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23rd REPORT

SELECT COMMITTEE ON
THE EUROPEAN UNION

THE SCRUTINY OF EUROPEAN UNION BUSINESS—PROVISIONAL AGREEMENT IN THE COUNCIL OF MINISTERS

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TWENTY-THIRD REPORT

18 JUNE 2002

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE SCRUTINY OF EUROPEAN UNION BUSINESS—PROVISIONAL AGREEMENT IN THE COUNCIL OF MINISTERS

PART 1: THE BACKGROUND

Introduction

1. The Scrutiny Reserve Resolution is the linchpin in the House's scrutiny of proposals emanating from the European Union. The Resolution[1] stipulates that no Minister should give agreement in the Council of Ministers to any proposal for Community legislation before it has cleared scrutiny. Events in May 2001 caused us to question the Government as to whether the Resolution was being undermined by the practice of reaching 'provisional agreement' on a text in the Council. There followed a somewhat lengthy exchange of correspondence between the Committee and the Government on the subject. This correspondence has revealed a lack of consistency in practice in the Council, together with a confusion of terminology. It has, however, also resulted in a clarification of the Council's decision-making process and improvement in the working relationship between the Committee and the Government in the conduct of the scrutiny process.

Purpose of Report

2. The purpose of this Report is, first, to make available, for the information of the House, the correspondence which has passed between the Committee and the Government on this subject. Second, we draw some conclusions for the future work of the Committee and the conduct of the scrutiny process. Part 2 of this Report sets out the issue and arguments. Part 3 contains a narrative of events and summary of issues dealt with in the correspondence which is printed in Appendix 3.

[1] Reproduced in Appendix 2.

PART 2: THE ISSUES

Our starting point

3. The Committee's attention was drawn to the potential problem of 'provisional agreements' when Mrs Barbara Roche MP, then Minister of State in the Home Office, wrote to the Committee reporting the outcome of the Justice and Home Affairs Council in May 2001. Member States had reached 'provisional agreement' on two matters held under scrutiny: the draft Protocol on Mutual Legal Assistance and the Framework Decision on Human Trafficking. That agreement was said to be subject to Parliamentary scrutiny reservations. We questioned what this meant. Our concern in pursuing the issue with the Minister was in the first instance to ensure that 'provisional agreement' was not used as a means of circumventing the restriction on reaching a 'political agreement' set out in the Scrutiny Reserve Resolution.

'Provisional agreement'/ 'general approach'

4. There is a terminological problem, reflecting a political dilemma. Presidencies are naturally keen to mark their achievements. There is pressure, particularly towards the end of the six month term, to secure agreement on as many matters as possible. But texts may not be ready for formal agreement or adoption: not all points may be agreed, the opinion of the European Parliament may be awaited, or whatever. The Presidency will nonetheless want to record any progress made on an individual dossier. Hence the Council has employed the device of 'provisional agreement'. But it was unclear what the term meant and its usage has given rise to confusion, not least when it has been mistaken for 'political agreement'.[2] And indeed one consequence of our having raised the issue is that its usage is now to be eschewed. The term 'general approach' is to be preferred. We asked the Government to explain the difference and were told that they were "very similar" but differ from a 'political agreement'. Drawing on advice from the Council's Legal Service, the Government said that what distinguishes a 'provisional agreement' or 'general approach' from a 'political agreement' on, or the 'adoption' of, a text is the absence of a definitive position on the text.

The Government's position

5. The Government contends that it can reach a 'provisional agreement' or 'general approach' and at the same time maintain a Parliamentary scrutiny reserve. Where a document has not been cleared but is held under scrutiny by the Committee, reaching a 'provisional agreement' or 'general approach' does not override that scrutiny. It is regrettable that the Government has not responded to our request for clarification of its reasoning. It has explained how a 'provisional agreement/general approach' differs from a 'political agreement' but offers no detailed explanation on the compatibility of its position with the Scrutiny Reserve Resolution. The Government appears to be construing the Resolution narrowly, perhaps with higher regard to questions of form than of substance and purpose. It will be recalled that the Resolution provides that "No Minister of the Crown should give *agreement* in the Council to any proposal for European Community legislation … framework decision, decision or convention under Title VI of the Treaty on European Union – (a) which is still subject to scrutiny …". "Agreement" … "*includes* … (b) political agreement" (emphasis added). The terms 'provisional agreement' and 'general approach' are not mentioned in the Resolution. It is not clear whether the Government takes the view that, notwithstanding the use of the word "includes", the list set out in the Resolution is exhaustive and/or whether the Government considers that there can be no "agreement" within the meaning of the Resolution except where it results in a definitive position on a text.

6. **Our view remains that 'provisional agreement' or 'general approach' involves some form of agreement in the Council. And it is clear that the definition of "agreement" in the Resolution is not exhaustive. There can be no doubt that reaching 'provisional agreement' or 'general approach' on a proposal in the Council marks a significant step in the political and legislative process in the Council and in our Parliamentary scrutiny process. The Government has said that it will consider points made by the Scrutiny Committees and is prepared to take them up in the negotiations. The proof of the pudding will be in the eating. We cannot recall any recent case**

[2] The Council's press release following the Justice and Home Affairs Council in May 2001 recorded that 'political agreement' had been reached on the two measures on which the Minister told the Scrutiny Committees the Council had reached 'provisional agreement. The European Arrest Warrant provides a more recent example. The European Union's own website referred to the measure having secured political agreement at the Laeken European Council.

where changes proposed by the Committees have been accepted by the Government following such a step in the Council, and indeed recent experience[3] is not encouraging.

The assurances given

7. In the course of the correspondence between the Committee and the Government, the Government has given the following assurances/undertakings:

- It will seek to ensure that Presidencies would only use the terms 'adoption' or 'common position' (for co-decision procedures), 'political agreement' and 'general approach', and that they avoid using the term 'provisional agreement'.
- It would also seek to ensure that Presidencies do not incorrectly describe a decision as 'political agreement'.
- It will do all it can to provide the Scrutiny Committees with information and documents in a timely fashion, and to respond promptly to concerns raised by the Committees.
- It does not regard the maintenance of a Parliamentary scrutiny reservation as a "mere formality"; the Government had made this clear to the Spanish Presidency in our discussions with them about the term 'general approach' and will do so with future Presidencies.

8. **These assurances are helpful and in so far as they go beyond current practice, which in several respects they clearly do, they are particularly welcome. Like our sister Committee in the Commons, we intend to monitor future practice in the Council.**

The timetable—successive six month Presidencies

9. As regards the Committee's request for an assurance that the timetable should permit points raised to be considered properly and fully the Government is less positive. It is not a matter in its control. The Presidency of the day sets the Council's timetable. However, the Government would "continue to do all we can to provide you with information and documents in a timely fashion, and to respond promptly to concerns which you raise". We have some sympathy for this position. As it exists at the moment, the system by which the Presidency changes every six months is not always conducive to the efficient handling of the business of the Union. Although external events, existing commitments and the work programmes will necessarily influence agenda setting, the Presidency of the day will want to make its mark, to give priority to one or more areas of its choosing and to identify dossiers where it seeks to obtain agreement. **There needs to be change in the working of the Council and, as we have said before, those preparing for the next Intergovernmental Conference need to give consideration to the role of the Presidency**.[4]

The timetable—increased co-operation

10. The Government suggests that some of the difficulties surrounding the timetable may be avoided by action on the part of the Committee and its Sub-Committees. Ms Angela Eagle MP concludes her letter of 13 May 2002 as follows: "It would be particularly helpful if in each case we were able to provide the Presidency with concrete details of your timetable, including information on when any debate might take place … Such planning will also maximize the Government's ability to influence a particular negotiation. The earlier in the process we can register your concerns the greater likelihood we have of securing amendments to the text". While we will explore these possibilities, we wonder how realistic they actually are.

11. As regards day to day scrutiny work (*ie* with the exception of detailed inquiries carried out by the Sub-Committees), the timetable of our work is mainly dictated by the Government and the Council of Ministers. It is in practice dependent on how quickly the Government deposits the documents and furnishes explanatory memoranda, how much information Ministers give in explanatory memoranda, how quickly Ministers respond to questions raised by the Committee and exceptionally how soon Ministers are prepared to come to meet the Committee. Performance is patchy, but we know that Departments are making efforts to improve their performance. From our side, dates of meetings are published and the Clerks are always willing to discuss the agenda with Departments. Requests for urgent treatment are favourably considered. And changes are being made. We have reviewed some of our staffing and working methods. More resources are to be made available to scrutiny work and more

[3] For example on matters such as the proposed Framework Decision on the European Arrest Warrant, 16th Report 2001-02, HL Paper 89, and the proposed Framework Decision on the execution of orders freezing property or evidence. Correspondence to be published.

[4] See our earlier Report, *A Second Parliamentary Chamber for Europe: An Unreal Solution to some Real Problems*, 7th Report 2001-02, at para 63.

information regarding the progress of particular items will be placed on our website. **We will continue to do our utmost to operate the scrutiny process both rigorously and efficiently, but we remain largely dependent on timetables outside our control.**

12. As mentioned in paragraph 10 above, the Minister indicated that it would be helpful to have advance notice of debates. Debates on our Reports do not happen that often, but, under the terms of the Scrutiny Reserve Resolution, have the effect of clearing a proposal from scrutiny. Holding a debate on a matter on which the Committee has reported but not cleared can therefore be a useful opportunity for the Government to complete the scrutiny process. The timing of debates is not, however, in our control but is settled by agreement via the "usual channels". We have already proposed[5] that debates should normally be held within 12 weeks of publication of a Report, but this has not been taken up. What the Government is now suggesting would imply a much shorter period in some cases. The European Arrest Warrant demonstrates the promptness with which matters may need to be dealt.[6] **We will draw the Government's concern in this regard to the attention of the Leader of the House.**

The Convention—the role of national parliaments

13. The Convention recently established to pave the way for the next Intergovernmental Conference has within its remit the need to consider how there can be more democracy, transparency and efficiency in the EU. That encompasses the role of national parliaments in Community law-making. One of the Working Groups set up under the Convention will consider the position and role of national parliaments.[7] It is chaired by Mrs Gisela Stuart MP and is due to report during the autumn. This is not the place to go into the issues that the Group will need to consider. But we would expect them to review the operation of the Protocol on the role of national parliaments in the European Union, annexed to the Amsterdam Treaty. Suffice it to say that, compared with the UK practice, the Protocol provides only a minimal structure for involvement for national parliaments and for effective parliamentary scrutiny. **What the 'provisional agreement' episode serves to show is that if national parliaments are to have a meaningful role in the preparation and formulation of Community policies and legislation, the nature and extent of the involvement of national parliaments (including the status of parliamentary scrutiny reservations) may need careful definition and the timetable adjusted accordingly.**

Recommendation

14. **The conclusions in this Report are on a limited but important topic. They relate to the essential purpose and effectiveness of the scrutiny process. We accordingly make this Report to the House for debate.**

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5 In an unpublished memorandum to the Leader's Group on the Working Practices of the House (the Report of the Group is published as HL Paper 111, 29 April 2002).

6 The Committee's first Report, *Counter-Terrorism: The European Arrest Warrant*, was ordered to be printed on 12 November 2001 and was published on 15 November. The debate took place on 19 November. The Committee's second Report, *The European Arrest Warrant*, was ordered to be printed on 26 February 2002 and was published on 6 March. The debate took place on 23 April.

7 It is mandated to answer the following questions: How is the role of national Parliaments exercised in the current architecture of the European Union? What national arrangements function best? Is there a need to consider new mechanisms/procedures at national level or at European level?

PART 3: SUMMARY OF CORRESPONDENCE

The issue emerges

15. By letter of 6 June 2001 Mrs Barbara Roche MP, then Minister of State in the Home Office wrote to the Committee reporting the outcome of the Justice and Home Affairs Council in May 2001. At that meeting Member States reached 'provisional agreement' on two matters held under scrutiny: the draft Protocol on Mutual Legal Assistance and the Framework Decision on Human Trafficking. That agreement was said to be subject to Parliamentary scrutiny reservations. The Committee wrote to the Home Secretary on 5 July 2001 questioning the meaning and effect of the term 'provisional agreement'. We sought an explanation as to how a 'provisional agreement' differed from a 'political agreement'. The Scrutiny Reserve Resolution expressly precludes the Government reaching 'political agreement' on a proposal held under scrutiny but does not mention 'provisional agreement'.

Extract from Scrutiny Reserve Resolution

Monday 6th December 1999

(1) No Minister of the Crown should give agreement in the Council to any proposal for European Community legislation or for a common strategy, joint action or common position under Title V or a common position, framework decision, decision or convention under Title VI of the Treaty on European Union—

(a) which is still subject to scrutiny (that is, on which the European Union Committee has not completed its scrutiny);

(b) on which the European Union Committee has made a report to the House for debate, but on which the debate has not yet taken place.

(2) In this Resolution, any reference to agreement to a proposal includes—

(a) agreement to a programme, plan or recommendation for European Community legislation;

(b) political agreement;

(c) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community (co-decision), agreement to a common position, to an act in the form of a common position incorporating amendments proposed by the European Parliament, and to a joint text; and

(d) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 252 of the Treaty establishing the European Community (co-operation), agreement to a common position.

16. We asked the Minister to identify the factors and circumstances when the Government would be prepared to re-open 'provisionally agreed' texts in the light of comments from the Committee.

The story unfolds

17. By letter of 6 September 2001 the Government replied, under the hand of Ms Angela Eagle MP, Parliamentary Under-Secretary of State, Home Office. The Minister explained what she understood by the notion of 'provisional agreement', referring to the practice of successive Presidencies. She did not identify the difference in practical effect between a 'provisional' and a 'political' agreement. But what she did say was: "If the Committee were to identify a new point of major importance on either instrument, the Government would be prepared to pursue it if we considered there were a realistic prospect of securing an amendment to the text and provided of course that we agreed with the Committee".

18. The Minister's reply was considered by Sub-Committee E (Law and Institutions) on 7 November 2001, in the course of its scrutiny of certain documents. The Sub-Committee flagged up its intention to return to the question of 'provisional agreements' when the Minister had given evidence to the House of Commons European Scrutiny Committee.

The House of Commons European Scrutiny Committee takes over

19. The events of the May 2001 JHA also raised concerns in our sister Committee. On 31 October Ms Eagle and officials appeared before the House of Commons European Scrutiny Committee to explain and defend the Home Office's performance in submitting documents for scrutiny, including the events surrounding the May JHA. A number of the Committee's questions dealt directly with the issue of 'provisional agreement'.[8] The Minister was adamant that scrutiny had not been overridden (Q 15). She sought to explain the meaning and purpose of 'provisional agreement'. Such agreement did not stop Member States from re-opening the issues: "It is an attempt to work through the texts and see the lie of the land and get as much consensus around 15 states as possible so that you know where you are instead of leaving all of the work with all of the rest of the instruments to the end". The Minister acknowledged that it was more difficult to raise new points the further the negotiation process proceeded.[9]

Back to Sub-Committee E

20. On 18 December 2001 Sub-Committee E reconsidered the issue of 'provisional agreement' in the light of the Minister's evidence to the Commons Scrutiny Committee and what further steps, if any, should be taken. The Committee noted that if the Government's view that 'provisional agreement' did not override the Parliamentary scrutiny reserve was accepted, it nevertheless seemed clear that it marked a significant step in the scrutiny process. The threshold for the Government taking up an issue raised by the Scrutiny Committees once provisional agreement had been reached appeared to be a high one, though understandable in the context of EU negotiations and especially where the UK was the demandeur. But it was implicit in what the Minister had said that the Government would not be prepared to re-open negotiations on points already raised by the Scrutiny Committees. It would appear that so far as the Government was concerned scrutiny was over as regards these matters, whether or not any dialogue between the Scrutiny Committees and the Government has been concluded. Second, it remained unclear to the Sub-Committee how 'provisional' agreement as described by the Minister differed, except for the formal designation, from the position where there had been 'political' agreement. One possible factor was absence of any necessary input from the European Parliament. The Committee noted that in the cases in point (and also in the case of the European Arrest Warrant) the Parliament had not delivered its opinion on the measures.

21. The issue being one of general importance to the scrutiny process the Sub-Committee decided to refer it for consideration by the Select Committee.

The Select Committee takes the baton

22. Following discussion in the Select Committee at its meeting on 15 January 2002, the Committee decided to seek clarification from the Government. On 31 January Lord Brabazon of Tara, Chairman of the Committee, wrote to Lord Williams of Mostyn, the Leader of the House, making the following points:

- 'Provisional agreement' should not be used as a means of circumventing the restriction on reaching a political agreement set out in the Scrutiny Reserve Resolution and frustrating meaningful and effective Parliamentary scrutiny.
- While the Government's view was that 'provisional agreement' did not override the Parliamentary scrutiny reserve, such agreement marked a significant step in the scrutiny process.
- The threshold for the Government taking up an issue raised by the Scrutiny Committees after 'provisional agreement' in the Council was a high one. The Government appeared not to be prepared to re-open negotiations on points already raised by the Scrutiny Committees.
- It remained unclear how 'provisional agreement' as described by the Minister differed, but for the formal designation, from the position where there had been 'political agreement'.

23. Lord Williams was invited to clarify whether Ms Eagle's view represented the Government's position so that the Committee could consider how to ensure the resilience of the scrutiny process.

The interim reply—an isolated incident—problems of terminology

24. In his letter of 7 February 2002, Lord Williams asked for details of occasions when provisional agreement has been given to measures in the Council of Ministers. Lord Brabazon responded (letter of 13 February) that the Committee did not have such a record. In practice the majority of documents sent for scrutiny were cleared without detailed correspondence and/or before the relevant Council

[8] See in particular questions 15-20. European Scrutiny Committee Minutes of Evidence: Scrutiny of Justice and Home Affairs documents, Wednesday 31 October 2001, HC–325.

[9] *Ibid* QQ 1,20.

meeting. Only when the Council had taken a decision affecting a proposal under scrutiny had a problem arisen. Nonetheless, Lord Brabazon said, the Committee believed that the decisions of the May 2001 JHA were not isolated examples. First, in her letter of 6 September 2001 to the Committee and in her evidence to the House of Commons European Scrutiny Committee the Minister, Ms Angela Eagle MP, had suggested that the events at the May JHA were not out of the ordinary: securing 'provisional agreement' to a proposal was a common and accepted way of a Presidency's marking progress and success.[10] Second, a quick search on the Internet provided other examples.[11] Finally, Lord Brabazon acknowledged that there was a textual or classification problem. The nature of the agreement in the Council might not always be correctly reported. The European Arrest Warrant was a case in point.

The issue is raised in the Council—a 'general approach' approved

25. The Government raised the issue in the Council. The Committee was alerted to this by a brief note in *european report* describing the discussions at the February 28 Justice and Home Affairs Council.[12] In the context of the proposed Framework Decision on the execution in the European Union of orders freezing property or evidence, it was reported that "the UK objected to the Council's tendency to mark a 'political agreement' on texts before parliamentary reserves have been lifted". And on 15 March 2002, in a Written Answer[13] reporting the outcome of the February 28 JHA Council, Ms Angela Eagle MP referred to the Council approving a 'general approach' on the proposed Framework Decision. The Minister promised to write to the Chairman of the European Scrutiny Committee about the term 'general approach'.

The Government's substantive reply—three undertakings given

26. On 20 March Lord Williams wrote, giving the Government's considered response to the issues raised in Lord Brabazon's letter of 31 January 2002. He explained that in cases where the UK had entered into 'provisional agreement', the legislative process had not been complete: either the European Parliament's opinion had not yet been considered or there was a requirement to reconsult the European Parliament. "Ministers therefore considered that they could take a general position in support of a text, while retaining the possibility of pursuing issues raised by our Parliament at the point when the Council returned to the European Parliament's opinion".

27. The Government had checked to see how widespread the use of the term 'provisional agreement' had been. A search of Council documents on the Council's website indicated that the term has been used almost exclusively by the Justice and Home Affairs Council. It was confusing for one formation of the Council to use language not used by others. The Government would therefore seek to persuade Presidencies to use standard terminology used in other Council formations.

28. Lord Williams referred to the guidance given by the Council's Legal Service on the types of decision that can be taken and on their terminology. There are three categories: 'adoption' or 'common position' (for co-decision procedures), 'political agreement' and 'general approach'.

The Council Legal Service's Guidance[14]

The Council Legal Service identifies three categories of decision or outcome at a Council:

- terms referring to a decision adopting a text finalised by the Legal/Linguistic experts: 'adoption' or 'common position' (for co-decision procedures);
- terms referring to a decision adopting a definitive position on a text, subject to finalisation of that text by the Legal/Linguistic experts: 'political agreement'; and
- terms referring to a decision stating a position on a text before fulfilment of the legislative-procedure preconditions for voting, in particular delivery of the European Parliament's opinion: 'general approach'.

In cases relating to legally binding rules, the Council is advised to avoid the use of terms other than those above.

[10] See paragraph 11 of the Minister's letter, and her reply to question 20 of the European Scrutiny Committee.

[11] Listed in letter of 13 February 2002 from Lord Brabazon to the Leader of the House: EU-Egyptian Trade, General Affairs Council June 1999; Tobacco Products, Health Council, June 2000; European Company Statute, Nice, December 2000; Erika 2, Transport Council June 2001.

[12] *european report*, vol 2664, March 2, 2002, p. IV.12.

[13] Written Answer 15 March 2002, HC Hansard at col *1259W.*

[14] This description is taken from Lord Williams' letter of 20 March 2002.

29. The Government would seek to ensure that Presidencies would only use these terms, and that they avoid using the term 'provisional agreement'. It would also seek to ensure that they do not incorrectly describe a decision as 'political agreement'.

30. Lord Williams reiterated the Government's view that it could legitimately approve a 'general approach' while maintaining a domestic Parliamentary Scrutiny reservation.

Lord Brabazon replies—need to clarify 'general approach'

31. In his response of 26 March 2002 Lord Brabazon acknowledged the helpfulness of the Council Legal Service's tripartite specification of Council decisions and of the Government's seeking to ensure consistency of terminology in future. However, the Select Committee would wish to be clear how the adoption of a 'general approach' was compatible with the Scrutiny Reserve resolution and to consider the Government's view that it could legitimately approve a 'general approach' while maintaining a domestic Parliamentary scrutiny reservation. Lord Brabazon said that the Committee was waiting to see the detailed explanation of the concept of 'general approach' promised by the Minister, Ms Angela Eagle MP, and to learn how, in terms of the practical consequences for scrutiny, 'general approach' differed from a 'provisional agreement', as described in her letter of 6 September 2001.

Ms Eagle explains 'general approach'—not a definitive position

32. In her letter of 15 April 2002 the Minister said that the situation described by the term 'general approach' was "very similar to what we have previously described as 'provisional agreement' *ie* a situation where the Council states a position on a text before the legislative procedure is complete, and where the Government considers it legitimate to approve the position while if necessary maintaining a domestic parliamentary scrutiny reservation … the term 'political agreement' describes a definitive position on a text, where the only remaining step before adoption is revision on the text by legal/linguistic experts. The position stated by the Council when it approves a 'general approach' is not described as definitive, and the legislative process is not complete. We therefore consider that we remain free to raise points arising from domestic scrutiny after a 'general approach' has been approved, for example when the Council subsequently considers the European Parliament's opinion. I do, therefore, think that the Council Legal Service's definition of the term 'general approach' and the discussions we have had in Brussels on the use of the term should provide reassurance that approving a 'general approach' while maintaining a domestic parliamentary scrutiny reservation does not frustrate the scrutiny process."

Lord Brabazon seeks assurances and further clarification from the Government

33. In his letter of 18 April Lord Brabazon said that the Minster's likening of 'general approach' to 'provisional agreement' rekindled the concerns initially raised about the latter and the possible adverse implications for the scrutiny process. While the Minister had imposed restrictions on taking up a point where there was 'provisional agreement' in the Council, no such restrictions or limitations had been expressed in relation to the 'general approach'. Lord Brabazon sought the Government's explicit assurance that, where a 'general approach' is adopted, all points made by the Scrutiny Committees will be considered on their merits and, equally importantly, that the timetable will permit them to be properly and fully considered. Lord Brabazon also sought clarification of the reasoning behind the Government's conclusion that participation in the adoption of a 'general approach' in the Council while maintaining a scrutiny reserve was compatible with the scrutiny reserve resolution. A 'general approach' would seem at first glance to constitute an agreement for the purposes of the scrutiny reserve resolution.

Ms Eagle replies—assurances given—need for co-operation

34. In her letter of 13 May 2002 the Minister reiterated the Government's view that approving a 'general approach' did not undermine the scrutiny process. She said: "Since a 'general approach' does not establish a final and definitive text, it does not prevent us taking up points which you raise. We have stated clearly in the Council that the UK Government reserves the right to re-open a text after a 'general approach' has been approved on the basis of concerns raised by our Parliament".

35. The Government could give the assurance sought by the Committee, that it would consider any point raised by the Committee on its merits. The Minister also assured the Committee that the Government did not regard the maintenance of a Parliamentary scrutiny reservation as a "mere formality". The Government had made its position clear to the Spanish Presidency and would do so with future Presidencies. However, the Government could not give an assurance that the timetable should permit points raised to be considered properly and fully. It was not in the Government's

control. The Presidency of the day set the Council's timetable. However, the Government would "continue to do all we can to provide you with information and documents in a timely fashion, and to respond promptly to concerns which you raise". At a practical level the Government and the Scrutiny Committees needed to work together closely and to build on the existing good co-operation. The Minister believed that it should be possible to establish a reasonable timetable in each case. She added: "It would be particularly helpful if in each case we were able to provide the Presidency with concrete details of your timetable, including information on when any debate might take place … Such planning will also maximize the Government's ability to influence a particular negotiation. The earlier in the process we can register your concerns the greater likelihood we have of securing amendments to the text".

APPENDIX 1

The European Union Committee

The members of the Committee are:

Baroness Billingham
Viscount Bledisloe
Lord Brabazon of Tara (Chairman)
Lord Brennan
Lord Brooke of Alverthorpe
Viscount Brookeborough
Lord Cavendish of Furness
Lord Grenfell
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Baroness Park of Monmouth
Lord Scott of Foscote
The Earl of Selborne
Baroness Stern
Lord Tomlinson
Lord Williams of Elvel
Lord Williamson of Horton

APPENDIX 2

Scrutiny Reserve Resolution

Monday 6 December 1999

1. No Minister of the Crown should give agreement in the Council to any proposal for European Community legislation or for a common strategy, joint action or common position under Title V or a common position, framework decision, decision or convention under Title VI of the Treaty on European Union—

(a) which is still subject to scrutiny (that is, on which the European Union Committee has not completed its scrutiny);

(b) on which the European Union Committee has made a report to the House for debate, but on which the debate has not yet taken place.

2. In this Resolution, any reference to agreement to a proposal includes—

(a) agreement to a programme, plan or recommendation for European Community legislation;

(b) political agreement;

(c) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community (co-decision), agreement to a common position, to an act in the form of a common position incorporating amendments proposed by the European Parliament, and to a joint text; and

(d) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 252 of the Treaty establishing the European Community (co-operation), agreement to a common position.

3. The Minister concerned may, however, give agreement to a proposal which is still subject to scrutiny or which is awaiting debate in the House—

(a) if he considers that it is confidential, routine or trivial or is substantially the same as a proposal on which scrutiny has been completed;

(b) if the European Union Committee has indicated that agreement need not be withheld pending completion of scrutiny or the holding of the debate.

4. The Minister concerned may also give agreement to a proposal which is still subject to scrutiny or awaiting debate in the House if he decides that for special reasons agreement should be given; but he should explain his reasons—

(a) in every such case, to the European Union Committee at the first opportunity after reaching his decision; and

(b) in the case of a proposal awaiting debate in the House, to the House at the opening of the debate on the Committee's Report.

5. In relation to any proposal which requires adoption by unanimity, abstention shall, for the purposes of paragraph (4), be treated as giving agreement.

APPENDIX 3

Correspondence

Letter from Barbara Roche MP, Minister of State at the Home Office, to Lord Brabazon of Tara, Chairman of the European Union Committee

JUSTICE AND HOME AFFAIRS COUNCIL, 28–29 MAY 2001: OUTCOME

I am writing to report the outcome of the Justice and Home Affairs Council meeting on 28–29 May 2001. I represented the United Kingdom on 28 May, and the Home Secretary represented the UK on 29 May.

"A" points

The "A" items on the attached list (8944/01 PTS A 27) were adopted, with the exception of points 16, 28, 29, 30 and 34. I am writing separately to the Leaders of the House of Commons and House of Lords reporting and explaining our decision to override the Parliamentary scrutiny reserve on some of these items.

Protocol to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

The Council considered the main outstanding political issues: the abolition of the dual criminality requirement in relation to requests for search and seizure; and the provision of banking information. Member States remained divided on abolition of the dual criminality requirement, and Article 2 of the draft protocol was therefore deleted. Agreement was reached in relation to the provision of banking information (Article 5), and Member States lifted their reservations on related provisions (Article 5a, 5x and 5b). The Council reached provisional agreement on the draft protocol, subject to scrutiny reserves from two delegations. The United Kingdom maintained its parliamentary scrutiny reservation.

Council Framework Decision on combating trafficking in human beings

The Council reached provisional agreement on and froze all the articles in the framework decision except for Article 3 (penalties). The United Kingdom retained its Parliamentary scrutiny reservation. The Council discussed the scope for developing a horizontal approach to the approximation of penalties. Some Member States proposed an approach whereby the Council would determine the level of seriousness of certain offences, and Member States would then determine the appropriate penalty within their national penalty structure. Some Member States called for a study of national sentencing practice in the Member States. Other Member States emphasised that work on a general approach to penalties should not delay progress on a number of important instruments, including the framework decision on trafficking in human beings. The Council asked COREPER to continue work on the level of sanctions for offences of trafficking in human beings with a view to reaching agreement at the earliest possible opportunity. The Council asked COREPER to look further at developing a general approach to penalties.

Council Regulation on co-operation between the courts of the Member States of the European Union on the taking of evidence in civil and commercial matters

The Council adopted this Regulation.

Council decision on the opening of negotiations within the framework of the Hague Conference on Private International Law for a worldwide Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters

The Council agreed a negotiating mandate for the European Commission on the European Community's position in negotiations in the Hague Conference.

Directive on temporary protection in case of mass influx of displaced persons in need of international protection

The Council reached political agreement on the draft directive. A compromise wording was agreed to simplify the article on family reunification (Article 15) and make it clear that family reunification in relation to the extended family was optional. A Council declaration on solidarity between Member States in the framework of temporary protection was also agreed. This records that in indicating its reception capacity under Article 25 of the directive, a Member State indicates its willingness and readiness to act accordingly.

At the meeting of the Permanent Representative Committee on 30 May, however, one Member State indicated that it was not in fact able to accept the text agreed at the Council, and withdrew from the political agreement.

Directive on the right to family reunification

The Council discussed fundamental issues including the scope of the family unit for the purposes of reunification, and time limits relating to qualification for the rights and benefits of family reunification. The Council was unable to reach agreement on these issues.

Protection of the euro against counterfeiting

The Council reached provisional agreement on the draft decision on protection of the euro against counterfeiting. The United Kingdom retained its parliamentary scrutiny reservation. The European Parliament will be reconsulted as a result of the changes to the initial proposal. It was agreed that Article 5 of the draft decision, on the recognition of previous convictions, should be removed from the decision and reformatted as a separate framework decision. The council also adopted conclusions on Europol's role in protecting the euro, through the exchange of technical information as well as strategic and operational data.

Principles for financing SIS II

The Council considered whether the Schengen Information System II, the planned successor to the current database, should be financed intergovernmentally by contributions from the Member States in accordance with the gross national product scale, or from the budget of the European Community. In the absence of unanimity on the method of funding, the Council concluded that operational expenditure should be charged to the Community budget from 2002 in accordance with Article 41(3) of the Treaty on European Union. The Council also instructed COREPER to ensure the necessary co-ordination within the Council on the various aspects of the development of the SIS II.

Directive on the protection of the Community's financial interests

The Commission presented its proposal to replace the Convention on the protection of the European Communities' financial interests of 26 July 1995 and its associated protocols with a Community directive.

Tampere scoreboard

The Commission presented its biannual update of the scoreboard charting progress on implementation of the Tampere conclusions.

Any other business

Belgium presented a proposal for a Resolution on the creation of national centres and organisations for the fight against the disappearance and sexual exploitation of children, which will be negotiated under the future Belgian Presidency.

Greece announced that it intended to bring forward a legislative proposal to establish a migration observatory, and that this proposal would be a priority of the future Greek Presidency.

The Council confirmed political agreement on authorising the director of Europol to sign agreements with Interpol, Norway and Iceland. The United Kingdom lifted its Parliamentary scrutiny reservation, but another Member State subsequently entered a Parliamentary reservation; preventing formal adoption. This Parliamentary reservation is expected to be removed by 15 June, in time for formal adoption on 21 June at the Culture Council.

Mixed committee with Iceland and Norway

Protocol to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

The Mixed Committee confirmed its agreement to those aspects of the protocol which constitute a development of the Schengen *acquis*.

Directive defining the facilitation of unauthorised entry, movement and residence

Council framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence

The Mixed Committee reached political agreement on these two instruments. The United Kingdom maintained its Parliamentary scrutiny reserve, but the Home Secretary stated that we would lift it in time for formal adoption. The framework decision provides that where certain aggravating circumstances apply, the offence of facilitation will be punishable by custodial sentences with a maximum of at least eight years,

although to preserve the coherence of national penalty systems, some Member States will apply a maximum of not less than six years provided that it is among the most severe maximum sentences available for crimes of comparable seriousness. A number of Member States including the United Kingdom will make a declaration stating that they will continue to apply a maximum penalty of at least 10 years for the offences in question. The directive contains a provision allowing Member States to decide, by applying its national law and practice, not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

Council directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (carriers liability)

The Council reached political agreement on this directive. The United Kingdom maintained its Parliamentary scrutiny reservation, but again stated that it would lift it in time for formal adoption.

Illegal immigration via the Western Balkans

The Mixed Committee noted a Presidency progress report on measures to combat illegal immigration via the Western Balkans, including progress on the United Kingdom initiative for stationing immigration experts in the Western Balkans. The Home Secretary urged other Member States to match the commitment which the United Kingdom was making in contributing officers to the joint teams for Bosnia-Herzegovina and Croatia.

I am writing in similar terms to the Chairman of the European Scrutiny Committee of the House of Commons, and to the Clerks in both the Commons and the Lords.

6 June 2001

Letter from Lord Brabazon of Tara, Chairman of the European Union Committee, to the Rt. Hon. David Blunkett MP, Secretary of State for the Home Department

JUSTICE AND HOME AFFAIRS COUNCIL 28/29 MAY: DECISION TO OVERRIDE PARLIAMENTARY SCRUTINY RESERVE

Thank you for the letter of 6 June from Barbara Roche MP, then Minister of State, informing the Committee of the proposals on which the Government decided to override scrutiny at the Justice and Home Affairs Council on 28/29 May and those on which it intended to give agreement in the course of June, thus also overriding scrutiny. Sub-Committee E (Law and Institutions) considered your letter at its meeting on 4 July.

Where a proposal has been formally adopted or "agreed" by the Council, the retention of a Parliamentary scrutiny reservation by the Committee may amount to little more than a formality. The Committee has therefore decided, with some reluctance and with one exception, to clear the proposals referred to in your letter on which scrutiny has not been completed (for convenience the proposals are listed in an Appendix hereto) *(not published with this Report)*. The Committee nevertheless wishes to express grave concern at the procedure adopted and the justification given by the Government for overriding Parliamentary scrutiny on the following matters.

French Presidency immigration package

The Committee wrote to Barbara Roche, MP on 22 November and again on 21 February, 1 March and 22 March. She replied by letter of 11 May, which arrived after the dissolution of Parliament. The Minister's reply offered no compelling reasons for the failure to respond more promptly. That failure is aggravated by the fact that the Committee, recognising the importance of the Presidency package, had initiated early consultation of interested NGOs. The inability of the Government to provide a response to the substantial concerns identified and the specific issues raised in correspondence with the Minister in time for consideration by the Committee before the dissolution of Parliament represents a significant failure of the scrutiny procedure. It is all the more surprising in the light of the Minister's letter of 6 June in which she emphasises the importance the Government attached to early adoption of the French Presidency package.

As regards the adoption of the draft Directive on mutual recognition of decisions on the expulsion of third country nationals, the Minister draws the Committee's attention to "an important legal consideration" based on Article 3 of the Protocol on the Position of United Kingdom and Ireland. That provision permits Member States to adopt a proposal based on Title IV of the EC Treaty if agreement cannot be reached with UK participation "within a reasonable period of time". The Committee does not accept that Article 3 of the Protocol provides a sufficient justification for overriding Parliamentary scrutiny in the circumstances. Indeed we are surprised that the Government has raised this argument. As mentioned above, the Government's own failure to respond promptly to the Committee's letters placed it in the position of having to decide whether to override scrutiny.

Notwithstanding that agreement has been reached on the French Presidency package, the Committee requests copies of the final texts to be provided together with a Note from the Government explaining the main issues and changes agreed at the Council.

Law enforcement operational needs

Regrettably, the Committee was not able to examine these documents in detail prior to the dissolution of Parliament. Your officials were aware that the Committee had looked in some detail at an earlier proposal on the same subject—Enfopol 98—and that the new proposals would therefore be of some interest. It seems that the documents deposited for scrutiny have been superseded by a draft Council Resolution—Enfopol 29 Rev 1. The Minister's letter of 6 June indicates that this proposal was likely to be adopted in the course of June. The reason she gives to justify overriding Parliamentary scrutiny—namely the efficient conduct of Council business—is, in our view, inadequate and inappropriate. The Government has provided no explanation of how the business of the Council may be impaired by a further short postponement to allow the completion of Parliamentary scrutiny procedures. Moreover, given that the content of the draft Resolution is potentially controversial, it would seem all the more important that the Scrutiny Committees should have the opportunity to consider the proposal before adoption.

As it is not clear from the Minister's letter when the draft Resolution is to be formally adopted, the Committee expects normal scrutiny procedures to apply. The prompt provision of a full Explanatory Memorandum would assist the Committee.

Europol agreements

The Committee has consistently drawn attention to the need for agreements between Europol and third parties to include adequate safeguards for human rights and data protection. The Government has previously expressed sympathy for the Committee's position. It is therefore surprising and disappointing that the Government agreed to the adoption of the agreements with Norway and with Interpol as "A" points without having responded to the Committee's concerns set out in my letter of 10 April. The procedural reasons given by the Government to justify overriding Parliamentary scrutiny do not, on balance, appear to outweigh the need for full consideration of the substantive points raised by the Committee. The Committee awaits a detailed response to the points in my earlier letter.

While the terms of the Scrutiny Reserve Resolution recognise that there may be exceptional circumstances justifying the overriding of Parliamentary scrutiny, the explanations proffered by the Minister provide little, if any, excuse for the Government's apparent disregard for the scrutiny process. We believe that the difficulties could have been overcome by foresight and prompter action on the part of your Department. I cannot conceal the Committee's displeasure. The Committee awaits your detailed response to the concerns described above. In the light of that the Committee will consider whether further action is needed.

I am copying this letter to the Chairman and Clerk of the European Scrutiny Committee in the House of Commons.

5 July 2001

Letter from Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office, to Lord Brabazon of Tara, Chairman of the European Union Committee

JUSTICE AND HOME AFFAIRS COUNCIL: 28/29 MAY 2001

Thank you for your letter of 5 July to David Blunkett on the outcome of the Justice and Home Affairs Council meeting on 28/29 May and the decision to override the Parliamentary Scrutiny Reserve on certain points.

2. Your letter on those measures which were subject to Parliamentary Scrutiny overrides raised a number of detailed points about the documents concerned. Responses to these points are contained in the annex enclosed with this letter.

3. I should additionally wish to respond to the general points raised by the Committee about the Parliamentary Scrutiny process, delays in responding to correspondence with the Committee and the nature of agreements reached at the Justice and Home Affairs Council.

4. The Government is committed to ensuring full and proper Parliamentary Scrutiny of Justice and Home Affairs Council business in accordance with the agreed arrangements. It is not our intention to override the scrutiny process except where it is, in the Government's view, unavoidable. Subject to my comments below on delays in replying to correspondence, scrutiny override on a number of items was inevitable, given the state of readiness of the dossiers at the May Council. Barbara Roche's letter of 6 June to the Leader of both Houses therefore appears to me to set out, in the context of the circumstances of a General Election period, fully justifiable reasons for overriding scrutiny.

5. You questioned the arguments which the Government put forward in relation to Article 3 of the

Protocol on the position of the United Kingdom and Ireland. It may be helpful to the Committee if I set them out in greater detail.

6. As you know, the United Kingdom secured two protocols at Amsterdam, one protecting our position on frontiers and the other giving us the right to decide on a case-by-case basis whether or not to participate in measures on asylum, immigration, visas, borders and civil judicial co-operation. In order to maintain domestic control of the admission policy underpinning our frontier controls, we have tended not to participate in measures on legal migration and visa policy.

7. We do, however, believe that it is strongly in the United Kingdom's interests to participate in measures to establish a common European asylum system and measures to combat illegal immigration and migrant smuggling. We have successfully pursued a policy of positive engagement in these areas, to the extent that we are now in a position where we have real influence in shaping the agenda. It is very important that we maintain the strength of our current position. We had been successful in pressing for tough European Union-wide measures against illegal immigration and trafficking, particularly after the deaths of 58 Chinese nationals at Dover. Successive European Councils had called for the speeding up and early completion of this work. We could not afford to be the one Member State holding up adoption at the May Justice and Home Affairs Council and risk the possibility of a debate opening up about the commitment of the United Kingdom to European Union action against illegal immigration or the possibility of the other Member States proceeding without us. We were conscious that there was a real possibility that the measures would not be considered by Parliament before October. In the circumstances, we considered that it was strongly in the United Kingdom's interests to override the Parliamentary Scrutiny reservation.

8. As part of the Justice and Home Affairs Council's discussion of ensuring the timely delivery of the Tampere agenda, the United Kingdom has been arguing for a project-management approach to the European Union's management of its business. This would provide greater clarity, at an early stage, as to which items of business would be discussed at a particular Council and thus enable us to work more effectively with the Committees to ensure that scrutiny was complete in good time. I hope that this will, if agreed, help both us and the Committees better to organise our work in the future.

9. You raised in your letter a number of examples of delays in responding to correspondence which might otherwise have enabled the Committee to complete scrutiny before the May Justice and Home Affairs Council. Barbara Roche apologises for those delays in her responses and I entirely agree with her that the delays which occurred in the instances you have noted are unacceptable. We are addressing the problems which have arisen in the past; I am committed to providing the Committee with either a full response in three weeks or an explanation as to why a full reply cannot be provided within that timescale and when we expect to send a final response. I trust that we can start the new Parliamentary session on that basis. I suggest that officials here should discuss with the Clerk to your Committee how best to ensure that systems are in place to support this new arrangement.

10. Your letter of 5 July on the outcome of the Justice and Home Affairs Council questioned the use of terms such as "provisional agreement" and "political agreement" in the context of two specific measures which were on the Council agenda. In the case of both the Protocol to the Mutual Legal Assistance Convention and the Framework Decision on Combating Trafficking in Human Beings, the Swedish Presidency was determined to push work forward rapidly and achieve an outcome which it could describe as a Presidency achievement. At the May Council, solutions were found to the points on the text of the Protocol to the Mutual Legal Assistance Convention on which the United Kingdom had previously placed substantive reservations. On the Framework Decision on Trafficking in Human Beings, the United Kingdom no longer had any reservations on the provisions which dealt with issues other than penalties. Neither text has, however, been finalised. In the case of the Protocol on Mutual Legal Assistance, one Member State has maintained a substantive reservation on the text and the European Parliament is being re-consulted. In the case of the Framework Decision, work continues on the provisions on penalties. In addition, the opinion of the European Parliament has been received but has not yet been considered.

11. As is often the case, the Presidency wanted and chose to describe the outcome of the May Council as a form of agreement and a Presidency achievement. There is no realistic prospect of changing this practice. The United Kingdom has no control over the wording used in the press release issued after the Council nor over other Council documents. We did not however, consider it appropriate to override the Parliamentary Scrutiny Reserve in either case. If the Committee were to identify a new point of major importance on either instrument, the Government would be prepared to pursue it if we considered there were a realistic prospect of securing an amendment to the text and provided of course that we agreed with the Committee. The Committee is right that it is more difficult to secure changes to a text when negotiations are at an advanced stage but this is the case irrespective of the precise form of words used to describe the stage negotiations have reached.

12. I hope that this further explanation, together with the Home Secretary's and my commitment to ensuring that the Department significantly improves its future performance on correspondence with the Committee will ensure that we do not encounter similar problems in the future.

13. I am writing in similar terms to Jimmy Hood who has also written to us about the outcome of the May Justice and Home Affairs Council.

6 September 2001

Letter from Lord Brabazon of Tara, Chairman of the European Union Committee, to the Rt. Hon. Lord Williams of Mostyn QC, Leader of the House of Lords

I am writing to express the concern of the Select Committee about a developing practice under which Government Ministers at meetings of the Council of Ministers give their "provisional agreement" to proposals for legislative measures notwithstanding that the proposed measures are subject to Parliamentary scrutiny reserves.

At the May 2000 Justice and Home Affairs Council, the Government gave "provisional agreement" to two proposed measures. One was the draft Protocol on Mutual Legal Assistance. The other was the Framework Decision on Human Trafficking. Both were subject to Parliamentary scrutiny reserves. The Select Committee decided to seek clarification from the Government of the status of these "provisional agreements" and I wrote to the Home Secretary on 5 July last year enquiring about this. Ms Angela Eagle MP, a Parliamentary Under-Secretary of State, Home Office, replied by letter of 6 September. She defended the giving of "provisional agreements" which did not, she said, override Parliamentary scrutiny reservations. She said that "If the Committee were to identify a new point of major importance on either instrument, the Government would be prepared to pursue it if we considered there were a realistic prospect of securing an amendment to the text and provided of course that we agreed with the Committee". She did not otherwise identify any practical difference in effect between a "political agreement" which does override Parliamentary scrutiny and a "provisional agreement". A copy of the correspondence is attached.

The matter has also been of concern to our sister committee in the House of Commons. On 31 October Ms Eagle and officials appeared before the European Scrutiny Committee. A number of the Committee's questions dealt directly with the issue of "provisional agreement". I attach an extract from the Minutes of Evidence of that meeting and draw attention, in particular, to questions 15–20.

More recently, "provisional agreement" has apparently been given to the proposed Framework Decision on the European Arrest Warrant, notwithstanding that it is still held under scrutiny by this House. It so appears from Mr Hain MP, Minister for Europe's letter of 20 December and from evidence given by Mr Ainsworth MP, Parliamentary Under-Secretary of State, Home Office, on 9 January 2002 to the House of Commons Select Committee. I attach a copy of the letter and an extract from the Minutes of Evidence of that meeting and draw attention to Mr Ainsworth's answer to question 36.

My Committee's concern is that the giving by Ministers of "provisional agreement" to proposed European legislative measures may become, or has become, a means whereby effective Parliamentary scrutiny of the proposed measures before they come into effect can be circumvented.

The Committee notes the Government's view that a "provisional agreement" does not override the Parliamentary scrutiny reserve. But once a "provisional agreement" has been given, the scope of action for Parliament is, if Ms Eagle is right, severely restricted. The threshold for the Government taking up an issue raised by the Scrutiny Committees once provisional agreement has been reached is a high one. Ms Eagle's letter requires not only that the point be a "new one" of "major importance" but also that there be a "realistic prospect of securing an amendment to the text . . .". And it is implicit that the Government would not be prepared to re-open negotiations on points already raised by the Scrutiny Committees. It would appear that so far as the Government is concerned scrutiny is over as regards these matters, whether or not any dialogue between the Scrutiny Committee and the Government has been concluded. There seems little difference in effect between this situation and that where political agreement has been reached.

The Scrutiny Reserve Resolution provides that "No Minister of the Crown should give *agreement* in the Council to any proposal for European Community legislation . . . framework decision, decision or convention under Title VI of the Treaty on European Union—(a) which is still subject to scrutiny . . .". "Agreement" . . . "*includes* . . . (b) political agreement". "Provisional agreement" clearly involves some form of agreement in the Council and it remains unclear how "provisional agreement" as described by the Minister differs, but for the formal designation, from the position where there has been "political agreement". But, equally important, the definition of "agreement" in the Resolution is not exhaustive. There can, I believe, be no doubt that reaching "provisional agreement" on a proposal in the Council marks a significant step in the political and legislative process in the Council and, if Ms Eagle's approach is accepted, in our Parliamentary scrutiny process.

It is the opinion of the Select Committee that it is not open to the Government to amend in this *de facto* manner the terms of the Scrutiny Reserve Resolution and, further, that the issue is one of constitutional importance. The body primarily responsible for legislation in this country is Parliament. Subordinate legislation may be made by the executive in pursuance of legislative powers conferred by Parliament but is subject to Parliamentary supervision via, usually, affirmative or negative resolution procedure. The arrangements for Parliamentary scrutiny reservations enable Parliament, in respect of proposed European legislation, to discharge its constitutional responsibility for supervising the content of the legislation that applies in this country. The "provisional agreement" practice diminishes the efficacy of these arrangements.

I would be grateful for your comments on the "provisional agreement" practice and whether Ms Eagle's view represents the Government's position. The Committee can then consider what action might be taken to ensure the vitality of the Parliamentary scrutiny process.

I am copying this letter to Angela Eagle MP; The Rt. Hon Peter Hain MP, Minister for Europe; Jimmy Hood MP, Chairman of the Commons European Scrutiny Committee; Dorian Gerhold, Clerk of the Commons Committee; Michael Carpenter, Legal Adviser to the Commons Committee; Les Saunders (Cabinet Office) and to Penny Hart, Departmental Scrutiny Co-ordinator.

31 January 2002

Letter from the Rt. Hon. Lord Williams of Mostyn QC, Leader of the House of Lords, to Lord Brabazon of Tara, Chairman of the European Union Committee

SCRUTINY RESERVE

I wrote to you on 5 February in response to your letter of 31 January, explaining that I was looking into the concerns that you raised. In investigating these, it would be very helpful if you could give me chapter and verse on as many as possible of the occasions when provisional agreements have been given.

Thank you again for keeping me informed.

7 February 2002

Letter from Lord Brabazon of Tara, Chairman of the European Union Committee, to the Rt. Hon. Lord Williams of Mostyn QC, Leader of the House of Lords

Thank you for your letter of 7 February. You ask for details of occasions when provisional agreement has been given to measures in the Council of Ministers. The short answer is that we do not have or keep a list. As you may know, in practice the majority of documents sent for scrutiny are cleared without detailed correspondence and/or before the relevant Council meeting. Hence only when the Council has taken a decision affecting a proposal under scrutiny has a problem arisen.

As my letter of 31 January indicated, we had become alert to the practice following the JHA in May 2000. Our meeting with the Minister for Europe led to the disclosure that the European Arrest Warrant had been subject to provisional agreement.

That these are not isolated examples seems to be confirmed by two things. First, in her letter of 6 September 2001 to this Committee and in her evidence to the House of Commons European Scrutiny Committee the Minister, Ms Angela Eagle MP, suggests that the events at the May 2000 JHA were not an isolated occurrence and that securing "provisional agreement" to a proposal was a common and accepted way of a Presidency's marking progress and success. See paragraph 11 of the Minister's letter, and her reply to question 20 of the European Scrutiny Committtee. Second, a quick search on the Internet yields other possible examples (EU—Egyptian Trade, General Affairs Council June 1999; Tobacco Products, Health Council, June 2000; European Company Statute, Nice, December 2000; Erika 2, Transport Council June 2001). This is a non-exhaustive list and I cannot verify its accuracy, not least because it has not been possible to find definitive records of the relevant Council proceedings in the public domain.

There is also a textual or classification problem. The nature of the agreement in the Council may not always be correctly reported. A good example is the recent case of the European Arrest Warrant. It is noteworthy that the European Union's own website speaks of the measure having secured political agreement at Laeken (copy extract attached) *(not published with this Report)*.

As you will appreciate from what I have said above, the Government is better placed to let you have the information you request. Ministers attend the Council and their Departments should have records of what took place. But if you think there is any other material which we can provide please let me know.

13 February 2002

Letter from the Rt. Hon. Lord Williams of Mostyn QC, Leader of the House of Lords, to Lord Brabazon of Tara, Chairman of the European Union Committee

THE SCRUTINTY OF EUROPEAN UNION BUSINESS

Thank you for your letter of 31 January, in which you express concern about Ministers' practice of reaching "provisional agreement" on EU instruments on which there are Parliamentary scrutiny reserves. I apologise for the delay in replying; your letter raised issues in which several Ministers had an interest, and I have consulted colleagues on the terms of this reply.

In cases where the UK entered into "provisional agreement", the legislative process was not complete. Either the European Parliament's opinion had not yet been considered or there was a requirement to reconsult the European Parliament. Ministers therefore considered that they could take a general position in support of a text, while retaining the possibility of pursuing issues raised by our Parliament at the point when the Council returned to the European Parliament's opinion.

We have checked to see how widespread the use of the term "provisional agreement" has been. A search of Council documents on the Council's website indicates that the term has been used almost exclusively by the Justice and Home Affairs Council. We do accept that it is confusing for one formation of the Council to use language which is not used by others, and in future we will seek to persuade Presidencies to use standard terminology used in other Council formations.

We have established that the guidance to the Council from its own legal service identifies three categories of decision or outcome at a Council:

— terms referring to a decision adopting a text finalised by the Legal/Linguistic experts: "adoption" or "common position" (for co-decision procedures);

— terms referring to a decision adopting a definitive position on a text, subject to finalisation of that text by the Legal/Linguistic experts: "political agreement"; and

— terms referring to a decision stating a position on a text before fulfilment of the legislative-procedure preconditions for voting, in particular delivery of the European Parliament's opinion: "general approach".

In cases relating to legally binding rules, the Council is advised to avoid the use of terms other than those above.

In the light of this, we will seek to ensure that Presidencies only use the terms set out above, and that they avoid using the term "provisional agreement". We will also seek to ensure that they do not incorrectly describe a decision as "political agreement", something which has also happened on a number of occasions in the JHA Council. We were successful in urging the Council to use the term "general approach" to describe the outcome of the JHA Council on 28 February 2002 on the Framework Decision on the freezing of assets and evidence. Our Permanent Representative will pursue this point in COREPER whenever it arises. We consider that the Government can legitimately approve a general approach while maintaining a domestic Parliamentary Scrutiny reservation, but we will of course not enter into political agreement or adopt an instrument before scrutiny has been completed except in the very limited circumstances outlined in the Scrutiny reserve Resolution.

The Government is committed to working with Parliament, to keep it informed of the European Union's work programme and the expected timetable for negotiation and adoption of instruments, so that the European Scrutiny Committees can plan their work accordingly. Ministers have explained that the circumstances of the Justice and Home Affairs Council in May 2001 were exceptional, given the general election period. In her letter of 6 September, Angela Eagle clearly restated the Government's commitment to ensuring full and proper scrutiny of European Union business and emphasised the Home Secretary's and her commitment to ensuring that the Department's scrutiny performance was of the required standard.

Robin Cook, Peter Hain, Angela Eagle and I would all be very pleased to meet with you and with the Chairman of the Commons Committee (either separately or together) to discuss in more detail the negotiating process in Brussels and to follow-up your concerns about the scrutiny process.

I hope that this letter will reassure the Committee of the Government's commitment to the scrutiny process. I am copying this letter to Robin Cook, Angela Eagle, Peter Hain, Jimmy Hood, Dorian Gerhold, Clerk of the Commons Committee, Michael Carpenter, Legal Adviser to the Commons Committee, Simon Burton, Clerk of the Lords Committee, Les Saunders, Cabinet Office, and to Penny Hart, Departmental Scrutiny Co-ordinator, Home Office.

20 March 2002

Letter from Lord Brabazon of Tara, Chairman of The European Union Committee, to the Rt. Hon. Lord Williams of Mostyn QC, Leader of the House of Lords

SCRUTINY OF EUROPEAN UNION BUSINESS

Thank you for your letter of 20 March. It is helpful to have the results of your researches and in particular your conclusion that the use of the term "provisional agreement" has been most frequent in the Justice and Home Affairs Council. We have also found it helpful to learn of the guidance given by the Council's Legal Service and its tripartite specification of Council decisions. We welcome the approach being taken by the Government in seeking to ensure that in future Presidencies only use the terms "adoption" or "common position", "political agreement" and "general approach".

However, I believe that the Select Committee will wish to be clear how the adoption of a "general approach" is compatible with the Scrutiny Reserve resolution. You say that the Government considers that it can legitimately approve a general approach while maintaining a domestic parliamentary scrutiny reservation. This is a matter which we propose to discuss in the Select Committee in the near future. In the meantime, we wait to see the Government's detailed explanation of the concept of "general approach" which the Minister, Ms Angela Eagle MP, promised to give to Jimmy Hood, Chairman of the House of Commons European Scrutiny Committee (Written Answer 15 March 2002, HC Hansard at col 1259W). We would be particularly interested to learn how, in terms of the practical consequences for scrutiny, "general approach" differs from a "provisional agreement", as described in her letter of 6 September 2001.

Copies of this letter go to Jimmy Hood, Chairman of the Commons European Scrutiny Committee, Dorian Gerhold, Clerk of the Commons European Scrutiny Committee, Michael Carpenter, Legal Adviser to the Commons European Scrutiny Committee and Les Saunders, Cabinet Office.

26 March 2002

Letter from the Rt. Hon. Lord Williams of Mostyn QC, Leader of the House of Lords, to Lord Brabazon of Tara, Chairman of the European Union Committee

SCRUTINY OF EUROPEAN UNION BUSINESS

Thank you very much for your letter of 26 March. I am glad you found my previous letter helpful.

I quite understand your wish to be clear about the meaning of the term "general approach", and I am sure it is sensible to wait and see Anegla Eagle's explanation.

If I can be of any further assistance in the matter, please do not hesitate to let me know.

28 March 2002

Letter from Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office, to Lord Brabazon of Tara, Chairman of the European Union Committee

THE SCRUTINY OF EUROPEAN UNION BUSINESS

In my Parliamentary Answer of 15 March reporting the outcome of the Justice and Home Affairs Council on 28 February, I undertook to write about the term "general approach", which was used to describe the outcome of discussions in the Council on the framework decision on the freezing of assets and evidence. I am sorry that the corresponding House of Lords answer did not explicitly refer to your Committee; this was unintentional.

You have now received a copy of Gareth Williams' letter of 20 March in reply to your letter of 31 January about Ministers' practice of reaching "provisional agreement" on items on which there remain Parliamentary scrutiny reserves. Gareth's letter provides a full statement of the Government's position on the types of decisions which Councils can take, and the scrutiny consequences of these decisions.

In that letter the Government made a number of commitments:

— We will seek to persuade Presidencies to use standard terminology in all Council formations.

— We will seek to ensure that Presidencies avoid using the term "provisional agreement".

— We will not enter into political agreement or adopt an instrument before scrutiny has been completed except in the very limited circumstances outlined in the Scrutiny Reserve Resolution.

As Gareth's letter explained, the term "general approach" refers to situations in which the Council states a position on a text before the legislative procedure preconditions for voting, in particular delivery of the European Parliament's opinion, have been fulfilled. He went on to say that the Government considered that it could legitimately approve a general approach while maintaining a domestic Parliamentary Scrutiny reservation. I understand that you have replied to Gareth saying that your Committee would be particularly interested to learn how, in terms of the practical consequences for scrutiny, "general approach" differs from a "provisional agreement".

The situation described by the term "general approach" is indeed very similar to what we have previously described as "provisional agreement" ie a situation where the Council states a position on a text before the legislative procedure is complete, and where the Government considers it legitimate to approve the position while if necessary maintaining a domestic parliamentary scrutiny reservation. As Gareth's letter explained, the term "political agreement" describes a definitive position on a text, where the only remaining step before adoption is revision on the text by legal/linguistic experts. The position stated by the Council when it approves a "general approach" is not described as definitive, and the legislative process is not complete. We therefore consider that we remain free to raise points arising from domestic scrutiny after a "general approach" has been approved, for example when the Council subsequently considers the European Parliament's opinion. I do, therefore, think that the Council Legal Service's definition of the term "general approach" and the discussions we have had in Brussels on the use of the term should provide reassurance that approving a general approach while maintaining a domestic parliamentary scrutiny reservation does not frustrate the scrutiny process. We stated explicitly, in the discussion which led to the decision to describe the outcome on the framework decision on the freezing of assets and evidence as a "general approach", that the UK Government reserved the right to return to points raised by our Parliament.

In his letter, Gareth suggested a meeting with you and Jimmy Hood, which Robin Cook, Peter Hain and I would attend, to discuss parliamentary scrutiny issues in more detail. I am sure such a meeting would be helpful.

13–14 June 2002 JHA Council

Turning to a different issue, I should also like to take this opportunity to raise a timing difficulty which may arise over the scrutiny of business going to the 13–14 June JHA Council immediately after the Whitsun Recess. This will be the last JHA Council of the Spanish Presidency and the Spanish are likely to seek agreement on a number of proposals on which they wish to get a result before the end of their Presidency. I am concerned that the timing of the Recess will make it more difficult to complete the scrutiny of key proposals in time for the Council. Within the Home Office, we are working to manage pre-Council scrutiny in the most timely way possible, but as your last sift before the Recess will presumably take place on 28 May, and Sub Committees E and F will hold their last meetings on 29 May, there will be little or no margin for error. I know that the Lords' Whitsun Recess is shorter than the Commons', but I would nonetheless appreciate it if you and your Sub Committee chairmen could give some thought to either holding additional meetings before and after the Recess or conducting some business through correspondence in lieu of extra meetings should this prove necessary as the Council approaches.

25–26 April JHA Council

It might also be helpful for me to update you on timetable considerations for the 25–26 April Council. Negotiations are now moving quickly on two proposals in particular, the directive on reception conditions for asylum seekers and the framework decision on sexual exploitation of children. The Presidency is likely to seek political agreement on the latter at the 25–26 April Council. The Council may also be asked to approve a general approach to the directive on reception conditions whilst it awaits receipt of the European Parliament's opinion. This is due to be delivered on 25 April, after which the directive could be prepared for adoption. I would be grateful if you could give priority to the scrutiny of these two measures. In particular, it would be helpful if you were able to schedule the proposed debate on the directive on asylum reception conditions as soon as possible. We will provide you with a further text of and explanatory memorandum on the framework decision on sexual exploitation of children. Please let me know if we can assist your work on these texts in any other way.

I am writing in similar terms to Jimmy Hood and will copy this letter to Simon Burton, Les Saunders (Cabinet Office) and to Penny Hart, Departmental Scrutiny Co-ordinator.

15 April 2002

Letter from Lord Brabazon of Tara, Chairman of the European Union Committee, to Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office

SCRUTINY OF EUROPEAN UNION BUSINESS

Thank you for your letter of 15 April in which you provide some clarification of the term "general approach" when used to describe the outcome of discussions in the Council on proposed legislative measures. Your letter is helpful in supplementing Lord Williams' letter of 20 March describing the types of decisions which Councils can take and the Government's view as to the scrutiny consequences of such decisions. We are particularly grateful for the commitments made by the Government, in particular to seek to persuade Presidencies to use standard terminology and to avoid using the term "provisional agreement".

In her letter of 14 March, Baroness Symons, responding to questions raised in the debate on our Second Chamber Report, reaffirmed that the Government has given Parliament an undertaking that Ministers will not agree to proposals in the Council of Ministers unless scrutiny has been completed. We find the Government's stance on "general approach" difficult to square with that undertaking.

You say that the situation described by the term "general approach" is "very similar to what we have previously described as "provisional agreement" ie a situation where the Council states a position on a text before the legislative procedure is complete, and where the Government considers it legitimate to approve the position while if necessary maintaining a domestic Parliamentary scrutiny reservation". You distinguish the term "political agreement" as describing a "definitive position on a text, where the only remaining step before adoption is revision on the text by legal/linguistic experts". This is helpful. But your likening of "general approach" to "provisional agreement" rekindles the concerns we raised about the latter and the possible adverse implications for the scrutiny process.

As I said in my letter of 31 January to Lord Williams, the effect of reaching what you were then calling a "provisional agreement" was to restrict severely the scope of Parliamentary scrutiny. For the Government to take up a point raised by one of the scrutiny committees, that point had to be a "new one" of "major importance". There also had to be a "realistic prospect of securing an amendment to the text...". We are pleased to note that there are no such restrictions or limitations expressed in your latest letter. You speak of the Government reserving "the right to return to points raised by our Parliament". Our concern is that the maintenance of a Parliamentary scrutiny reservation should not be treated merely as a matter of formality—something which the fifth sentence of the penultimate paragraph of your letter, dealing with decision-making on the draft Directive on reception conditions, might imply. We would, therefore, welcome the Government's explicit assurance that, where a "general approach" is adopted, all points made by the scrutiny committees

will be considered on their merits and, equally importantly, that the timetable will permit them to be properly and fully considered.

I think it would also be useful if we could explore the reasoning behind the Government's conclusion that participation in the adoption of a "general approach" in the Council while maintaining a scrutiny reserve is compatible with the scrutiny reserve resolution. What is clear from the description of the Council Legal Service's analysis cited by Lord Williams is that there are, for current purposes, three categories of decision in the Council, the third being "a decision stating a position on a text before fulfilment of the legislative-procedure preconditions for voting, in particular delivery of the European Parliament's opinion". Reaching such a decision would inevitably involve agreement by the Member States, especially where there is a requirement for unanimity (eg the European Arrest Warrant). You will recall that the scrutiny reserve resolution provides that "No Minister of the Crown should give *agreement* in the Council to any proposal for European Community legislation". Paragraph 2 of the resolution commences "In this resolution, any reference to agreement to a proposal *includes*". The list of types of agreement which follows is therefore not exhaustive. A "general approach" would seem at first glance to constitute an agreement for the purposes of the scrutiny reserve resolution.

If this is right, participation in a "general approach" while maintaining a Parliamentary scrutiny reserve would undermine the resolution. As in the case of what was termed "provisional agreement" the adoption of a "general approach" on a proposal would seem to mark a significant step in the political and legislative process in the Council. Albeit that all legislative procedural preconditions may not have been met, "a decision stating a position on a text" will have been taken. While, as a matter of law, the Council cannot close its mind to the opinion of the European Parliament, no such restraint would seem necessarily to apply in relation to national parliaments and we are doubtful whether in practice any Member State would reopen the debate on a text "agreed" in the context of a general approach save in most exceptional circumstances.

Whilst your offer of a meeting is most generous, my own view is that the next step here should be discussion in the Select Committee on the basis of further clarification of the Government's position. I look forward to receiving your reply.

I am copying this letter to the Leader of the House of Lords and to the Chairman and Clerk of the European Scrutiny Committee in the House of Commons.

18 April 2002

Letter from Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office, to Lord Brabazon of Tara, Chairman of the European Union Committee

SCRUTINY OF EUROPEAN UNION BUSINESS

Thank you for your letter of 24 April in reply to mine of 15 April.

In your letter, you express concern that the term "general approach" presents the same difficulties for your Committee as "provisional agreement", in that it amounts to a form of agreement and therefore undermines the Scrutiny Reserve resolution. Both Gareth Williams and I have set out the Government's view that approving a "general approach" does not undermine the scrutiny process. Since a "general approach" does not establish a final and definitive text, it does not prevent us taking up points which you raise. We have stated clearly in the Council that the UK Government reserves the right to re-open a text after a "general approach" has been approved on the basis of concerns raised by our Parliament.

You seek an assurance that where a "general approach" is approved, all points made by the scrutiny committees will be considered on their merits. I am happy to give you the assurance that we will consider <u>any</u> point you raise on its merits (as indeed we already do). I can also assure you that the Government does not regard the maintenance of a Parliamentary scrutiny reservation as a "mere formality"; we have made this very clear to the Spanish Presidency in our discussions with them about the term "general approach" and will do so with future Presidencies.

You also asked for an assurance that the timetable will permit points you raise to be considered properly and fully. As you know, the Presidency of the day sets the Council's timetable, and we do not have direct control over when the Presidency seeks political agreement or formal adoption of a text. We will, however, continue to do all we can to provide you with information and documents in a timely fashion, and to respond promptly to concerns which you raise. It is essential that at a practical level the Government and the scrutiny committees work together closely to ensure that we exchange information on the likely timetable in the Council and your timetable for considering documents. Provided we can continue to build on the good co-operation which exists, we should be able to establish a reasonable timetable in each case.

It would be particularly helpful if in each case we were able to provide the Presidency with concrete details of your timetable, including information on when any debate might take place. It is noticeable that Denmark for example is able to do this, and Presidencies tend to take account of this information when constructing their own timetables for adoption of instruments. Such planning will also maximise the Government's ability to influence a particular negotiation. The earlier in the process we can register your concerns the greater likelihood we have of securing amendments to the text.

I hope that this letter provides you with the further clarification you need. I look forward to hearing the outcome of your discussions in the Select Committee.

I am writing in similar terms to Jimmy Hood, Chairman of the European Scrutiny Committee and am copying this letter to Simon Burton, to Les Saunders (Cabinet Office) and to Penny Hart, Departmental Scrutiny Co-ordinator.

13 May 2002

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