



HOUSE OF LORDS

European Union Committee

7th Report of Session 2008–09

The United Kingdom opt-in: problems with amendment and codification

Report with Evidence

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The European Union Committee

The European Union Committee of the House of Lords considers EU documents and other matters relating to the EU in advance of decisions being taken on them in Brussels. It does this in order to influence the Government's position in negotiations, and to hold them to account for their actions at EU level.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

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Foreign Affairs, Defence and Development Policy (Sub-Committee C)
Environment and Agriculture (Sub-Committee D)
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The Members of the Sub-Committee which conducted this inquiry are listed in Appendix 1.

Information about the Committee

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General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW

The telephone number for general enquiries is 020 7219 5791. The Committee's email address is:

euclords@parliament.uk

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Oral Evidence

Meg Hillier MP, Parliamentary Under-Secretary of State; Iain Macleod, Deputy Legal Adviser; Emma Gibbons, Head of EU Section, International Directorate, Home Office; and Christophe Prince, Director of International Policy, UK Borders Agency

Oral Evidence, 25 February 2009 1

Note: References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

The United Kingdom opt-in: problems with amendment and codification

Introduction

1. The provisions on visas, asylum, immigration and other policies related to the free movement of workers, currently making up Title IV of the Treaty establishing the European Community (TEC), were introduced into that Treaty by the Treaty of Amsterdam, which was signed on 2 October 1997 and came into force on 1 May 1999. The Government did not necessarily wish to be bound by EC measures on visas, asylum and immigration, and negotiated a Protocol to give the United Kingdom the necessary flexibility. This is Protocol No.4 on the Position of the United Kingdom and Ireland. We reproduce Articles 1–6 of the Protocol in Appendix 2 to this report.
2. The effect of this Protocol is that the United Kingdom does not take part in the negotiation and adoption of Title IV measures, and is not bound by them, unless within three months of a proposal for legislation being presented to the Council the United Kingdom notifies the President of the Council that “it wishes to take part in the adoption and application” of the proposed measure. This is the United Kingdom opt-in. What is sometimes referred to as an opt-out is simply a decision by the Government not to opt in, and requires no action by the United Kingdom.
3. No thought seems to have been given when the Protocol was drafted to what the situation might be if a Title IV measure came to be amended by further legislation, inevitably also made under Title IV and so subject to a United Kingdom opt-in. Both measures would be binding on 24 of the Member States.¹ No problem would arise if the United Kingdom opted in to both, or neither. But what if the United Kingdom had opted in to the first, but did not wish to opt in to the second? Or, *a fortiori*, if it had not opted in to the first, but wished to opt in to the second?
4. This problem was recognised when the Treaty of Lisbon was drafted, and a new Article 4a was inserted into the Protocol, the effect of which will be that if the United Kingdom does not opt in to any amendment of legislation which already applies to it, the Council has the power to order that the original measure, and any amendment of it which does apply to the United Kingdom, will cease to apply to it. The Council also has the power to make the United Kingdom pay for any financial consequences.² But since the Treaty of Lisbon is of course not yet in force, currently the new Article 4a is of no assistance.
5. A further problem, not foreseen when the Treaty of Lisbon was drafted, arises when changes need to be made to related measures, some of which

¹ No Title IV measures apply to Denmark. Ireland is in the same position as the United Kingdom.

² Article 4a is also printed in Appendix 2. For a fuller analysis of its consequences, see paragraphs 6.260 to 6.269 of our report *The Treaty of Lisbon: an impact assessment* (10th report, Session 2007–08, HL Paper 62).

apply to the United Kingdom and some of which do not. An example is the codification of such measures.

6. These are no longer academic questions. Since December 2008 the Commission has made three proposals for amendment of legislation and one proposal for codification which raise these problems in an acute form. Because of the three-month deadline for opting in there is of course considerable urgency. Sub-Committee F³ therefore conducted a brief inquiry, and took evidence on 25 February 2009 from Meg Hillier MP, the Parliamentary Under-Secretary of State at the Home Office, and three of her officials. We are most grateful to them for having come at short notice.

Amendment of legislation

The Reception Directive

7. The three proposals for amendment of legislation all relate to asylum. The first is a proposal⁴ to amend the Directive which lays down the minimum standards for the reception of asylum seekers—the Reception Directive.⁵ This was adopted by the Council on 27 January 2003 and entered into force on 6 February 2005. The United Kingdom opted in, but Ireland did not. The Directive is designed to harmonise the laws of the Member States on the support given to asylum seekers during the determination of their claims: their access to health care, education and employment, the housing and financial support provided to them, and the circumstances in which that support may be withdrawn. The changes proposed are significant. The Directive would be extended to persons who qualify for subsidiary protection—those who, while not refugees, are at risk of serious harm if returned to their countries of origin. There would be improved access to the labour market and a better level of support, and for the first time there would be provisions restricting the time for which and the circumstances in which asylum seekers can be detained.
8. At the date we took evidence 12 days remained of the three-month period for opting in. We were told that the Government had yet to reach a decision about whether to opt in, but that they were unlikely to do so; and they confirmed on 6 March 2009 that they had chosen not to opt in.⁶ Why not is a question outside the scope of this report, but it was made clear to us in evidence that while the Government intend to maintain the minimum standards currently laid down by the Directive, the amendments dealing with arrangements on detention, wider access by asylum seekers to the labour market, and some elements of financial support would be too onerous. (Q 22)

³ The members of Sub-Committee F are listed in Appendix 1.

⁴ Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Document 16913/08).

⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18).

⁶ Letter of 6 March 2009 from Phil Woolas MP, Minister of State, Home Office to Lord Roper.

The Dublin System

9. The second proposal⁷ is for amendment of the Dublin Regulation⁸ which determines which Member State has jurisdiction to examine and decide an asylum application. This is initially the State where the applicant's closest family already resides; failing which, the State which has allowed access to the EU by the issue of a visa or residence permit; failing which, the first State that the applicant entered, whether lawfully or irregularly; and lastly the State where the applicant applied for asylum. The changes proposed include the extension of the scope of the Regulation to applicants for subsidiary protection, and the inclusion of dependent relatives in the family reunion criteria.
10. The third proposal⁹ is for amendment of the second Regulation making up the Dublin system,¹⁰ which established a fingerprint database, EURODAC, for recording and comparing the fingerprints of asylum applicants and illegal entrants.
11. These two Regulations apply to all the Member States: to the United Kingdom and Ireland because they opted in; and to Denmark which has introduced a parallel system. The system also applies to Norway, Iceland, Switzerland and Liechtenstein by virtue of agreements with those States. In the case of these Regulations we were told that the Government were likely to opt in to both; and on 6 March 2009 they wrote to the Presidency of the Council notifying it of the Government's intention to participate in both proposals.¹¹

Interoperability of the Reception Directive and the Dublin System

12. In the case of the Reception Directive, if it was legally possible for the Directive to apply in its unamended form in the United Kingdom but amended in the rest of the EU, this would be workable. There is for example no operational necessity for access of asylum seekers to the labour market to be the same in the United Kingdom as in France. (Q 5) There is however both an operational and a legal necessity for the Dublin Regulation to apply in exactly the same way in the United Kingdom as in the other Member States. It imposes on each participating State mutual obligations which must be identical, otherwise the different regimes applicable in different Member States would in some cases lead to different results in determining the jurisdiction which should decide the claim.
13. Mr Christophe Prince, the Director of International Policy at the United Kingdom Borders Agency, told us that there was no formal legal link between the Reception Directive and the Dublin system. (Q 32) This is

⁷ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Document 16929/08).

⁸ Council Regulation (EC) No 343/2003/EC of 18 February 2003 on the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, p.1).

⁹ Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] (Document 16934/08).

¹⁰ Council Regulation (EC) No 2725/2000/EC of 11 December 2000 for the establishment of 'EURODAC' (OJ L 316, 15.12.2000, p. 1).

¹¹ Letter of 6 March 2009 from Phil Woolas MP, Minister of State, Home Office to Lord Roper.

currently true. He also pointed out that the Commission had never previously called into question the United Kingdom's ability to opt in to individual measures, though the question whether they would see the Dublin system and the Reception Directive as "inextricably linked" had not been raised with them. (Q 18) We pressed the Minister to seek the Commission's view on whether opting in to the two Dublin system proposals but not the Reception Directive proposal would cause difficulties; and to do so before reaching a final decision on whether or not to opt in. (Q 20) We understand that her officials did so and that the Commission, though unhappy with this suggestion, did not see that it would cause any insuperable difficulty.

14. We ourselves believe that the links between the measures may well cause problems. Under the Commission proposals the amended Dublin Regulation will have numerous cross-references to the amended Reception Directive.¹² One example is Article 27(12) of the amended Dublin Regulation, which in its current draft reads: "Member States shall ensure that asylum-seekers detained in accordance with this Article enjoy the same level of reception conditions for detained applicants as those laid down in particular in Articles 10 and 11 of [the Reception Directive]". To us, this is an example of provisions which are "inextricably linked"; we do not see how this provision can apply to the United Kingdom while referring to a level of reception conditions which does not apply.¹³ If, as is possible, the Treaty of Lisbon comes into force before the (inevitably lengthy) negotiations on these proposals are concluded, the United Kingdom will perhaps be told that if it does not opt in to the Reception Directive after its adoption (using Article 4 of the Protocol), the two Dublin Regulations will be disapplied under Article 4a.

Amendment versus repeal and replacement

15. Changes can be made to a measure by amending it, that is, either by adding or removing individual provisions, or by repealing and replacing individual provisions. Either way, elements of the original measure survive. If the changes are made by a measure which applies in the majority of the Member States but not in the United Kingdom, the original measure will continue to apply in its unamended form in the United Kingdom. This would be the consequence if the United Kingdom opted in to the initial measure, but not to the amending measure. The Home Office accept this.¹⁴ It is precisely because this might lead to an unworkable situation that Article 4a is to be inserted in the Protocol by the Treaty of Lisbon.
16. The question is whether the position is different when the initial measure is repealed in its entirety and replaced by a subsequent measure. This is the drafting method adopted by the Commission for each of these three proposals. The potential problem arises because the provision repealing the

¹² The following provisions of the draft of the amended Dublin Regulation in document 16929/08 have cross-references to the draft of the Reception Directive in document 16913/08: recitals (9) and (18), and Articles 6(2), 27(2), (10) and (12), 30(2) and 31(2), (3) and (9).

¹³ Now that the United Kingdom has chosen not to opt in to the amended Reception Directive it would be possible, as a matter of drafting, for Article 27(12) to state that, in the case of the United Kingdom, it is to be read as referring to the level of reception conditions currently applicable under the unamended Reception Directive; but we doubt whether this would be acceptable to other Member States as a matter of policy.

¹⁴ Letter of 5 February 2009 from Phil Woolas MP, Minister of State, to Lord Roper (not printed with the evidence).

initial measure is, inevitably, contained in the subsequent measure. If the United Kingdom opts in to the subsequent measure there is no problem; the repealing provision, like the rest of that measure, will apply to the United Kingdom, so that the initial measure will cease to have effect in the United Kingdom as in every other Member State. If however the United Kingdom does not opt in to the subsequent measure then, in consequence of Article 2 of the Protocol, that measure is not “binding upon or applicable in the United Kingdom”; and among the provisions of that measure not binding upon or applicable in the United Kingdom is the provision effecting the repeal of the initial measure. On that basis the initial measure would continue to apply in the United Kingdom in its unamended form.

17. In the view of the Home Office this would not be the case. In her opening statement Ms Hillier stated categorically that “if we do not take part in the repeal and replace provisions and they are approved by the Council and the European Parliament, then the existing legislation that we are in will have been repealed and will cease to exist”. (Q 1) Mr Iain Macleod, the Deputy Legal Adviser, took the same view; he saw the initial measure as disappearing from the *acquis*, and he expected that the European Court of Justice would share that view. (Q 13)
18. We are not so sanguine. **In our view, where the United Kingdom has opted in to a measure but does not opt in to a subsequent measure which purports to repeal and replace it, there is at the very least some doubt as to whether the repeal of the initial measure will be effective in the United Kingdom, or whether the initial measure will continue to apply here, even though only the subsequent measure will apply in other Member States.**
19. **In the particular case of the Reception Directive, because there is no policy or operational reason why the Directive should not continue to operate in the United Kingdom in its unamended form, it is vital to clarify whether or not it will in fact continue to be legally applicable in the United Kingdom.**
20. We suggested to the Home Office two ways in which the repeal of the initial measure might be put beyond doubt. The first would be to have two instruments coming into force at the same time; the first would simply repeal the existing legislation, and the United Kingdom would opt in to this, while the second, which the United Kingdom would not opt in to, would contain the new regime. Another way would be for the United Kingdom to opt in to a single instrument which would contain a provision on scope, specifying which parts of the instrument applied to the United Kingdom and which did not—a procedure familiar in the United Kingdom, where statutes frequently contain provisions applicable in one or two but not all three of the jurisdictions (England and Wales, Scotland and Northern Ireland). Mr Macleod did say that, in the light of the concerns which we had expressed, he would try to get the matter clarified during the negotiations in Brussels. (Q 43)

Codification of legislation

21. On 19 December 2008 the Commission put forward a proposal for codification of three Council Regulations laying down a uniform format for

- visas.¹⁵ The proposal is made under Article 62(2)(b)(iii) in Title IV, and hence is applicable to the United Kingdom only if the Government opt in. The proposal was published by the Council on 13 January 2009, so that the three-month period for opting in will expire on 13 April 2009.
22. The initial Council Regulation 1683/95¹⁶ laying down a uniform format for visas is very short. It lays down the outlines for a uniform visa format, and sets up a Comitology Committee with power to settle those details about the formatting of visas which inevitably are required to remain secret to avoid forgery.
 23. The Proposal aims to codify three measures:
 - Council Regulation 1683/95. This was adopted in 1995, before the Treaty of Amsterdam, before Title IV and before the United Kingdom opt-in; the legal basis was Article 100c(iii) of the EC Treaty, and the Regulation applied in the United Kingdom in the same way as in every other Member State. In 1995 there was no way it could not apply.
 - Council Regulation 334/2002:¹⁷ This amends the 1995 Regulation by specifying that visas must have “additional elements and security requirements including enhanced anti-forgery, counterfeiting and falsification standards”; again the details are left to the Comitology Committee. By 2002 the Protocol was in force, and the United Kingdom (but not Ireland) opted in to this Regulation.
 - Council Regulation 856/2008,¹⁸ whose single operative article deals only with the numbering of visas to make them compatible with the Visa Information System (VIS). Ministers decided that the United Kingdom should not opt in; given that it was not part of the VIS, they saw no disadvantage if visas issued by the United Kingdom to nationals of third countries were not machine-readable.
 24. Thus, of the three measures the proposal attempts to codify, the first applies to the United Kingdom automatically, the second applies because the Government opted in, and the third does not apply because the Government chose not to opt in.
 25. The proposal for codification presented by the Commission states that it “was drawn up on the basis of a preliminary consolidation ... carried out by the Office for Official Publications of the European Communities, by means of a data-processing system” [emphasis in the original]. It is clear that the data-processing system was not briefed about the problems caused by the United Kingdom opt-in, for the proposal states unequivocally in recital (15):

“In accordance with Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are not participating in the adoption of this Regulation. As a result, and without prejudice to Article 4 of the said

¹⁵ Proposal for a Council Regulation on laying down a uniform format for visas (codified version) (Document 5256/09).

¹⁶ Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ L 164, 14.7.1995, p. 1).

¹⁷ Council Regulation (EC) No 334/2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas (OJ L 53, 23.2.2002, p. 7).

¹⁸ Council Regulation (EC) No 856/2008 amending Regulation (EC) No 1683/95 laying down a uniform format for visas as regards the numbering of visas (OJ L 235, 2.9.2008, p. 1).

Protocol, the provisions of this Regulation do not apply to the United Kingdom and Ireland.”

26. This recital was taken verbatim from recital (8) of the 2008 Regulation, ignoring the fact that the 1995 and 2002 Regulations do apply to the United Kingdom, and one of them to Ireland. It was also a somewhat premature statement to make when the three-month period for opting in had not even started.¹⁹
27. It is accepted on all sides that the purpose, and the only purpose, of codification is to reproduce the law in a more accessible form without in any way changing its substance. It is also now accepted, including by the Commission, that recital (15) is erroneous. Ms Emma Gibbons from the Home Office International Directorate told us that they were in discussion with the Commission and hoped to be able to present this Committee with a revised text “very shortly”. Mr Prince added that he hoped that the matter would be clarified before the three-month period expired on 13 April. (QQ 44–47)
28. We certainly hope that the original Commission proposal will be withdrawn before then, otherwise the Government will have to choose between opting in to a Regulation which will apply to the United Kingdom provisions which do not currently apply, or being excluded altogether from the application of a Regulation some of whose provisions currently do apply. The latter option would also raise once again the question whether the repeals of the measures which are being codified would extend to the United Kingdom.
29. The problem could be avoided if, as we suggested in paragraph 20, the codifying measure simply contained a provision specifying which parts of the instrument applied to the United Kingdom and which did not. We hope that the Commission may adopt this drafting technique when attempting to codify measures which are not equally applicable to all the Member States.
30. **We suggest that Government lawyers take this opportunity to agree with Commission officials a technique for drafting codifications of such measures, so as to avoid any recurrence of this unfortunate episode.**
31. **This report is made to the House for information.**
32. We wish to make clear that this inquiry, like the evidence given to us, has primarily been considering the legal position rather than the policy implications, and that we are retaining under scrutiny the three asylum proposals and the proposal for codification.

¹⁹ The same premature statement was made in recital (20) of a proposal prepared by the Commission (COM(2008)761 final, 28.11.2008) for a Council Regulation codifying Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.3.2001, p. 1) and amendments made to it by five subsequent Regulations and by the 2003 Act of Accession. In that case, since the United Kingdom had opted in to none of the earlier Regulations, it was perhaps reasonable to assume that the United Kingdom would not wish to opt in to the codifying Regulation; but under Article 3 of the Protocol it would have been perfectly legitimate for the United Kingdom to do so. The Commission proposal was circulated by the Council as document 16750/1/08 on 5 December 2008, so that the 3-month period for opting in expired on 5 March 2009.

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
Lord Dear
Lord Faulkner of Worcester
Baroness Garden of Frognal
Lord Hannay of Chiswick
Lord Harrison
Baroness Henig
Lord Hodgson of Astley Abbotts
Lord Jopling (Chairman)
Lord Marlesford
Lord Mawson
Lord Richard

Lord Mance, the Chairman of Sub-Committee E, also took part in the inquiry.

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

APPENDIX 2: PROTOCOL ON THE POSITION OF THE UNITED KINGDOM AND IRELAND

Extract from the Protocol as currently applicable

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland,

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community and to the Treaty on European Union,

Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title IV of the Treaty establishing the European Community. By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2). The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland, shall be necessary for decisions of the Council which must be adopted unanimously.

Article 2

In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title IV of the Treaty establishing the European Community, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the *acquis communautaire* nor form part of Community law as they apply to the United Kingdom or Ireland.

Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV of the Treaty establishing the European Community, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so. By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2).

The unanimity of the members of the Council, with the exception of a member which has not made such a notification, shall be necessary for decisions of the Council which must be adopted unanimously. A measure adopted under this paragraph shall be binding upon all Member States which took part in its adoption.

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland. In that case Article 2 applies.

Article 4

The United Kingdom or Ireland may at any time after the adoption of a measure by the Council pursuant to Title IV of the Treaty establishing the European Community notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article 11(3)²⁰ of the Treaty establishing the European Community shall apply *mutatis mutandis*.

Article 5

A Member State which is not bound by a measure adopted pursuant to Title IV of the Treaty establishing the European Community shall bear no financial consequences of that measure other than administrative costs entailed for the institutions.

Article 6

Where, in cases referred to in this Protocol, the United Kingdom or Ireland is bound by a measure adopted by the Council pursuant to Title IV of the Treaty establishing the European Community, the relevant provisions of that Treaty, including Article 68, shall apply to that State in relation to that measure.

Article 4a to be added by the Treaty of Lisbon

1. The provisions of this Protocol apply for the United Kingdom and Ireland also to measures proposed or adopted pursuant to Title IV of Part III of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to make a notification under Article 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council.

If at the expiry of that period of two months from the Council's determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating or having participated in the adoption of the amending measure. A

²⁰ The provision referred to was numbered Article 11(3) in the re-numbering done following the Treaty of Amsterdam. In the further re-numbering under the Treaty of Nice this provision became Article 11a, but no consequential amendment was made in this Protocol.

qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that the United Kingdom or Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.

4. This Article shall be without prejudice to Article 4.

APPENDIX 3: RECENT REPORTS

Relevant Reports from the Select Committee

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62)

Enhanced scrutiny of EU legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Recent Reports prepared by Sub-Committee F (Home Affairs)

Session 2006–07

Schengen Information System II (SIS II) (9th Report, HL Paper 49)

Prüm: an effective weapon against terrorism and crime? (18th Report, HL Paper 90)

The EU/US Passenger Name Record (PNR) Agreement (21st Report, HL Paper 108)

Session 2007–08

FRONTEX: the EU external borders agency (9th Report, HL Paper 60)

The Passenger Name Record (PNR) Framework Decision (15th Report, HL Paper 106)

EUROPOL: coordinating the fight against serious and organised crime (29th Report, HL Paper 183)

Session 2008–09

Civil Protection and Crisis Management in the European Union: (6th Report, HL Paper 43)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE F)

WEDNESDAY 25 FEBRUARY 2009

Present	Avebury, L	Hodgson of Astley Abbots, L
	Dear, L	Jopling, L (Chairman)
	Faulkner of Worcester, L	Marlesford, L
	Garden of Frognal, B	Mawson, L
	Hannay of Chiswick, L	Richard, L
	Harrison, L	_____
	Henig, B	Mance, L

Examination of Witnesses

Witnesses: MEG HILLIER, a Member of the House of Commons, Parliamentary Under Secretary of State, IAIN MACLEOD, Deputy Legal Adviser, EMMA GIBBONS, Head of EU Section, International Directorate, Home Office and CHRISTOPHE PRINCE, Director of International Policy, UK Borders Agency, examined.

Q1 Chairman: You are most welcome this morning. We have to apologise for keeping you waiting. You will perhaps not be surprised that within this Committee, in discussing some of the background papers to the matters we should like to talk to you about, there was a fruitful field for discussion and debate. Minister, we did not originally understand that you were going to come but we are doubly pleased that you particularly said that you would like to come. If you feel afterwards that you would like to supplement anything you have said or enlarge on it, we would be most grateful to hear those points. I wonder whether you would now like to introduce your officials and I understand you have a short opening statement, which we are eager to hear.

Meg Hillier: Thank you very much Lord Jopling. One of the reasons I was keen to come along was because it will be the last time I am able to for a few months and I was particularly keen to come to speak to the Committee today. I am very grateful to you for inviting us to give evidence on this issue and actually for highlighting an issue because I know that the work of this Committee is read in Brussels, so it is always very helpful to be able to put things on the record in that way. My officials with me today are Christophe Prince, who is the UK Borders Agency's Director of International Policy, Iain Macleod is a Deputy Legal Adviser to the Home Office and Emma Gibbons is the Head of the European Union Section of the Home Office's International Directorate. You have asked me to come to talk about two particular things today. They are quite technical matters. One of the reasons I have three officials here is that if you go into technical detail, I may need to call on Iain in particular to pick up on some of the very particular legal aspects. The proposals to amend legislation on

asylum and the proposals to codify legislation on the uniform format of visas are what are before us today. As you know, the House of Commons discussed the asylum proposals on 10 February and my colleague Phil Woolas, the Minister of State, was representing the Government at that discussion and he said then that the UK had not decided whether or not to opt in. That is still the position but I can tell you that we have fewer problems with the Dublin and Eurodac proposals than we do with the reception conditions proposals which pose us more problems. We will be making a formal decision by 6 March and of course we will let the Committee know by the normal routes what that decision will be on opt-in on those issues. Whether or not you will then want to talk to us about that further is obviously a matter for the Committee. Firstly, we are clear that we are not legally required to opt in to or stay out of these proposals as a package. We will therefore decide individually and in the national interest whether we will wish to opt in to each one. I think I have given you an idea of our current thinking prior to that final decision. Secondly, these proposals will repeal and replace the existing Dublin and Eurodac regulations and the existing reception conditions directive and I know the Committee have asked questions about that which we will explore shortly. Our view as a Government is very clear. If we do not take part in the repeal and replace provisions and they are approved by the Council and the European Parliament, then the existing legislation that we are in will have been repealed and will cease to exist. This means that it will at that point cease to apply therefore to the UK. If we do not opt in to the new replacement, then we are not part of it because there will be nothing left on the table because of the repeal measure. On the proposal

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to codify the existing legislations on uniform format for visas, as far as we know this is the first time it applies on an issue where some countries participate and some do not. As the Committee notes, that raises important questions as to how that process is to apply to such instruments. The Government are currently considering their position on this issue and are in quite intense discussions with the Commission—I gather that there is a representative on the Commission here today—about how, if at all, the codification process can be taken forward in respect of each instrument. The key thing in relation to the specific regulation that the Commission have now accepted is that the original draft does need to be amended. When the redrafted version is presented we will deposit it with the Committee in the usual way along with an explanatory memorandum setting out our position. I hope I have given you a flavour of where we stand on things at the moment but I am obviously very happy to take the Committee's questions.

Q2 Chairman: That is very concise and helpful. What you have been telling us covers exactly the points which have concerned us and you will realise that there may be two ways of looking at some of these issues. May I ask you whether you agree—I suspect you do not but to explain further—that if the UK did not opt in to one or more of the three proposals to amend asylum legislation, it would not in practice be workable for the unamended regime to continue to apply in the UK while the amended regime operated in most of the other Member States?
Meg Hillier: As I have indicated, that is in a way a hypothetical question because the Commission have proposed not to amend but to repeal and replace the existing legislation. Therefore our choice is between taking part in the new instruments, which we will be making a decision on, or having no Community legislation apply in the UK. It is quite a stark choice.

Q3 Lord Mance: May I just ask a follow-up question in that regard and you may answer that it is hypothetical again? Is it right, in relation to the reception conditions directive, that it would not be sensible to think of that continuing to apply in its present form to the UK while at the same time the new directive applied in relation to other European countries? Is that not a feasible scenario?

Meg Hillier: No, if they are repealed they are off the table and it is therefore our decision then about whether we opt in to the replacement.

Mr Macleod: Is it a question of whether you could have two separate regimes on reception conditions?

Q4 Lord Mance: That is really my first question. Is that not feasible? Reception conditions are an internal matter. They do not affect other countries.

They are not bilateral, there is no element of mutuality, they do not depend on anybody else's performance and they are something the UK does for itself. Why could the UK not continue to apply the existing regime? Following from that, why should the existing directive therefore not continue to apply as a matter of operability?

Mr Macleod: The one does not follow from the other. You could have separate reception conditions applying in the UK but then there is a separate question as to whether the effect of repealing that earlier measure is to remove the application of that earlier reception condition directive from the UK.

Q5 Lord Mance: Yes; that is the legal question. I was focusing first on the factual question.

Mr Macleod: It is really probably for others but I think it could happen that you could have different reception conditions in the UK from other Member States.

Mr Prince: It is, in our view, plausible for the UK to have reception arrangements which are managed at a national level whilst other Member States have a different set of reception arrangements, whether or not those are legally determined. As you say, it is a matter for the national consideration. There is an interest in individual Member States in having some minimum standards in those reception arrangements but it is not implausible that they are different and indeed there are still subsisting differences in reception arrangements even under the current legislation.

Q6 Lord Avebury: We would be content to have reception arrangements which were inferior to those of other European Union countries.

Meg Hillier: It would be fair to say that our reception arrangements are superior to a number of other European countries.

Mr Prince: It would be acceptable for us to have different arrangements and in certain respects they may be superior, depending on the terms you are looking for, and in other cases perhaps inferior in terms of the specifics of those instruments. Those differences exist at the moment and it is not implausible for those differences to continue in the future.

Q7 Lord Mance: In other words, it would be perfectly feasible to have a new directive which said the existing directive shall continue to apply to the UK, the new arrangements shall continue to apply to all other states. We are talking about reception conditions.

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Meg Hillier: Yes; theoretically.

Q8 Lord Mance: As I understand it, if they had achieved the present alterations by amendment rather than by repeal and re-enactment, you would say that was the right legal analysis?

Meg Hillier: Yes.

Q9 Lord Mance: Is that not rather a technical viewpoint? Is the matter not one of substance? Whether you repeal and re-enact or whether you amend is a procedural matter, the substance is precisely the same?

Meg Hillier: The point about the repeal is that the existing setup is off the table, so in terms of EU law it is off the table. Then we have to decide whether we formally opt in to the new measures as laid down by the Commission. If I may just give a flavour to the Committee of the discussions we have had in the Justice and Home Affairs Council and other bodies, the French Presidency, for example, had a big immigration conference at which I represented the Government. There has been a lot of discussion generally about reception conditions in terms of practice as well as in terms of EU law and quite intense discussions between countries; I would not want to put on the record any country by name but some countries which perhaps have a poorer record on reception conditions than others. There was a desire from countries with better reception conditions to up the ante a bit. There is a practical discussion which does go alongside the legal discussion.

Q10 Lord Mance: May I come to the core point therefore which seems to divide the opinion which this Sub-Committee put to you in its letter and the opinion which is reflected in your answer, and that is whether the effect of the repeal and re-enact provision in each of these proposals is in fact to repeal the existing arrangements in relation to the United Kingdom automatically, and that is the core difference.

Meg Hillier: Yes.

Q11 Lord Mance: May I just probe a little to see whether your view is really the inevitable one? On the face of it these proposed measures do not apply to the UK at all.

Meg Hillier: Yes.

Q12 Lord Mance: Although it is a little obscure as to what they will provide because the relevant provision is deleted. If we do not opt in, there will be a provision which says this does not apply to the UK at all.

Meg Hillier: Yes.

Q13 Lord Mance: On the face of it this proposal is a unity: none of the proposals applies, including the repeal provision. If that is right—and one is of course predicting I suppose in an extreme situation what the European Court of Justice would decide—is one possibility not that the European Court of Justice would say that the existing measure is not, as a matter of law, affected. Of course, if it becomes—and I appreciate I am using a word from a later context—inoperable, if it becomes impossible to perform, then it must come to an end, but if it is still possible to perform and the reception conditions in the current directive would be possible for us to perform, it remains. Is that not a perfectly likely result?

Meg Hillier: Yes, you are right. We are clear that there is the legal position but there are certain things which the UK Borders Agency will continue to do on behalf of the Government in terms of reception conditions in practical terms. In EU law, once it is repealed, it is not there.

Mr Macleod: I can fully understand your analysis. I quite understand the argument which has been put forward. Our argument, our analysis is that the question is not whether this instrument or that instrument applies or does not apply. The question is: where did it come from? It is a measure of EU law, adopted by EU legislature, in this case the Council and Parliament. So the question really is: what have the Council and Parliament done with the pre-existing measure of EU law? Our analysis of the draft as it exists at the moment is that if a measure in a Council and Parliament measure repeals an earlier piece of EU law, then the effect is that that earlier piece of EU law no longer exists. We would expect the ECJ to share that view although we are not saying there is no merit in the alternative analysis which comes through a textual analysis of the Protocol. Looking at the picture in the round, looking at this as actions and acts of the EU legislature, we would see this as the EU legislature repealing and replacing one measure and therefore it disappearing from the *acquis*, and then replacing it by another.

Q14 Lord Mance: It is probably not going to be profitable spending a very long time on the debate and the difference of possible view. The European Court could say to itself “Why, if the existing measure is perfectly capable of being operated, should we allow a relaxation or in fact abolition of any European standard? All we have done by the repealing measure is affect the position in relation to other countries” it states so expressly “and it is perfectly possible for European law to have different stages, enhanced cooperation and so on, and there is no reason why we should not recognise the existing measure as continuing in EU law to bind the UK”.

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Meg Hillier: The question is whether it is in EU law. Maybe Christophe can talk about our reception conditions generally, because we pride ourselves on some of what we do; we have had a lot of enquiries about some of the work we do on reception. The point is that we believe we would not have an EU legislative basis for that. It is true that it has not been tested in case law, but we think, if it were, it is repealed, therefore it does not exist, therefore it cannot apply to the UK. We are dancing on a pinhead, if I may say so. We can do certain things practically in accordance with the spirit of what we have opted in to which is being repealed and then we have to make a decision about whether we opt in to the new regime.

Q15 Lord Mance: The practical assurance you are giving is that standards are not going to be reduced even if your analysis is right in law.

Meg Hillier: That is what we would say.

Mr Prince: In terms of the actual practical standards, we remain committed to maintaining the highest standards we can in the receptions field and arguably that would therefore not be an issue.

Q16 Lord Mance: I think it follows that there probably is some acceptance that this is at any rate a debatable area of law, and perhaps that is one aspect of the Treaty of Lisbon that would be represented as our introduction of some greater clarity.

Meg Hillier: I do not want to get drawn on the Lisbon Treaty. I think it would be fair to say it is not in our hands.

Mr Macleod: I am sure the point will come up in negotiation of these measures. It is not in our interests to have unclarity as to whether something applies to us or not as a matter of EU law.

Lord Mance: I would just add that I do of course see the point. Where there is a situation of mutuality, as there is in relation to the proposed regulation relating to the criteria for deciding which country has responsibility in relation to Eurodac, then it is extremely difficult to see how the existing regulation could go ahead.

Q17 Lord Hannay of Chiswick: I am having slight trouble following this complexity and I slightly lost track of your answer to your original question that Lord Jopling put to you. Have I understood it rightly? What you are saying is that if the Government, in the hypothetical circumstance, decided not to opt in to the reception proposal but to opt in to the other two proposals, that would be a perfectly practical way of proceeding, that is that you do not agree that if we do not opt in to one of the three this pulls down the others. If that is the case, if that is the Government's view, is that shared by the Commission?

Meg Hillier: We can choose; we can opt in separately.

Q18 Lord Hannay of Chiswick: Does the Commission share the view that we could opt in to two and not opt in to the reception one and that this would not bring about practical complications?

Meg Hillier: Yes, that is the case.

Mr Prince: The test of that would be, if that is the decision we take, that the Commission will take a view on that. They have not called into question our ability to opt in to individual measures in the past. I have not had that discussion directly with them as to whether or not they would see the reception conditions in Dublin and Eurodac inextricably linked. It is not a question which has been raised.

Q19 Lord Hannay of Chiswick: You would presumably have such a discussion with the Commission before you took a decision, would you not? It would be a little unwise to take a decision and then find the Commission took a different view.

Mr Prince: On the reading of the Protocol and the arrangements we have, it has not been questioned in previous discussions with the Commission that we would be bound to participate in individual and separate instruments because of our participation in another.

Q20 Lord Hannay of Chiswick: No, sorry, that is not the question I am really putting. I am sure the Commission would not challenge the basic right of the UK to opt in or not to opt in. All I am asking is whether you are going to make sure, before you take the decision on the reception proposal, that the Commission share your view that were we not to opt in this would not put us in difficulty with regard to the two that we were going to opt in to.

Meg Hillier: We will make sure that is not the case. That is a very helpful point.

Q21 Lord Richard: I am slightly mystified by the whole thing. A very simple question. What are the advantages for the UK of not opting in to this, particularly the asylum reception one? What do we get from it except a certain freedom of action which the Home Office tells us you would not exercise anyway because our reception standards are higher, or certainly as high, as any in the rest of Europe? What do we get?

Meg Hillier: We are anxious not to fetter our discretion. Of course we are not a Schengen country so we do not operate the Schengen border controls. We maintain our own border controls and that is really in essence why we are having debates about which parts of this we opt in to or not.

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Mr Prince: The view is perhaps more about what the consequences would be of opting in. If we look at the reception conditions proposals as they currently stand, they pose some significant difficulties for us.

Q22 Lord Richard: What?

Mr Prince: Specifically on reception conditions is the wider access to employment in the labour market after six months, specific elements on the financial support which we would be required to give to individuals and also on the arrangements on detention which, if they were to be adopted as presented, would in our view reduce our ability to achieve our objectives on asylum.

Q23 Lord Richard: So the effect of this is that the conditions, if we opt in, would be more onerous than the present ones. They would be accepted by all those countries which have no opt in and would give us the opportunity to resile from our present position of being one of the best receptors in the EU to being able to withdraw some of those facilities. In other words, it gives you freedom to go back from where you are.

Mr Prince: It would give the freedom, although we are clear that we intend to maintain existing standards.

Q24 Lord Richard: It gives you the freedom to act but then you say you would not do it anyway in which case why can you not opt in?

Meg Hillier: If we opt in, if you look back for example to speeches made by my Hon friend Liam Byrne, the Member for Birmingham Hodge Hill, when he set out changes to what we were doing at the border, subsequently well written now into government practice and policy, we have set out very clear parameters as a government about what we are trying to do in terms of asylum claims. We have seen the numbers come down, we know that asylum shopping goes on within the EU and around the world about where people think they can go, for example the suggestion that people can have employment after a certain period of time is a very, very big draw. We already see people who come to the UK because they can get education for their child, even if it is only for a year, or however long their application takes. There are a lot of draws that do make a difference. The week before last I was in Belfast and we picked up there, when talking about border controls between Ireland and Northern Ireland, part of the UK, that we see people even benefit-shopping across that border and making decisions about where to settle. It is quite important to us that we have the decision about opt-in and we have negotiated hard for it. It is not that we want to water down what we have but we do not want to have to take certain things higher. There are other areas where the reception rules would improve certain situations in other countries. I do not want to

name individual countries because I have not visited them so I would not want to speak specifically but other ministers tell me they have visited some countries which have quite basic reception conditions, for instance in terms of detention, which would be well below what the UK would ever consider offering.

Q25 Lord Richard: If you do not opt in what you are doing is preserving the freedom to have reception standards in this country which are lower than ones which are acceptable in the rest of the world.

Meg Hillier: It depends how you characterise "lower". Less generous in terms of work and certain other things possibly, but actually that means that our primary aim is to maintain our border controls and to reduce incentives for people to come for non-legitimate reasons. Economic migrancy is a legitimate reason; lots of people are economic migrants and do it legitimately, but there are those who choose to come by other routes as economic migrants. It is about getting that balance. We feel we have that balance reasonably well; we are always open to scrutiny and that is why I value coming to committees like your own to hear your thoughts on how well we are doing that. We are not afraid of that scrutiny. We are certainly scrutinised plenty of times in court on a lot of these issues. We go through a lot of scrutiny on this but we have to have in mind what the Government's main policy priority is and it is about maintaining strong borders.

Q26 Lord Richard: That is what it is all about, is it? If you opt in you will not be able to.

Meg Hillier: Yes.

Q27 Lord Richard: That is the only issue, is it?

Meg Hillier: Not the only issue but that is quite an important one.

Q28 Lord Richard: What are the other ones then?

Mr Prince: The question you posed made the point more specifically on onerous arrangements. In our view the proposals, as they currently stand, would be more onerous and therefore reduce our ability to deal swiftly with the unfounded claims and therefore require us to shift our resources from processing the appropriate claims properly. The other question and issue here is what the reception conditions arrangements in other countries would be.

Q29 Lord Richard: Precisely.

Mr Prince: What the Minister has said is that our view is that the standards, as they currently are, are amongst the highest in Europe and adequately provide for reception conditions for asylum seekers in the UK. Our key interest is to ensure that other countries are able to meet standards of a similar level.

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Q30 Lord Marlesford: I am surprised that you have not mentioned and nobody else has mentioned the word subsidiarity. It strikes me that the whole question of reception conditions, because it relates so very much to other matters in connection with the country itself, is not a matter of subsidiarity. I would have thought you were absolutely right therefore not to opt in to this form of harmonisation; indeed I am surprised the Commission has brought the thing forward.

Meg Hillier: There has been intense discussion in the Justice and Home Affairs Council among ministers and also, I have to say, a lot of discussion away from the main table about things; often when ministers come up and ask the UK about what we are doing and how we are achieving some of the successes we are achieving in border control, notwithstanding that we are not part of Schengen. In terms of the subsidiarity point, that is a wider legal point.

Mr Macleod: I see the point of what you are saying. That is another way perhaps of putting the policy reasons which have led to the Government reaching the conclusion they have.

Q31 Lord Mance: There is a possible cross link here, is there not, with the Dublin proposal? If you are going to have an agreement between states that the responsibility of one state shall exist in respect of a particular asylum seeker or illegal entrant then it is logical to have some sort of harmonisation at a European level of the conditions in which that person will be held.

Mr Macleod: It does not exist at the moment but the Dublin and Eurodac regulations operate perfectly well.

Q32 Lord Mance: Does it not exist at the moment under the current reception arrangements?

Mr Prince: There is no formal link between the Dublin and Eurodac arrangements and the reception conditions which are in the individual countries across the European Union. That is in effect a hypothetical question as to whether that would have a material impact on the operation of the Dublin and Eurodac arrangements. In our view the proposals as currently presented, the amendment or the repeal and replace, would not materially affect the operation of Dublin and Eurodac. In that reading of the proposals we believe you can have those instruments as separate.

Q33 Lord Mance: I was not suggesting there was a formal legal link, just that there was an underlying thought behind the reception conditions directive which made it logical to have harmonised reception conditions.

Mr Macleod: Your earlier questions to us were premised on the reception conditions directive not applying.

Q34 Lord Mance: It does not matter whether it applies. For the present purpose there is just an underlying logic, if you are going to have a Dublin type agreement, in having a reception conditions agreement.

Mr Macleod: There certainly is logic to it.

Q35 Lord Mance: Minister, you mentioned that among the three points, employment, financial support and the third was detention arrangements which concerned you, just comparing the existing detention arrangements with the proposed new ones and looking at it as a lawyer, therefore it is a matter of some interest, would it be possible to identify specifically, not necessarily now but in writing possibly, where actually the difference which you would regard as problematic arises because there is an awful lot of common ground?

Meg Hillier: There certainly is common ground. What I was referring to particularly were some of the issues in other countries which are just less well developed, for instance just even the physical estate. I know that MEPs recently did an inquiry about reception conditions in Europe. You have probably seen that work but perhaps we can direct the Clerk towards that work. We can certainly write to you on specifics.

Q36 Lord Mance: I understand that from the UK's point of view you were concerned that the detention arrangements will be more onerous than they presently are.

Meg Hillier: Yes.

Q37 Lord Mance: That was the point I was interested in. In what respects do you think that would occur and why would it be detrimental?

Meg Hillier: We can write.

Mr Prince: We can certainly write to provide some additional information, if you wish. In broad terms the proposals suggest that there has to be a review by judicial order or authority within 72 hours. Currently those decisions within our detention arrangements are taken by officials. Of course at any stage in that process an individual can apply for bail to the immigration judge and we believe that provides sufficient judicial oversight to enable an individual to take their case against their detention. The key element here for us is our detained fast track arrangements where we are able to process rapidly a small number of cases which are likely to be unfounded and therefore to focus our resources on those cases where there is a more complex consideration to be had. That is our key concern but

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we are happy to write with more detail on those detention arrangements if you want.

Q38 Chairman: Thank you. Because of the opt-in deadline do you think we could have that letter this week please?

Mr Prince: Yes.

Meg Hillier: Yes. I would add that the percentage of those cases that are fast tracked and then have a determination that actually they do not have a case is fairly wide. We can put all the detail in your letter.

Q39 Lord Hannay of Chiswick: On the point about subsidiarity, I was a little surprised by your response. It does strike me, but perhaps you will correct me, that if we were to advance the argument that subsidiarity applies to these areas we would be arguing that all 27 Member States should have different regimes because it would be a matter which was better dealt with at Member State level. As I understand it, we would not be arguing that if we decided not to opt in. We would merely be saying that because we are not a member of Schengen, because we have the right to opt in, we do not wish ourselves to apply. I do not think it is a subsidiarity issue at all.

Meg Hillier: We have the opt-in because we have negotiated that and that puts us in a slightly different position. In all of this the debate is widening and there is a wider debate about the common asylum system and the effects on minimum standards. We could have that now or we could happily come along—perhaps not me personally; I might not be able to—and discuss that with the Committee at a future point. It is certainly a very interesting area in Europe being discussed a lot among ministers and notwithstanding these revised directives we will be continuing to have that discussion. I will name some countries now, if you take Malta, Italy, southern Mediterranean states, Cyprus, every time I have been to a JHA Council those three countries try to raise the issue about the particular conditions they face, the particular numbers of people they are dealing with. That is one end of the dominant debate. We are now also having some interesting debates with some of the Schengen border countries and they think there is common ground, although we have different positions in the UK, about how we operate border controls. There is quite a wide range of debate around asylum generally, how it is policed, about conditions in country, about numbers of people arriving, about asylum shopping. Those debates will not stop, notwithstanding the progress made during the French Presidency towards a common European asylum system.

Chairman: The Committee is familiar with the problems which some Mediterranean States have. We have discussed this before.

Q40 Lord Avebury: My question really relates to the previous answer on the adequacy of the arrangements for judicial review of detention compared with the requirements of the directive. Were you not acknowledging that we would have difficulty because in practice those who are fast tracked hardly ever get bail or even have access to legal advice for the purposes of getting bail during the period they are in detention and that this would be incompatible with the proposals?

Mr Prince: As we said earlier, we will give further details but the actual arrangements pertaining to fast track we believe do provide adequate access to legal advice and to judicial review. The effectiveness of that system is demonstrated by the fact that nearly 70 per cent of cases go through under that system but 95 per cent of those are found to be groundless and indeed a very significant proportion are removed within six months. So we know it is an effective way of focusing our resources on the small number of cases which have a high percentage chance of being unfounded and we believe that is an effective approach and that we do provide sufficient safeguards for those individuals in that arrangement.

Meg Hillier: I cannot resist saying around judicial review, speaking not as a lawyer but as a politician, the number of times that a judicial review is brought in at the very last moment before deportation—and I cannot off the top of my head remember the percentage but very, very often, a very high percentage—and is unsuccessful and just extends the length of time it takes to remove an individual or family, adds to human distress. I just feel I cannot resist putting my crude political views about the effectiveness of judicial review. Forgive me for my diversion.

Chairman: We have had so far a very broad discussion. We may well have covered some of the other points we wanted to raise, but I still think it is worth raising them.

Q41 Baroness Garden of Frognal: May I take you on to the issue of visas? The Minister cites in support of his interpretation the two regulations establishing a common visa list, the second of which replaced the first, at least in relation to most Member States. Given that UK policy broadly conforms to requiring visas from the States listed in the annex, can you say how it is possible to tell whether or not it continues to be bound by the first regulation?

Meg Hillier: It is more than seven years since its repeal and there has been no suggestion by any of the Community institutions or by any other Member State that the UK is bound by the first regulation, so we believe the proof is in the eating, if that is not too simple an answer.

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Q42 Baroness Garden of Frognal: The first regulation has ceased to exist.

Meg Hillier: Yes, it has ceased to exist and there have been no examples.

Chairman: It may be we have a White Knight galloping over the horizon to get you out of the difficulties and get us out of the difficulties.

Q43 Lord Mawson: You may think you have already answered all of this but to put the matter beyond any doubt, might a solution be to have two instruments coming into force at the same time: the first simply repealing the existing legislation and the second setting up the new regime with the UK opting in to the first but not the second? Alternatively, might the UK opt in to a single instrument which included a provision on scope, making clear that the measure did not apply to the UK except in respect of the provision on scope and the repealing provision?

Meg Hillier: We are in the hands of the Commission here and the Commission has decided to go for the repeal and replace proposals.

Mr Macleod: Both of these options are logically possible but the situation we are in is that the Commission has brought forward a proposal which simply states that it is replacing—I think is the word they use—the earlier measures. We are back into the question of the meaning of that phrase. Our position is that it means that the earlier measure disappears and that that is adequate. I suspect this is an issue which will emerge in negotiations in Brussels. There are ways of clarifying this and I suspect we will want, particularly in the light of the concerns and the doubts which have been expressed here, to try to get as much clarity as we can on that and to keep you abreast of what emerges. But these would certainly be ways of dealing with this.

Q44 Lord Richard: May I turn to something different, the proposal to codify the legislation on the uniform format of visas? As I understand it, there are various regulations here, some going back as far as 1995, amended and upgraded in 2002 and there is another one which is more recent than that. I suppose everyone agrees that if you codify something you do not actually change the law, what you do is to bring it together.

Meg Hillier: Absolutely.

Q45 Lord Richard: If that is so, can you give us an absolute view or an insight on how you see this proposed codification measure? On the face of it, it is incredibly complex and almost impenetrable.

Meg Hillier: The codification process, as you rightly say, cannot change the substance of the law, so it has brought together these issues. There is a drafting issue on this.

Ms Gibbons: We entirely agree with you that the intention of codification, consolidation as it were, of the three previous instruments is not to change the substance. Obviously the current draft did not produce that outcome and we have pursued that with the Commission, and we understand that they are going back and looking at changing the text to ensure that it maintains the status quo. The subject matter is incredibly complex and the text is rather dense as a result but the overall aim of consolidation is to bring together those three measures into a single measure to try to simplify. In attempting to simplify, they have not reflected the UK position and we had very productive discussions with them, which we believe will rectify that situation.

Q46 Lord Avebury: We have three regulations covered by this consolidation proposal and as I understand it two of them apply to the UK and one to Ireland. If you look at recital 15, it says that the UK and Ireland are not participating in the adoption of this regulation so the provisions do not apply to the United Kingdom and to Ireland. How can that statement be made while the UK still has the right to express an opinion within the three-month period?

Meg Hillier: We believe it is a drafting error and we have had discussions with the Commission about this. We need to get the drafting error sorted out.

Ms Gibbons: We agree with the Committee that the UK position is not accurately reflected. We are in discussions with the Commission to rectify that and we hope to be able to present the Committee with a revised text very shortly, including the usual explanatory memoranda, hopefully rectifying the situation.

Meg Hillier: May I add that, although the Home Office lawyers have picked up this issue and Emma Gibbons' team, it is very helpful to have this Committee highlight the issue as well because it just helps us in our discussions as we try to resolve this what we believe is a drafting error. Thank you for your input on this.

Q47 Lord Richard: What is the timing?

Meg Hillier: Fairly short timing. We are talking about weeks rather than months. I am hopeful but then I am an impatient politician so perhaps I should let the officials tell you what their view is.

Mr Prince: Making an assumption that there is an issue that we would like to resolve before the normal completion of the three-month period, given the proposal was presented on 13 January, we will want to have clarity on this certainly before 13 April.

Q48 Baroness Henig: Is it possible under the Protocol for the United Kingdom to opt in to the codifying measure but to seek to have it amended so

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that only those provisions which apply to it now would apply to the UK in future under the measure?

Ms Gibbons: I believe the answer is yes.

Mr Prince: Picking up on the earlier comments, there is a degree of unclarity which we are now expecting the Commission to bring back to us in order to enable us to make the correct decision. Our view is that the codification process should not be changing the legal status quo and that will be the process which we will be looking for from them.

Q49 *Baroness Henig:* So that could be a way forward.

Mr Prince: It could be one of the options for dealing with the new instrument.

Q50 *Lord Mance:* It would also be possible, if you did not get satisfaction within the three-month period, not to opt in but in the hope then of being able to negotiate satisfactory changes so as to enable a subsequent opt-in.

Ms Gibbons: That is hypothetical. It goes back to the first question. The whole intention of the codification process is not to change the status quo. That is regulated by an institutional agreement between the Council, Parliament and the Commission. Obviously if they are changing the status quo by not reflecting our position, then it technically cannot be argued to be a codification and you come outside that agreement, so new rules would apply.

Mr Macleod: The problem is that the codification arrangements date from 1994; they are well worn and well used in relation to the bulk of EU legislation. Where they have not yet been tested and applied is in relation to both the JHA opt-ins and potentially other areas where there are variable or differential applications of EU law throughout the Union. The question is how the principles of codification are to apply in these areas. And of course the principles, which everyone is agreed on, are that codification does not change the substance of the law at all and second, formally speaking, that the legislative procedures, including the rights of the Member States and institutions, are formally preserved through the codification process. The point you end up with at the end of codification is real EU law.

Q51 *Lord Mance:* If you felt that codification was not actually reflecting the existing law, which you do at present, then not opting in would actually be an unusual way but certainly a quite effective way of marking that and getting agreement.

Meg Hillier: I would hope we do not get to that point and, as it affects Ireland as well, I cannot speak for Irish colleagues but I would imagine there would then be equal concern.

Q52 *Lord Mance:* You are confident that it will not get to that point.

Mr Macleod: Yes.

Meg Hillier: Yes.

Q53 *Lord Hannay of Chiswick:* On a timing point, as you recognised yourself I think, the timing is very tight on the reception and the other two proposals and you have not yet reached a decision on this. The Committee therefore has not given an opinion on that issue. Am I right in thinking that for us to express an opinion you would have to give us your decision whether to opt in or not by this time next week?

Meg Hillier: Yes; I am hopeful that we will do that. I think I have given a clear indication of our current thinking. It is not my personal responsibility alone; our decision clearly has to go through my senior colleagues. I hope you have a feel for what our thinking is on that and we will certainly make sure, I hope; we do not always get it absolutely perfect but I hope you have seen some improvements about our timeliness from the Home Office in getting you everything from the explanatory memorandum to any other information you need. I am not intending that that should change on my watch.

Q54 *Baroness Henig:* May I thank you very much for the replies? I have struggled with some of the legal technicalities but I understand the political issues much better. Clearly a lot of this relates to our position as a Schengen power and I just wondered whether we were working with other Schengen powers. We are obviously not operating on our own—you mentioned Ireland—because others are facing a similar situation. Are we working closely with them?

Meg Hillier: Yes, when I was over in Belfast, for example, I was talking to Northern Ireland, organisations within the UK but we were talking a lot about cooperation with the Garda Síochána and the Irish Government and others. I have been over myself to Budapest and talked to ministers there because they are a Schengen border country. We found that, although we have quite different constitutions, on many issues we were looking at practical cooperation that we could have and intensely in Europe. I have been the Europe Minister now at the Home Office for nearly two years and have been out to nearly every JHA Council in that time and that personal relationship with ministers does help but equally we have a very good team of officials with very good official contacts. We have done an awful lot of work with countries within Europe, those at the Schengen borders but also within Europe on a number of these wider asylum issues. For example, we did some very helpful work on e-Borders and repeat passenger name records and we have done some intense work with colleagues in Europe on that.

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A lot of political discussion goes on around these areas sometimes, which leads to changes in European formal positions, but actually in a way more often than not a lot of practical cooperation. If I can reassure you, there is a lot of good old-fashioned politics going on behind the scenes outside all the legal stuff.

Q55 Chairman: Minister, to end this, I am sure you are aware that over a number of years this Committee has had a fairly bilious attitude towards the Home Office and the way the Home Office has cooperated with this Committee, and I include ministers in that. The bottom was reached when Mr Byrne found it necessary to wait a year before replying to correspondence from this Committee through Lord Grenfell, in spite of many reminders. Since you have come, if I might say so, you have brought a totally new approach and help to us in our procedures with regard to scrutiny. I want to put on record how much we have appreciated your personal influence and particularly we have appreciated this morning, on very complicated issues, that you have taken a real lead with your colleagues in answering our questions. Thank you very much for that. I know you are going on maternity leave very shortly and you take with you the warmest good wishes from this Committee over that period in your life which is shortly going to

happen. We hope very much that you come back after that continuing to be as helpful as you have been to this Committee. By that I do not mean, as I suspect, that somebody will promote you, because it seems to me you deserve it. We shall wish you luck if that happens but we shall be disappointed that we shall no longer have the pleasure of your helpfulness.

Meg Hillier: You are embarrassing me, Lord Jopling, but may I thank you very much because I have to say that we are all politicians here. I believe in scrutiny very much. I have been a scrutineer myself and it is important that ministers particularly, departments, Government, pay respect to your great expertise which actually provides me with a real resource. I have to say that I am very ably supported by a team of excellent professionals across a range of areas on justice and home affairs issues. May I reassure you that the Home Secretary personally is keen that we maintain this openness with committees? It is very much something she wants to see continue, so you should rest assured that being on maternity leave I may be out of sight and maybe some of you may be out of my mind for a little bit as I am busy with other things, but you will not be out of the Home Office's mind and we will make sure that the same standards are maintained. I apologise for the odd error which has occurred but we will make sure we are watchful and make sure they do not happen in future.

Chairman: Thank you very much.
