08: see HC 19–iv (2008–09) chapter 4 (21 January 2009).

22 An individual who does not qualify as a refugee may nevertheless qualify for "subsidiary protection" where there are substantial grounds for believing that he or she would face a real risk of serious harm if returned to his or her country of origin.

23 See (32072) and the Reports highlighted in the head note.

establish the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection. The draft Regulation did not include a provision to enable Europol or national law enforcement authorities to request access to EURODAC data, as the Commission feared that such a provision would prolong negotiations and delay the establishment of a new IT Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. Once established, the Agency would be responsible for the management of EURODAC.

3.7 The draft Regulation included the following changes:

- extension of the scope of EURODAC to include applications for international protection (encompassing claims for asylum and for subsidiary protection);
- provision for a new IT Management Agency to take over responsibility for the operational management of EURODAC;
- a 72-hour deadline for transmitting fingerprint data to EURODAC, but with an extension of time allowed where fingertips were too damaged to permit accurate comparison;
- a reduction from two years to one of the period for storing fingerprint data of third country or stateless people apprehended in connection with the irregular crossing of a Member State's external border;
- the inclusion of additional safeguards to ensure the safety and accuracy of data and an improvement in the rights of data subjects; and
- provision for the European Data Protection Supervisor to oversee the processing of personal data.

3.8 The Commission suggested that the costs involved in implementing the changes contained in the amended draft Regulation would be substantially reduced because the removal of the provision on the access of law enforcement authorities to EURODAC meant that fewer adaptations would be required to the existing EURODAC database. It estimated the cost of adapting EURODAC's central unit at €230,000, instead of the projected €2,415,000 required to facilitate law enforcement access.

3.9 We welcomed the removal of the provision on access to EURODAC data for law enforcement purposes which reflected a broader concern about the use of databases for purposes other than those for which they were originally intended and designed. Following notification by the Government that the other changes proposed by the Commission were acceptable and that it had decided to opt into the amended draft Regulation, we decided to clear it from scrutiny but asked to be informed of any significant developments.

## The amended draft Regulation

3.10 The amended draft Regulation is the Commission's fourth attempt to make changes to the EURODAC system and supersedes its earlier proposals. This latest proposal restores provisions first included in the Commission's 2009 proposal, to enable access to EURODAC data for law enforcement purposes. According to the Commission, the

possibility for Member States' law enforcement authorities and Europol to access the EURODAC database is necessary to achieve "a balanced deal" on a package of measures which are intended to complete the second stage of the Common European Asylum System by the end of 2012.[24] It says that its proposal "addresses a structural information and verification gap that currently results from the lack of an EU instrument available to law enforcement authorities to determine the Member State that holds information on an asylum seeker. While data on EU citizens exits in many different databases in Member States which are in general accessible to law enforcement authorities in other Member States, there are no effective possibilities available for law enforcement authorities to exchange information on asylum seekers."[25]

3.11 Law enforcement access to EURODAC data is intended to help establish the identity of a person suspected of a serious crime or a crime victim. The comparison of fingerprint data would be on a "hit/no hit basis" — a successful hit would enable the requesting State to seek to obtain further information on the identity of the individual concerned from the Member State responsible for sending the fingerprint data to EURODAC.

### *The legal base*

3.12 The Commission has retained Article 78(2)(e) TFEU as one of the legal bases for the draft Regulation, but added Articles 87(2)(a) and 88(2)(a) which provide for the collection, storage, processing, analysis and exchange of information by and between national law enforcement authorities and Europol for the purposes of crime prevention, detection and investigation. These Articles, which form part of Title V of Part Three of the TFEU, are subject to the UK's Title V opt-in.

### *The main elements of the draft Regulation*

3.13 The draft Regulation specifies that designated national authorities responsible for the prevention, detection or investigation of terrorist and other serious criminal offences may request access to the EURODAC central database in order to compare fingerprint data. Each request for access must first be verified by a national verifying authority to ensure that the following access conditions have been satisfied:

- the fingerprint data have already been compared with the requesting Member State's national fingerprint database and with the automated fingerprint databases of other Member States under the procedures established by Council Decision 2008/615/JHA ("the Prüm Decision") and have yielded a negative result; and
- the comparison is necessary for the purpose of preventing, detecting or investigating a terrorist or other serious criminal offence;
- the comparison is necessary in a specific case (systematic comparisons shall not be carried out); and

24 See p.3 of the Commission's explanatory memorandum accompanying the draft Regulation.

25 See p.4 of the Commission's explanatory memorandum accompanying the draft Regulation.

- there are reasonable grounds to consider that such comparison with EURODAC data will contribute to the prevention, detection or investigation of any of the serious criminal offences in question (Article 20).

3.14 In cases of exceptional urgency, a fingerprint comparison may be obtained without prior verification, but an ex-post verification must take place without undue delay afterwards and, if it establishes that the access conditions were not met, information obtained from EUORDAC must be destroyed.

3.15 Europol may also request access to EURODAC data "for the purposes of a specific analysis or an analysis of a general nature and of a strategic type" (Article 21).

3.16 The amended draft Regulation makes clear that any processing of personal data for law enforcement purposes is subject to the requirements of Framework Decision 2008/977/JHA on the protection of personal data in the framework of police and judicial cooperation in criminal matters. Personal data obtained from EURODAC must be erased after one month unless they are required for a specific ongoing criminal investigation (Article 33). The data may not be transferred or made available to any third country, international organisation or private entity within or outside the EU (Article 35).[26] All data processing operations resulting from a request for comparison with EURODAC data must be logged or documented so that the admissibility of the request for access, the lawfulness of the data processing, and the integrity and security of the data obtained can be verified (Article 36).

3.17 Finally, each Member State and Europol is required to prepare an annual report on the effectiveness of EURODAC fingerprint comparisons, including information on the type of serious criminal offence for which the comparison was sought, the number and type of cases which resulted in a successful identification, and how frequently urgent comparisons (without prior verification) were requested (Article 40(8)) These national reports will inform the Commission's four-yearly evaluation reports on EURODAC.

### *Compliance with fundamental rights*

3.18 The Commission recognises that the EURODAC database contains data on individuals who, in principle, are not suspected of any crime and that the comparison of fingerprint data for law enforcement purposes is not compatible with the purpose for which the data were originally collected or for which the database was established. Although the use of EURODAC data for law enforcement purposes constitutes an interference with the right to the protection of personal data, the Commission suggests that it is justified for the following reasons:

- the draft Regulation clearly establishes the circumstances in which law enforcement access to EURODAC data may be requested;

- the prevention, detection and investigation of terrorist or other serious criminal offences is an objective of general interest; and

26 This prohibition does not extend to third countries participating in the Dublin system (Iceland, Norway, Switzerland, Liechtenstein).

- the interference is proportionate because, without access to EURODAC data, law enforcement authorities would have to contact other Member States bilaterally to determine whether they held data on an asylum seeker.

3.19 The Commission notes that a comparison with EURODAC data may only be requested after first completing an automated fingerprint comparison under the Prüm Decision and that the request must relate to a specific case involving a serious crime (as defined in EU Framework Decisions on Terrorism and on the European Arrest Warrant).[27] The Commission emphasises that Member States may not conduct searches on a systematic and routine basis. The Commission also highlights the specific prohibition on sharing data with third countries, organisations or entities, and the inclusion of a monitoring and evaluation mechanism to verify whether "the search functionality for law enforcement purposes" results in the "stigmatisation" of individuals seeking international protection.[28]

### *Cost*

3.20 The Commission uses the cost estimates for its 2009 proposal, which also envisaged enhancing the functionality of EURODAC to include law enforcement access, to reach a figure of €2,415 million for non-administrative costs (€2,771 million if administrative costs are included). It says that funding will be found from existing home affairs budget lines.

## The Government's position

3.21 The Minister for Immigration (Damian Green) notes that the most significant change of substance in the Commission's latest draft amended Regulation is the proposal to allow access to the EURODAC database for law enforcement purposes. He continues:

> "The Government supports a strategic approach to data sharing and the use of data in the area of JHA. Given that the threat from terrorism is international and perpetrators of crime are highly mobile, fingerprint data contained in EURODAC is viewed by law enforcement authorities as a useful tool in cases where individuals have provided false identities. The new latent searching functionality of EURODAC will also be useful in establishing the identity of individuals in cases where latent prints are found at crime scenes.
>
> "The proposal is attractive to law enforcement authorities because it will make use of an existing information system rather than creating a new one. Furthermore, the Commission has in its proposal put in place safeguards to ensure that access and consultation of EURODAC in law enforcement cases is specific and proportional and relates only to serious offences and terrorism. Chapters I and II of the Decision [sic] ensure that Member States' designated competent authorities' rights of access should be proportionate and relate to the prevention, detection or investigation of terrorist or serious crime. The UK concurs with this safeguard in that the rights of

27 See Framework Decisions 2002/475/JHA on combating terrorism and 2002/584/JHA on the European Arrest Warrant.

28 See p.6 of the Commission's explanatory memorandum accompanying the draft Regulation.

the individual are upheld and that EURODAC is not perceived as being a criminalising database."[29]

3.22 Turning to the conditions governing access to the EURODAC database for a fingerprint comparison for law enforcement purposes, the Minister notes:

"No request for EURODAC data can be made unless a request could have been made using the processes set up in Council Decision 2008/615/JHA (Prüm). We are content with this limitation. It makes it clear that fingerprints of asylum seekers are a separate category of data from` those of people convicted of offences. Asylum seekers may well not have been convicted of any criminal offence and the UK agrees that it would not be right to allow a Member State to access fingerprints of the innocent before it is able to access fingerprints of those convicted of offences. We are also content that the text does not place any obligations on Member States to implement Prüm, a measure that is subject to the 2014 opt-out decision."[30]

3.23 The Minister is content with the provision prohibiting the sharing of the results of fingerprint comparisons with third countries and international organisations and with the proposal to establish a national verifying authority to ensure that law enforcement access requests meet the necessary conditions. He anticipates that the UK verifying authority would operate within the UK's national policing structures.

3.24 The Minister considers that the provisions on the transmission of fingerprint data to EURODAC are "more realistic in practical terms" than the Commission's original 2008 proposal (for example, the latest draft extends from 48 to 72 hours the time in which fingerprint data must be sent to EURODAC). He notes, however, that the Commission continues to insist on a reduction in the time (from two years to one) during which the fingerprint data of third country nationals apprehended in connection with the irregular crossing of an external border may be held. He adds:

"We continue to observe that this does not reflect different views expressed by many Member States during negotiations in the Council Working Group where opinion has been divided on the length of the storage period. The Commission argues that after one year the data loses its relevance for the purpose of the facilitation of the Dublin Regulation. This position is supported by the European Data Protection Supervisor on the basis that it is proportionate.

"We note that this reduced storage period proposal mirrors that of responsibility for cases falling under the Dublin Regulation on the basis of illegal entry. However, we maintain our position: Member States are currently notified of 'hits' beyond the period of one year and the experience of the UK Border Agency is that later 'hits' provide information that has been significant in addressing credibility issues about the claim for protection."[31]

29 See paras 21–22 of the Minister's Explanatory Memorandum.

30 See para 24 of the Minister's Explanatory Memorandum.

31 See paras 17–18 of the Minister's Explanatory Memorandum.

3.25 The Minister notes that the draft Regulation includes changes to the Regulation establishing the new EU Agency responsible for the operational management of large scale IT systems in the area of freedom, security and justice which will take over responsibility for EURODAC from 1 December 2012.[32]

3.26 The Minister is content that any interference with fundamental rights arising from the law enforcement provisions of the draft Regulation is for a legitimate objective (the prevention, detection, investigation and prosecution of terrorism and other serious crimes) and adds:

> "The Government considers that the safeguards set out in the Proposal satisfy the requirements of necessity and proportionality. A comparison with EURODAC can only be made if it can be demonstrated that this is necessary for the purpose of prevention, detection or investigation of terrorist offences or other serious criminal offences — and this must be set out in the reasoned request for the comparison. These comparisons cannot be made on a systematic basis, and only be carried out effectively as a last resort — i.e. after national databases and the database under Council Decision 2008/615/JHA have been checked and returned a nil result. The 'verifying authority' will check that the requirements for access are met, and the processing will be subject to the overall supervision of the national data protection authorities and the European Data Protection Supervisor."[33]

3.27 As the UK already participates in EURODAC, the Minister does not expect the draft Regulation to have "significant additional impact" but says that:

> "[...] the improvements in efficiency proposed, as well as the inclusion of fingerprints and data on recognised refugees may well increase the numbers identified for removal from the United Kingdom. UK taken fingerprint data will be accessed for law enforcement purposes but we do not expect this to be in large volumes and only where necessary to help solve serious crimes or terrorist offences."[34]

3.28 The Minister notes that changes to the EURODAC central database will be funded from the EU budget. He continues:

> "As technical amendments may be required to national systems some additional costs may be accrued, however, these should be seen in the context of ongoing improvements to existing infrastructures within the UK Border Agency regarding identity management.
>
> "An interface already exists between the national Police Automated Fingerprint Identification System (IDENT1) and the UK Border Agency Immigration and Asylum Biometric System (IABS). Additional costs will be incurred in linking the Police IDENT to EURODAC. There would also be a resource cost to the UK Border

32 Regulation 1077/2011, OJ L No. 286, 01.11.2011. pp. 1–17.

33 See para 6(vi) of the Minister's Explanatory Memorandum.

34 See para 28 of the Minister's Explanatory Memorandum.

> Agency in processing law enforcement requests though the resource impact is difficult to quantify. We will study the arrangements for funding in more detail."[35]

3.29 The draft Regulation is subject to the UK's Title V opt-in. The Government considers that the UK is not bound by decisions to opt into the Commission's three earlier proposals (in 2008, 2009 and 2010) and that a fresh opt-in decision will therefore be required. The Minister adds:

> "The Government is committed to taking all opt-in decisions on a case-by-case basis, putting the national interest at the heart of our decision making. In making the opt-in decision on this proposal, we will have particular regard to the following:
>
> - whether participation in the EURODAC system would be of net benefit to the UK if the proposals were adopted; and
>
> - the implications if we did not opt in to this proposal given that the UK has opted in to the earlier proposal to replace the Dublin Regulation and into earlier EURODAC proposals."[36]

3.30 The Minister expects negotiations to proceed quickly with a view to meeting the timetable set by the European Council for adopting all measures forming the second stage of the Common European Asylum System by the end of 2102.

## Conclusion

3.31 **The EURODAC database was established for a specific purpose — to facilitate the application of the Dublin system which seeks to ensure a fair, efficient and effective allocation of responsibility for the determination of claims for international protection. We question whether the Commission has provided sufficient evidence of need to substantiate what, in our view, would amount to a significant extension of the purpose of the EURODAC database. The Commission alludes to "a structural information and verification gap" which makes it difficult to identify suspected perpetrators of terrorist or other serious crime, but it is unclear what contribution access to the EURODAC database would make to close this gap.**

3.32 **We also question the extent to which the inclusion of provisions on law enforcement access to EURODAC data will be of "net benefit" to the UK, one of the factors cited by the Minister for determining whether or not to opt into the draft Regulation. Although he considers that access to fingerprint data held in EURODAC would be "a useful tool", in his Explanatory Memorandum on the Commission's 2010 proposal, he told us that the removal of a provision on law enforcement access to EURODAC data did not raise significant operational issues for UK law enforcement agencies and that it would reduce costs significantly.**

3.33 **We note that law enforcement access to EURODAC data may only be requested after an automated fingerprint comparison under the Prüm Decisions[37] has been**

35 See paras 29–30 of the Minister's Explanatory Memorandum.

36 See para 11 of the Minister's Explanatory Memorandum.

37 Council Decisions 2008/615/JHA and 2008/616/JHA, OJ L No. 210, pp. 1–17.

**completed and produced a negative result. The Parliamentary Under-Secretary for Crime and Security (James Brokenshire) wrote to inform us on 7 February 2011 that the UK would not be in a position to implement the Prüm Decisions (which provide for automated exchange of fingerprint and other data for the prevention and investigation of criminal offences) by the August 2011 deadline or within the current spending review period (2011–15). If this remains the case, it suggests that UK law enforcement authorities will not, in any event, be in a position to request access to EURODAC fingerprint data before 2015 at the earliest. Moreover, should the UK decide to exercise its "block opt-out" of pre-Lisbon measures on police and criminal judicial cooperation (including the Prüm Decisions) by the end of May 2014 at the latest, then it seems that UK law enforcement authorities would lose any opportunity to request access to EURODAC data. We ask the Minister to confirm whether our assessment of the implications for the UK of not implementing the Prüm Decisions, or of opting out, is correct and, if so, to explain what net benefit the UK would derive from the inclusion in the draft Regulation of provisions on law enforcement access to EURODAC.**

3.34 **The Commission underlines the efforts it has made to build in proportionate safeguards to prevent data mining by, for example, specifying that fingerprint comparisons may only be requested in specific cases and precluding "systematic comparisons" by national law enforcement authorities. However, different conditions apply to requests made by Europol to access EURODAC data, which may be for the purpose of a specific analysis or "an analysis of a general nature and of a strategic type." We ask the Minister to explain why the access conditions for Europol are different and to clarify what type of analyses is envisaged.**

3.35 **Finally, we agree with the Government's assessment that the UK is not bound by its opt-in to three earlier attempts to amend EURDOAC and that a fresh opt-in decision will be required. We think that the Government's decision whether or not to opt into the draft Regulation should be debated in European Committee B. Meanwhile, the draft Regulation remains under scrutiny and we look forward to receiving the Minister's response to the questions we have raised.**

# 4 European unitary patent

| | |
|---|---|
| (a)<br>(32700)<br>9224/11<br>COM(11) 215 | Draft Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection |
| (b)<br>(32701)<br>9226/11<br>COM(11) 216 | Draft Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regards to applicable translation arrangements |

| | |
|---|---|
| *Legal base* | (a) Article 118(1) TFEU; co-decision; QMV<br>(b) Article 118(2) TFEU; consultation; unanimity |
| *Department* | Business, Innovation and Skills |
| *Basis of consideration* | Minister's letter of 3 July 2012 |
| *Previous Committee Reports* | (a) HC 428–xxvii (2010–12), chapter 2 (18 May 2011)<br>(b) HC 428–xxvii (2010–12), chapter 3 (18 May 2011) |
| *Discussion in Council* | 11 July 2012 |
| *Committee's assessment* | Legally important |
| *Committee's decision* | Not cleared; further information requested; but waiver granted under paragraph (3)(b) of the Scrutiny Reserve Resolution |

## Documents

4.1 The European Patent Convention ('the EPC'), signed at Munich on 5 October 1973, is a Treaty to which 38 States, including all the Member States of the European Union, are now parties. The European Union is not a party to the EPC. The EPC provides for a unitary procedure for granting European patents by the European Patent Office ('the EPO'). Whilst the procedure for granting patents is unitary, the European patent in fact amounts to a bundle of national patents, each governed by the domestic law of the States which the holder of the patent has designated.

4.2 In April 2007 the Commission presented a Communication entitled "Enhancing the patent system in Europe". It proposed the creation of an integrated system for the European patent and a new Community patent. The latter would be granted by the EPO pursuant to the provisions of the EPC. It would be unitary and autonomous, producing equal effect throughout the European Union (unlike the European patent), and could be granted, transferred, declared invalid or lapse only in respect of the whole of that territorial area. The provisions of the EPC would apply to the Community patent to the extent that no specific rules were provided for in EU law (in the form of a Regulation on the Community patent).

4.3 Work by the Council also led to the drawing up of a draft international agreement to be concluded between EU Member States, the European Union and third countries which are

parties to the EPC to create a court with jurisdiction to hear actions related to European and Community patents. The agreement would establish a European and Community Patents Court ("the European patent court"), composed of a court of first instance, comprising a central, regional and local divisions, and a court of appeal, that court having jurisdiction to hear appeals brought against decisions delivered by the court of first instance. The third body would be a joint registry.

4.4 In December 2009 political agreement was reached on document (a), a Regulation establishing a unitary EU patent (the name was changed from Community patent after the entry into force of the Lisbon Treaty). Its adoption was dependant, however, on the European patent court being established.

4.5 In June 2010 the Commission adopted a proposal for a Regulation on the translation arrangements for the EU patent, document (b). Translations represent a significant proportion of the cost of patenting across Europe, and therefore agreeing a business-friendly language regime for the EU patent is important. Studies quoted by the Council say that to obtain a European patent in 13 countries would cost about €18,000, with approximately €10,000 of that being spent on translations. It proved impossible to achieve political agreement on this proposal, so in December 2010 11 Member States, including the UK, wrote to the Commission to request it to make a proposal to use enhanced cooperation for the translation of EU patents. On 14 December 2010 the Commission duly proposed a draft Council Decision authorising enhanced cooperation.

4.6 The Decision on enhanced cooperation was due to be adopted by the Council on 10 March 2011. However, a pending Opinion of the Court of Justice (ECJ), requested by the Council, was expected on 8 March. The ECJ had been asked to consider whether the draft agreement creating the European patent court was compatible with the EU Treaties. The ECJ found that the draft agreement was incompatible with the EU Treaties for two reasons. Firstly, it would deprive national courts of the power or, as the case may be, obligation, to refer a question of EU law (including under the EU Patent Regulation) to the ECJ for a preliminary ruling under Article 267 TFEU — such preliminary rulings were "indispensable to the preservation of the very nature of [EU] law". And secondly, if a decision of the unified patent court were to be in breach of EU law, it could not be subject to infringement proceedings by the Commission nor could it give rise to financial liability on behalf the EU Member States — two essential characteristics of EU law.

4.7 The ECJ's Opinion notwithstanding, the Council adopted the authorising Decision on enhanced cooperation on 10 March 2011. All Member States, other than Italy and Spain, participated.

4.8 A general approach on both Regulations was agreed at an extraordinary session of the Competitiveness Council, on 27 June 2011.

## Legal base and legislative procedure

4.9 Following entry into force of the Treaty of Lisbon, the legal basis for intellectual property proposals is Article 118 TFEU. This confers specific powers on the EU to create uniform, EU-wide intellectual property rights and to establish their language

arrangements. Previously Article 308 of the EC Treaty had been used for this purpose (as for the Community Trade Mark and Community Design Regulations).

4.10 Article 118 TFEU specifies that qualified majority voting is to be used, except in relation to language arrangements where unanimity is required. Under enhanced cooperation, these same voting rules apply, but only among the 25 participating Member States.

## Previous scrutiny

4.11 As a consequence of the pending ECJ Opinion, the UK sought an agreement with the Council and Commission that it could withdraw from the Council Decision authorising enhanced cooperation after 10 March 2011, if the Opinion meant that the European patent court could not be established. The Committee doubted the legality of a Member State being able to withdraw from a legally binding Council Decision after it had been adopted and also asked the Parliamentary Secretary for Business, Innovation and Skills (Baroness Wilcox) to postpone the Decision from 10 March, so that the Government and the Committee could consider the Opinion fully before the authorising Decision was adopted. By voting for the Decision on 10 March, however, the Minister breached the scrutiny reserve. She gave evidence to the Committee about this on 11 May 2011. The Committee subsequently published a Report on enhanced cooperation for the EU patent, in which it questioned the legal basis for withdrawing from enhanced cooperation.[38]

4.12 From January to March 2012, the Committee conducted an inquiry into the intergovernmental agreement establishing the "Unified Patent Court", which had been renamed and revised to take account of the Opinion of the ECJ, in light of trenchant criticism of the proposed court from European patent professions and industry. One of the conclusions of its Report, *The Unified Patent Court: help or hindrance?*,[39] was to oppose the inclusion of Articles 6–8 in the EU patent Regulation. These gave jurisdiction to the ECJ over direct and indirect infringement of patent rights and meant that EU law would govern this aspect of substantive patent law.

## The Minister's letter

4.13 Baroness Wilcox writes on 3 July to say:

> "Further to my letter of 2 July providing your Committee with an update on the June European Council, I would like to advise you of recent developments. I would also like to take this opportunity to request that you consider lifting the scrutiny reserve on the Patent and Languages regulations.
>
> "In my letter of 2 July I indicated that Coreper would be asked on 3 July to agree the change to the Patent Regulation as an amendment to the compromise proposal which is currently scheduled for a first reading vote in the European Parliament on 4 July. I have been made aware that Coreper will now instead take this point on 11 July

38 *Enhanced cooperation for the EU Patent: the Committee's evidence session with Baroness Wilcox*, Thirty-second report of Session 2010–12, HC 942.

39 Sixty-fifth Report of Session 2010–12, HC 1799.