



HOUSE OF LORDS

European Union Committee

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11th Report of Session 2009-10

**Government and  
Commission  
Responses  
Session 2008-09**

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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.

The Committee has seven Sub-Committees which are:

Economic and Financial Affairs, and International Trade (Sub-Committee A)  
Internal Market (Sub-Committee B)  
Foreign Affairs, Defence and Development Policy (Sub-Committee C)  
Environment and Agriculture (Sub-Committee D)  
Law and Institutions (Sub-Committee E)  
Home Affairs (Sub-Committee F)  
Social Policy and Consumer Affairs (Sub-Committee G)

### *Our Membership*

The Members of the European Union Committee are:

Lord Bowness	Lord Paul
Lord Carter of Barnes	Lord Plumb
Baroness Cohen of Pimlico	Lord Powell of Bayswater
Lord Dear	Lord Richard
Lord Dykes	Lord Roper (Chairman)
Lord Freeman	Lord Sewel
Lord Hannay of Chiswick	Baroness Sharp of Guildford
Baroness Howarth of Breckland	Lord Teverson
Lord Jopling	Lord Trimble

Lord Kerr of Kinlochard

In addition, the following were Members during the Session 2008-2009:

Lord Mance	Baroness Symons of Vernham Dean
Lord Maclennan of Rogart	Lord Wade of Chorlton

### *Information about the Committee*

The reports and evidence of the Committee are published by and available from The Stationery Office. For information freely available on the web, our homepage is

<http://www.parliament.uk/hleu>

There you will find many of our publications, along with press notices, details of membership and forthcoming meetings, and other information about the ongoing work of the Committee and its Sub-Committees, each of which has its own homepage.

### *General Information*

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at

[http://www.parliament.uk/about\\_lords/about\\_lords.cfm](http://www.parliament.uk/about_lords/about_lords.cfm)

### *Contacts for the European Union Committee*

Contact details for individual Sub-Committees are given on the website.

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

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## **GOVERNMENT AND COMMISSION RESPONSES FOR SESSION 2008-09**

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1. The Government have undertaken to respond in writing to all reports from the Committee (other than purely formal reports) within two months of publication.
2. The European Commission has likewise undertaken to respond in writing to opinions transmitted to them from national parliaments. This is part of the “Barroso initiative”, launched by the Commission in 2006 to “bring the EU closer to citizens”. We send selected reports to the Commission for response on this basis.
3. This report makes available, for the information of the House, Government and Commission responses received to date to our reports from Session 2008-09. A complete list of reports and responses for the session is annexed to this report.
4. Some Government responses are published as Command Papers. These responses are not printed in this report but are listed in Annex A.

## ANNEX A: 2008-09

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2 <sup>nd</sup> Report: Enhanced scrutiny of EU legislation with a United Kingdom opt-in		No response required
3 <sup>rd</sup> Report: After Georgia. The EU and Russia: Follow-up Report		Government response printed in this report
4 <sup>th</sup> Report: Healthcare across EU borders: a safe framework		Both Government and Commission responses printed in this report
5 <sup>th</sup> Report: Mobile Phone Charges in the EU: Follow-up Report		Both Government and Commission responses printed in this report
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8 <sup>th</sup> Report: Priorities of the European Union: evidence from the Ambassador of the Czech Republic and the Minister for Europe		No response required
9 <sup>th</sup> Report: Procedural Rights in EU criminal proceedings – an update		Government response printed in this report
10 <sup>th</sup> Report: Recast of the First Rail Freight Package		Both Government and Commission responses printed in this report
11 <sup>th</sup> Report: Correspondence with Ministers May to October 2007		No response required
12 <sup>th</sup> Report: European Contract Law: the Draft Common Frame of Reference		Government response printed in this report
13 <sup>th</sup> Report: The Review of the Less Favoured Areas Scheme		Both Government and Commission responses printed in this report
14 <sup>th</sup> Report: The future of EU financial regulation and supervision		Both Government and Commission responses printed in this report
15 <sup>th</sup> Report: Access to EU Documents		Government response printed in this report
16 <sup>th</sup> Report: The EU's Renewable Energy Target and the Revision of the Emissions Trading System: Follow-up report		No response required
17 <sup>th</sup> Report: Codecision and national parliamentary scrutiny		Government response printed in this report

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18 <sup>th</sup> Report: EU Consumer Rights Directive: getting it right	Both Government and Commission responses printed in this report
19 <sup>th</sup> Report: Money laundering and the financing of terrorism	Government response published as Command Paper 7718 by Home Office, October 2009. Commission response printed in this report
20 <sup>th</sup> Report: The EC Budget 2010	No response required
21 <sup>st</sup> Report: Green Paper on the Brussels I Regulation	Government response printed in this report
22 <sup>nd</sup> Report: Revision of the EU Directive on the protection of animals used for scientific purposes	Government response printed in this report
23 <sup>rd</sup> Report: Annual Report 2009	No response required
24 <sup>th</sup> Report: Government and Commission Responses Session 2007-08; Remaining Government Responses Session 2006-07	No response required
25 <sup>th</sup> Report: The Stockholm Programme: home affairs	Government response printed in this report

# Part I: Government Responses

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## 3RD REPORT: AFTER GEORGIA. THE EU AND RUSSIA: FOLLOW-UP REPORT

### Letter from the Rt Hon Caroline Flint MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman

I am writing in response to the 3rd Report of the 2008–09 session by the House of Lords European Union Committee (Sub-Committee C), *After Georgia. The EU and Russia: Follow-Up Report*.

The Government welcomes the rigorous analysis in the report, much of which is in line with our own analysis. I enclose a note responding to the key recommendations the report made.

31 March 2009

#### GOVERNMENT RESPONSE

##### *Conclusions and Recommendations*

The Government welcomes this report and believes it makes an important contribution to our understanding of EU-Russia relations following the crisis in Georgia. The Committee's report makes clear the importance of the EU's response to the crisis and the successful negotiation of a ceasefire agreement. The confidence and authority it displayed indeed showed that when the EU acts quickly and with one voice, it can play a crucial role in international affairs. And it also highlights the EU's ability to use military and civilian tools to ensure stability and security internationally.

The Government also welcomes the support of the Committee for our and the EU's overall policy of engagement with Russia. Russian actions in the South Caucasus have raised serious questions about their commitment to European security, and to the international community as a whole, but it is only through engagement, hard-headed and pragmatic, including through rules based organisations, that we can build a constructive relationship with Russia. This is both in the UK's and the EU's interest. We continue to underline the importance of Russia meeting in full all her international commitments and obligations, including honouring the commitments it made under the peace plan brokered by President Sarkozy.

The Committee also identifies some of the key challenges that face EU-Russia relations moving forward. The Government's response to some of the key recommendations in this report is set out below. For ease of reference, the relevant recommendation is re-printed in bold type above the Government's response.

##### *Georgia*

**82. The precise circumstances surrounding the August 2008 outbreak of the conflict are not yet clear but responsibility for the conflict was shared, in differing measures, by all the parties. There is evidence of a Russian military build-up prior to the August war. In addition, Russia's use of force was disproportionate in response to provocative statements and military action by President Saakashvili.**

The Government agrees that the exact circumstances surrounding the outbreak of conflict in August 2008 remain unclear. That is why the Government supports the international inquiry into the conflict, announced in September 2008 by the EU. The inquiry will look at a range of issues relating to the conflict.

What is clear is that tensions between Russia and Georgia over the separatist regions had risen earlier in 2008. In April of that year, Russia issued a decree establishing closer bilateral relations, including legal relations, with Georgia's separatist regions. Subsequently a Russian aircraft shot down a Georgian Unmanned Aerial Vehicle over Abkhazia, and Russia sent paratroopers to Abkhazia along with associated military equipment. In July, Russia admitted publicly that its aircraft had over-flown South Ossetia.

In the days preceding 7 August, clashes in South Ossetia between Georgian peacekeepers and South Ossetian irregulars increased in intensity. On 7 August, the Georgian Armed Forces, in a reckless move, attempted to take and hold Tskhinvali, the *de facto* "capital" of South Ossetia, significantly compounding successive breaches by all parties of international arrangements for the region.

Russian armed forces reacted with massive force. During the fighting, Russian forces encroached deep into Georgian territory beyond South Ossetia and Abkhazia, and threatened Tbilisi itself.

The Government agrees that, whatever the origins of this conflict, Russia's use of disproportionate force, which extended the geographical range of the conflict and the scale of the fighting, had no justification. Nor did Russia's violation of Georgian sovereignty and territorial integrity, which continues to this day. And by its unilateral recognition of the breakaway regions, and its use of force to achieve its objectives, Russia has damaged the principles of multilateralism, by which disputes are resolved through negotiation not unilateral force, and its own reputation as a reliable member of the international community and the UN.

**83. President Saakashvili seems to have drawn unfounded confidence in confronting Russia as a result of mixed signals from the US Administration.**

The Government does not believe that the signals of the US administration were mixed. The US, and other partners including the UK, sought to calm tensions in the run up to August 2008. That is why the Government judges that Georgia's actions in attempting to take and hold Tskhinvali by force were reckless.

**85. The EU's response to the conflict in Georgia was rapid and reasonably successful. It persuaded the two parties to accept a ceasefire, and with some delay brought about the withdrawal of Russian troops from all Georgian territory outside South Ossetia and Abkhazia and brought the parties together for talks in Geneva. This success owed much to the effectiveness of a strong Presidency with whom the Russians were prepared to negotiate. The EU was the obvious and perhaps only credible body to act as intermediary in the conflict, and acted with unaccustomed confidence and authority.**

The Government believes that the EU responded with admirable speed and purpose. The EU's intervention was instrumental in achieving a ceasefire. The UK played a full part, helping shape the EU debate, complementing EU efforts bilaterally, and deploying 22 equipped monitors to the EU Monitoring Mission. The EU's intervention prompted Russia's withdrawal from most of Georgian territory outside the separatist regions, but the Russian military retain a checkpoint at Perevi outside of South Ossetia and in the rest of Georgia.

**86. We are seriously concerned that Russia has not complied fully with the ceasefire agreement reached between President Sarkozy and President Medvedev. Full Russian compliance with the ceasefire plan should continue to be used as a measure of Russia's behaviour, even though such compliance is unlikely in the near future. We endorse the statement by the Europe Minister that the pace and tone of the negotiations on the new Partnership and Cooperation Agreement would be informed by Russia's fulfilment of its obligations under the ceasefire agreements.**

The Government agrees with the Committee. Additionally, Russia's announced plans to militarise the separatist regions contradict Russia's commitments under the Sarkozy-Medvedev agreements, will add to rather than reduce tension, and further violate Georgian sovereignty and territorial integrity. The Government echoes the EU Presidency Statement of 5 February '09 calling on Russia not to carry out these plans.

**87. We welcome the EU's decision to set up an inquiry to investigate the origins and the course of the conflict in Georgia. Any action the EU takes to find lasting solutions must involve the local communities and take account of their views, as well as addressing the wider geopolitical situation. In doing so, lessons should be drawn from previous UN and OSCE missions in the area.**

**88. The EU should, with the UN, the OSCE, the United States and other partners, make an effective contribution towards building a long-term peace in the region. It is essential that the mandate of the EU Monitoring Mission in Georgia (EUMM) is renewed later this year and is allowed to exercise its agreed tasks in full on both sides of the border.**

The Government also welcomed the setting up of the inquiry and successfully pressed for it to address allegation of war crimes made by both sides as part of its remit. The independent inquiry will not necessarily advocate long term solutions, but we agree with the need to involve and consult with local communities as part of any final settlement.

The Government fully agrees on both the need for the EUMM mandate to be extended with any necessary amendments to reflect changed circumstances and for international access to South Ossetia.

**89. In recognising South Ossetia and Abkhazia Russia has further breached the principles of sovereignty and territorial integrity, following its intervention in Georgia. There should be no question of the EU Member States recognising either of these entities. It will be important for the EU to maintain pressure on Russia to respect the international commitments it has made on these subjects. At the same time the EU will need to continue to rebut Russia's assertions that there is a parallel with Kosovo.**

The Government agrees that it is important that no EU Member State recognises the independence of South Ossetia or Abkhazia. Nor is such a step likely; only one country (Nicaragua) has followed Russia in recognising these regions. Otherwise Russia is entirely isolated.

We reject comparisons to the situation in Kosovo. Russia claims a “Kosovo precedent” for its actions in Georgia but seldom mentions the extensive involvement of the international community, including the UN administration of Kosovo, for almost 10 years, which was so important an element in the resolution of the Kosovo crisis. Unlike in South Ossetia and Abkhazia, there was a UN-sanctioned international administration in Kosovo and an international security force operating there under UN authorization and mandate. By contrast, in South Ossetia and Abkhazia, Russia’s recognition followed mere weeks after the fighting, and with international arrangements subverted rather than exhaustively pursued.

There was also a security guarantee in Kosovo to protect different ethnic communities. In South Ossetia and Abkhazia Russia has failed for nearly two decades to create the conditions for the return of refugees. As one commentator has put it, the international community’s response in Kosovo was an attempt to respond to the evils of ethnic cleansing. Russia’s recognition of the separatist regions of Georgia risks entrenching ethnic division and makes the return of refugees even more difficult to achieve.

**90. There is evidence of distribution of Russian passports to non-Russian citizens in South Ossetia and Abkhazia and also in Ukraine. At the same time President Medvedev has outlined Russia’s priority to protect the life and dignity of Russian citizens wherever they are. We are greatly concerned by the combination of these two developments. The EU should refute firmly this doctrine of intervention.**

The Government shares the Committee’s concerns. We are specifically concerned about the way this principle is being applied in unstable environments. We have raised this issue at Ministerial level and urged the Russians to clarify these principles. It is clear that the focus should be on long term conflict resolution.

#### *The Russian Economy*

**92. Russia’s economy has been severely affected by the financial crisis and global economic downturn. In particular the fall in the price of oil has dramatically changed Russia’s strong economic position since our last report. These events should have brought home to the Russian leadership their unavoidable involvement in the world economy. There is a risk that Russia may make a protectionist response. The EU should continue to encourage Russia’s full integration into the global economy by continuing actively to support their membership of the World Trade Organisation.**

The Committee’s assessment of the Russian economy closely mirrors that of HMG. The country has suffered, in a period of less than four months, the twin shocks of a commodity price collapse and closure of international capital markets. These shocks have brought a sustained period of strong economic growth to an abrupt end. Industrial output has fallen sharply. The Russian government itself expects the economy to contract by 2.2% in 2009. As the Committee notes, this all underlines Russia’s integration in the global economy.

In seeking to support the Russian economy, and manage the social fall out of the downturn, the Russian government has publicly stated its commitment both to participate constructively in international efforts to promote global recovery, and to refrain from protectionism. Russia is already playing a full role in the G20 anti-crisis talks. At the same time, the Committee is right to highlight the risk of protectionism in Russia. There have been a number of worrying signs, particularly in the automotive, agricultural and metals sectors. We agree with the Committee’s recommendation that the EU continue to encourage Russia’s integration into the global economy, lobbying against protectionism, and supporting membership of the World Trade Organisation.

#### *Energy*

**93. It is clear that the response by the EU to the interruption of gas supplies through Ukraine in 2006 had no effect in deterring a recurrence of similar action in January this year. Furthermore little progress has been made to safeguard gas supplies to EU Member States in eastern, central and southern Europe through the diversification of supply and delivery routes. This policy failure needs to be remedied urgently. This issue will become a major test of whether solidarity between Member States can be made a reality.**

**94. Events since our last report have increased the importance we attributed to the EU’s having a unified energy strategy, including an interconnected and liberalised internal market in energy, especially gas. We welcome the continued commitment of the Government and the European Commission to achieving this goal and we urge the European Union to take the necessary decision at the next meeting of the European Council in March.**

**95. The close proximity of the Georgia conflict to key energy transit routes in the Caucasus highlighted their vulnerability and is a matter of considerable concern. This should be addressed by the European Institutions and the Member States taking as a basis the European Commission’s Second Strategic Energy Review to ensure security and dependability of energy supplies. More vigorous action needs to be taken by the EU to diversify gas supplies, to increase gas storage capacity and to encourage the development of the Nabucco pipeline.**

The Government agrees that more progress needs to be made to increase interconnection of gas supplies within the EU and diversify external sources and routes of supply to improve EU energy security. The Spring Council Conclusions build upon the Commission's second Strategic Energy Review. Recognising the key challenges to energy security faced by the European Union, we believe that the Strategic Energy Review will be instrumental in achieving many of the necessary improvements to our energy security.

The European Economic Recovery Package, agreed at the Spring Council, includes €3.98 billion for energy infrastructure. This includes approximately €2.4bn for interconnection projects, including many in Central and Eastern Europe and €200 million for Nabucco. We welcome this as a concrete step towards improving diversification of sources of supply and interconnection within the EU and hope that some of the projects will be implemented in time for next winter. The funds will also help us to meet our climate change objectives by supporting CCS.

The Strategic Energy Review forms the basis of a concrete and ambitious push to improve EU energy security. Of particular importance will be increasing diversification of sources of energy supply, including the delivery of a functioning Southern Corridor supplying the EU with gas from the Caspian region. The Council asked the Commission to produce a plan of action on the Southern Corridor before the end of the year. There will also be action to improve EU resilience to supply disruptions, including a revision of the existing Gas Security of Supply Directive by the end of this year.

We also welcome continuing EU-level engagement in the region and especially the Presidency's New Silk Road Summit on May 8 which will seek to make clear the EU's strong political commitment for work to diversify sources of energy supply and will look forward to concrete actions for the development of the Southern Corridor for Energy.

#### *NATO*

**96. The ongoing disputes between Russia and the West over missile defence and NATO enlargement risk further complicating EU-Russia relations. The EU should consult closely and at an early stage with the new American administration about engaging with Russia in a firm but constructive, fair and balanced way.**

We are committed to a joined up, coherent and pragmatic transatlantic approach to Russia. The EU and the US last discussed relations with the Russia at the EU-US Ministerial meeting on 6 March 2009. Discussions included issues around missile defence, the gas crisis and Georgia. Both sides agreed to work together to encourage Russia to play a constructive role on the international stage.

The US and European members of NATO regularly discuss NATO enlargement and relations with Russia. NATO-Russia relations were most recently discussed at the NATO Foreign Ministers meeting on 5 March. All Allies agreed to the resumption of formal sessions of the NATO-Russia Council (NRC). We want to use the NRC to engage with Russia on important issues of mutual concern, such as Afghanistan, and to make clear to Russia the unacceptability of its actions when they threaten NATO's interests.

Russia appears to interpret NATO enlargement as a threat to her national security; we disagree. The Government believes that enlargement has been an historic success in building stability and security in Europe and the door to membership should remain open. We also believe that having stable and well-governed countries on our common borders (delivered by the reforms which NATO membership and the NATO enlargement process demands) should be desirable for Russia and NATO.

Russia continues to oppose the deployment of US BMD assets in Europe despite frequent US assurances that its limited BMD plans are not aimed at countering Russian strategic nuclear forces, nor would they be capable of this. The point was reiterated by President Obama on 3 March when he stated "the missile defense program, to the extent that it is deployed, is designed to deal with not a Russian threat, but an Iranian threat". Secretary of State Hilary Clinton addressed Russian concerns about BMD by offering the possibility of cooperation with Moscow on joint research, joint development, and even joint deployment. The new administration has also confirmed on several occasions that continued development of the BMD system would be done in the context of its commitments to the NATO Alliance and its relations with Russia, provided the technology is proven to work and cost effective.

**97. It is clear from the NATO ministerial meeting in December that there is no prospect of early NATO membership for either Georgia or the Ukraine. Without drawing back from the commitment by NATO to the two countries' eventual membership, the focus should remain in the immediate future on practical cooperation.**

The Government agrees with the Committee that the focus of NATO's relationship with both should continue to be on practical co-operation and support to the reforms needed for eventual membership. We and NATO also remain committed to the Bucharest decision that Ukraine and Georgia will one day become members of the Alliance. This message was reinforced last December when NATO agreed to upgrade its relationship with

both aspirants through the development of Annual National Programmes to take forward reforms overseen by the NATO-Ukraine Commission and the NATO-Georgia Commission. The Commissions also provide a forum for wider discussions including on practical co-operation and contributions to NATO operations.

### *Neighbourhood*

**98. The EU has an important role to play in strengthening the economies and democracies of both Georgia and the Ukraine and should pursue this through development of the Neighbourhood Policy and the Eastern Partnership while also developing a more positive attitude towards their eventual membership.**

**100. Developments since our previous report have reinforced our view then that the common neighbourhood is a particularly sensitive area for both Russia and the EU. The Russian intervention in Georgia and the crisis over gas from Russia transiting Ukraine have demonstrated the need for the EU to work with the Russians over all aspects our relationships with these countries. The EU should show understanding for Russia's concerns, but should stand firm on issues of principle concerning these countries.**

**101. Events in Georgia have demonstrated that concrete progress is needed in resolving frozen conflicts, including in Georgia and Moldova. These should be a key aspect of discussions with Russia.**

The UK strongly supports the Eastern Partnership as a tool for deepening the Eastern neighbours' relations with the EU and offering strengthened support for accelerating reforms, approximation and integration. Building respect for democracy, human rights and the rule of law will remain an integral part of the EU's relationship with the Eastern neighbours with the key principles of market economy, sustainable development and good governance at its core. It is particularly important that the Eastern Partnership meets the needs and aspirations of countries like Ukraine that seek to be members of the EU one day, as well as countries whose priority is to build a stronger relationship with the EU. The Eastern Partnership can do much to bring those countries aspiring to EU membership further along the path in their preparations. The Eastern Partnership is complementary to EU-Russia relations. Russia can participate in regional projects by consensus. The Black Sea Synergy also offers Russia an opportunity to engage with the EU and our common neighbourhood.

The UK firmly believes that the international community has a common interest in promoting the settlement of these unresolved conflicts, These issues feature regularly in our bilateral dialogue with Russia. The UK also supports mediation efforts of the EU and the OSCE (where Russia is an active member).

**102. We welcome the EU's new commitment to strengthening its relationship with Ukraine, Georgia and its other eastern partners in the Eastern Partnership. In so doing, the EU should seek to build respect for democracy, human rights and the rule of law in each country.**

**103. The Ukraine is a key neighbour for both Russia and the EU. Insufficient attention has so far been given to nurturing the EU-Ukrainian relationship. EU Member States should make more efforts to foster cultural, educational and other links which would be perceived as non-threatening by the Russians. The prospect of EU membership should be given greater encouragement and substance.**

The Government believes Ukraine should be able to join the EU when it meets the criteria. We will continue to seek to convince the more sceptical Member States that holding out the prospect of future membership will bring the maximum benefits to the EU, Ukraine and the wider region. Ukraine has an important role to play in this regard by demonstrating a greater commitment to EU norms and standards.

The 2008 EU-Ukraine summit marked a step forward in relations with agreement to conclude an Association Agreement, the EU's recognition of Ukraine as a European country and a reiteration that the EU acknowledges Ukraine's European aspirations and welcomes its European choice. It is important now for the EU and Ukraine to conclude a substantive new Association Agreement, including a deep and comprehensive Free Trade Agreement, that will represent a substantial strengthening of our ties and offer an opportunity for Ukraine to integrate into the European economy, align with EU energy policy and take part in co-operation on tackling organised crime and trafficking.

Many EU Member States have opened cultural offices in Ukraine, with a view to promoting cultural and educational links. The UK is represented by the British Council which has offices in Kyiv, Donetsk, Odesa, Lviv and Kharkiv (<http://www.britishcouncil.org/ukraine.htm>). The UK offers scholarships to Ukrainian students through the FCO's Chevening Scholarship Scheme and supports the John Smith Fellowship Programme.

*EU-Russia Partnership and Cooperation Agreement*

**99. Hard-headed and pragmatic engagement and not isolation is the right policy for the EU in its relations with Russia. Despite the conflict in Georgia, a new Partnership and Cooperation Agreement (PCA) remains the appropriate vehicle for the EU to pursue this engagement. However the EU should not compromise on its principles during the negotiations for a new PCA. We agree that the PCA should reflect the much changed international agenda, particularly areas such as counter-proliferation and climate change.**

**104. We agree with the overall policy of the Government and the European Union that it is important to remain engaged with Russia but, as we stated in our previous report, that engagement must be hard-headed, pragmatic and unsentimental.**

Steady progress has been made on the negotiations for a successor to the EU-Russia Partnership and Cooperation agreement, but negotiations are likely to continue for some time. We remain committed to negotiating a comprehensive, binding agreement which will help the EU and Russia build a stable long-term partnership based on consistency and predictability. The mandate for this negotiation, agreed by all Member States, ranges across the spectrum of EU/Russia relations, including justice and home affairs as well as trade and investment issues and climate security and energy. We continue to engage. Russia, both bilaterally and through the EU, on all these issues and more.

#### 4TH REPORT: HEALTHCARE ACROSS EU BORDERS: A SAFE FRAMEWORK

**Letter from the Rt Hon Dawn Primarolo MP, Minister of State, Department of Health, to the Chairman**

I am writing to thank you for your helpful Report, *Healthcare across EU borders: A safe framework*, which I feel was a helpful contribution to the debate in this area.

I have today published the response alongside a response to the public consultation that we held. The Government agrees with most of the recommendations and points made in the report, and I think that we generally agree on what the UK's stance on this draft Directive should be.

I am enclosing copies of both the response to your report<sup>1</sup> (not printed) and the consultation for you and Committee members (not printed). The response to the House of Lords is also available in the Parliamentary library, and both documents are available on the Department's website.

In addition, we have recently become aware that there were inaccuracies in some of the E112 data that we supplied to you. This error was as a result of IT problems and data capture issues faced by the team in Newcastle responsible for the collation of this information. The correct processes and systems are now in place and we have received revised data from Newcastle.

I apologise for this previously inaccurate data and attach with this letter corrected versions of the data (not printed) I provided to you. However, the essential points I made in my evidence to the Lords' remains valid in that:

- The overall numbers of patients using the E112 scheme remain very low.
- The majority of E112s are issued for patients travelling to France or Poland.
- The majority of patients are travelling for maternity services.

I hope that you find the Government response to your report helpful and useful, and look forward to continuing our relationship in this area. Finally you may wish to note that the European Parliament is holding a plenary debate and vote later this week on the draft Directive and therefore I will be writing to update both Scrutiny Committees of progress more broadly on the draft Directive in the near future.

27 April 2009

#### 5TH REPORT: MOBILE PHONE CHARGES IN THE EU: FOLLOW-UP REPORT

**Letter from Lord Carter of Barnes, Minister for Communications, Technology and Broadcasting, Department for Business, Enterprise and Regulatory Reform, to the Chairman**

I am responding to your report *Mobile phone charges in the EU: Follow-up Report* published on 10 March 2009.

Since I submitted the Explanatory Memorandum, things have moved on considerably. It was always envisaged that the Council would seek a first reading deal with the Parliament to allow the Regulation to finish the legislative process and come into force by the start of July. The Council and Parliament have agreed changes to the text proposed by the Commission and I can see no impediment to this completing the legislative process in the coming weeks. I do not propose to vote against the proposal or seek to block it.

<sup>1</sup> Command Paper 7580, April 2009.

Your report recommends that the Commission builds up a better evidence base while noting the political imperative that has driven the timing of this regulation. I agree entirely. I believe that there was a reasonable basis in the data collected by the European Regulators Group to extend the Regulation to cover SMS and wholesale data rates. It was clear from the evidence gathered by the Regulators that the roaming voice rates had tended to gather around the Eurotariff caps, indicating that competition was not yet strong enough to ensure that falling wholesale costs, especially falling Mobile Termination Rates, would be passed through to consumers in the absence of regulation. Viable alternative services, which could introduce competitive pressure on voice prices, were not expected to provide a solution in the near term. Average European SMS rates seemed excessive and had not reduced at all since 2007; average UK prices were not reducing as fast or as much as could be expected. There was evidence of some very high wholesale prices for data, which could prevent the development of competitive retail prices. The Regulation required the Commission to review the Regulation by December 2008; it was a matter for the judgement of the Commission to decide to bring that forward to September 2008 and whether to seek amendments. As I said in my evidence to your committee and you have confirmed, there was a political imperative at work here and arguments that we should give the original Regulation more time were simply not going to carry much weight. I believe that you are completely right that the need for the Regulation should be monitored by the Commission and therefore agree with you that a sunset clause would be an effective way of ensuring that the value of this form of regulation was kept under review.

This brings me to the changes that have occurred to the proposal during its passage through the Council and then with the European Parliament. First, as we anticipated, the European Parliament—supported by several Member States—sought to reduce slightly the proposed regulated prices of roaming voice calls (the agreement with the European Parliament has not changed the regulated wholesale and retail limits for SMS) and the agreed amendments are that from 1 July 2010 wholesale charges will be 22 eurocents (down from 23 in the proposal), retail charges for calls made will be 39 eurocents (down from 40) and retail charges for calls received will be 15 (down from 16). Similar reductions apply to the regulated rates the following year: 18 eurocents for wholesale (down from 20), 35 eurocents for calls made (down from 37) and 11 eurocents for calls received down from 13. Another change agreed in negotiation was that the consumer should not be charged for voice call messages left in his or her voicemail box while roaming (he or she may be charged for listening to messages).

The European Parliament thought that the rates should be reduced in this way but still believed that regulation should be a temporary measure and that we should avoid putting down roots for the continuation of this sort of regulation. For that reason, they proposed that we shorten the lifetime of the Regulation and there is now agreement that there should not be rates set from 1 July 2012, when the Regulation will end. We have also agreed to insert a much more challenging Review clause that will require the Commission to provide an interim report by Summer 2010 and a full report by the Summer of 2011 on the degree of competition in the market, the extent to which consumers have benefited from reductions and the development of alternative services to roaming.

The negotiation with the Parliament also led to a reduction in the wholesale rates for data downloads. The companies would have to offer a maximum of 1 Euro—in line with the original proposal—from 1 July 2009. This would then reduce to 80 eurocents and 50 eurocents on 1 July 2010 and 2011 respectively.

Overall, I think this was a reasonable package of amendments to the original proposals. I believe that the reductions in voice roaming rates were within the parameters set by the original guidance from the European Regulators Group and that the changes to voicemail calls while roaming is to be welcomed. I also believe that the changes to data wholesale rates are in line with the expected path of wholesale rates in the industry and serve to create a cap on the highest rates that will be relevant for the life of the Regulation. I am sure that the reduction in the length of the Regulation and the increased emphasis on looking to avoid legislation in the future strongly endorses the views you have expressed. I have therefore supported these changes and propose not to stand in the way of a first reading deal being finalised in the coming month.

I understand that as the proposal was cleared from scrutiny by the Lords Sub-Committee B on 17 November 2008 (Progress of Scrutiny: 27 Nov 2008, Session 2007–08), there is no need to ask the Committee to release it again from scrutiny.

2 June 2009

## 6TH REPORT: CIVIL PROTECTION AND CRISIS MANAGEMENT IN THE EUROPEAN UNION

### Letter from Tom Watson MP, Parliamentary Secretary, Cabinet Office, to the Chairman

Thank you for your letter of 11 March enclosing a copy of the Select Committee's report *Civil Protection and Crisis Management in the European Union*, which the Government welcomes. I attach the Government's response to its recommendations.

On one specific point, the report recommends that the Government should look into NATO policy on security clearance. In doing so, we have consulted the NATO Office of Security. That Office has provided evidence in the form of an explanatory letter dated 4 August 2005 which it has asked us not to release into the public domain and which I attach herewith (not printed). In accord with that specific request, I would be grateful if you could keep this NATO letter private.

On a second point, the report recommends that the UK should be playing a full part in all major EU and NATO exercises.

I agree with the broad thrust of this recommendation and have accordingly written to Ministerial colleagues to ask them to identify those resources which might be made available to support appropriate multi-national exercises.

Finally, when giving evidence to the Select Committee, I made a commitment to visit the area of the 2012 Olympics Games; I plan to do this in June.

*7 May 2009*

#### GOVERNMENT RESPONSE

The Government warmly welcomes the Report and its findings. This paper outlines the Government's response to the Committee's specific recommendations.

##### *Committee Recommendations*

##### Coordination of EU early warning mechanisms

**Para 19. We believe the European Union, and in particular the Commission, should keep a watchful eye on the interfaces between the many existing alert mechanisms to ensure that they remain relevant and effective, and should resist any further proliferation. Coordination of the coordinators should be a priority.**

The Government agrees that duplication and inefficiencies should be avoided. We continue to work closely with EU partners to ensure that there is no unnecessary creation of new alerting and early warning mechanisms which could complicate or duplicate existing arrangements. We keep in mind that the situations which the alert mechanisms address are time-critical and require rapid action. Therefore, we are continuously looking at efficiently developing the existing mechanisms rather than creating new structures which could hamper the process.

##### Improving communication and cooperation between MIC and EADRCC

**Para 25. If, as appears, the stumbling block is political reluctance, the Government should emphasise to those States which continue to have concerns that the two bodies, instead of duplicating their work (with the financial consequences this entails), would do better to support and complement one another.**

The Government shares the Committee's view on this. We continue to stress both bilaterally and in relevant inter-governmental fora the importance which we attach to greater cooperation and complementarity in the work of the MIC and EADRCC. Whereas there is still room for improvements in this area, it is important to recall that there are positive developments in the relationship between the MIC and the EADRCC. Indeed, both organisations now exchange relevant information on disasters when they are active in the response.

**Para 26. The overall aim should be, in this as in other areas of policy, to ensure a much closer working relationship between the EU and NATO than has ever existed in the past. We would hope that the NATO 60th anniversary summit in Strasbourg in April could endorse that objective.**

The Government shares the Committee's view. We consider a closer working relationship between the EU and NATO to be highly desirable. In the specific field of civil protection, a country stricken by disaster may seek assistance from both organisations. It is therefore imperative that we co-operate fully to ensure that assistance is provided efficiently and effectively. We will continue to support and promote closer EU—NATO working relations. We welcome the agreement to plan for a joint NATO—EU crisis management exercise in 2010.

More broadly, the Government believes that NATO and the transatlantic relationship remain at the heart of European defence and security. The December 2008 Review of the European Security Strategy makes that point strongly. NATO and the EU must be mutually reinforcing, rather than seeking to duplicate, challenge or undermine each other; and we welcome the clear public statements of President Sarkozy of France that the two organisations are complementary. The European Council of December 2008 reaffirmed the goal of strengthening the strategic partnership between the EU and NATO, and the setting up of an informal EU-NATO high-level group to improve practical and operational cooperation between the two organisations.

Co-operation between the EU and NATO on the ground in Bosnia and Kosovo has been good, but is less so in Afghanistan: we will continue our efforts in both organisations to find practical solutions to this problem. We will continue to work with Allies and European partners to further this goal.

Heads of State and Government agreed at NATO's 60th Anniversary Summit that NATO and the EU share common values and strategic interests. In this light, NATO and the EU are working together and side by side in key crisis management operations and are cooperating *inter alia* in the fight against terrorism, in the development of coherent and mutually reinforcing military capabilities, and in civil emergency planning; and they will continue to do so. NATO recognises the importance of a stronger and more capable European defence, and welcomes the EU's efforts to strengthen its capabilities and its capacity to address common security challenges which both NATO and the EU face today. These developments have significant implications and relevance for the Alliance as a whole, which is why NATO stands ready to support and work with the EU in such mutually reinforcing efforts, recognising the on-going concerns of Allies.

We are also willing to explore ways to further intensify work in the framework of the NATO-EU Capability Group. Success in these and future cooperative endeavours calls for enhanced mutual commitment to ensure effective methods of working together. We are therefore determined to improve the NATO-EU strategic partnership, as agreed by both organisations, to achieve closer cooperation and greater efficiency, and to avoid unnecessary duplication in a spirit of transparency, respecting the autonomy of the two organisations.

The Situation Centres of NATO and the EU

**Para 30. The Government should look into NATO policy on security clearance. If NATO has genuine concerns about EU security clearance, those concerns should be declared and addressed. But unless there are good arguments to the contrary, the criteria used to address the security clearance of individuals should be the same whether they work for national Governments or international institutions.**

The Government is clear that NATO and EU policies concerning security clearance are robust and appropriate. The UK is an active participant in NATO and EU (Council and Commission) Security Committees and every effort is made to ensure consistency between the policies developed by these bodies and HMG policies as set out in the Security Policy Framework (<http://www.cabinetoffice.gov.uk/spf.aspx>).

International Organisations which have the legal capacity to produce, exchange and store classified Information develop security regulations governing access to and handling of such information. Personnel Security Clearance (PSC) procedures are an important aspect of these regulations. Whilst PSC procedures are based on the national laws and regulations of the Member States, the unique circumstances of each Organisation (including its legal construction and organisational structure) may necessitate differences between PSC procedures and, sometimes, additional checks to those undertaken for national PSCs.

PSCs are specific to the Organisation and the cleared individual commits to protect information that is marked as belonging to that Organisation. Any security breaches may be handled in accordance with that entity's disciplinary procedures and under national laws. Each Organisation requires its own PSC to be issued; an individual may hold more than one PSC (national, NATO, EU); and PSCs are not interchangeable. In addition, the implications of potential conflicts of interest may vary significantly between Organisations, as may the appetite to accept and manage any security risks identified during the PSC investigation. The criteria used to assess NATO and EU PSCs meet common minimum standards agreed by all Member States in each organisation, and are fully compatible with the respective national standards.

NATO courses are by definition "NATO Eyes Only"; some have been developed for Non-NATO Entities; and some have been made releasable to Non-NATO Entities. Individuals serving in EU capacity/status can only attend Courses designated or made "Releasable to the EU". This has no connection with PSC. The NATO Office of Security has advised that there are no restrictions from a security clearance aspect on the attendance of EU Situation Centre officials attending the NATO School at Oberammergau.

The Government has written, under cover of a separate letter, with further information detailing the relevant policy.

UK participation in training exercises

**Para 35. Holding similar exercises at similar times can bring little added benefit, and is wasteful of financial and other resources. We urge the Government to work for much better coordination of the timetables for exercises.**

The Government agrees that greater coordination of international and national exercise plans could in principle facilitate our active deployment of participating teams. We will work with EU and NATO partners to improve coordination of exercise timetables among Member States.

**Para 36. This is a country more susceptible than most to terrorist attacks, including perhaps CBRN attacks. The United Kingdom should be playing a full part in all major EU and NATO exercises. We find the current level of United Kingdom participation unacceptably low.**

The Government welcomes the recommendation to raise UK participation in major multi-national exercises. Government attaches great importance to preparedness for terrorist attacks including CBRN incidents, and where practicable to participating actively in those exercises which can best add value by testing both our capabilities and those of our international partners. The government agrees that participation in multi-national exercises can add value, for example by promoting the inter-operability of resources of participating states, when it takes the form either of deploying active teams or of contributing staff who direct the exercise. We agree that it is desirable to deploy active teams to major multi-national exercises. Where appropriate, we are working actively with Departments to explore suitable team deployment to future exercises.

Security at the 2012 Olympics

**Para 42. We do not believe that it is too soon to involve the MIC in preparations for security issues, not just within the Olympic venue but also in the surrounding boroughs. We urge the Government to contact the MIC without delay to begin work on back-up support for our national security arrangements, even if a formal request for assistance is not needed until nearer the time.**

The Government (and the Commission) agree that the MIC may have a useful role to play in the run up to and during the Games period, for example in facilitating the sharing of information on the availability of civil protection assets held by member states for mutual aid. Similarly, it may also have a role to play in facilitating the exchange of experience and good practice between Member States around civil protection issues building on, for example, France's experience hosting the Rugby World Cup, and Greece's experience with the 2004 Olympic Games.

In giving evidence to the Committee, the Commission noted that it would not expect a request for potential assistance via the MIC at this relatively early stage: for other recent major international sporting events abroad in the EU the MIC had only been in contact with national authorities a few months in advance. However, officials in the Cabinet Office are already in regular contact with colleagues in the EU, including the Commission officials responsible for running the MIC, to discuss a broad range of emergency preparedness issues, including preparations for the 2012 Olympic and Paralympic Games.

As part of the Olympic and Paralympic Safety and Security Programme, work is in hand to identify Games-time demand for civil protection assets, particularly for niche capabilities, and how best to ensure that any potential shortfalls are met. These plans are at an early stage, but at present the Government does not envisage a need to deploy overseas assets in an operational security role at the Games.

Finally, it is important to recognise that the MIC provides a mechanism to share information relating to civil protection assets to assist in the response to an emergency. It has no direct function in supporting national security for the UK or any other Member State, and it is misleading to suggest that it does.

**Letter from the Chairman to the Rt Hon Tessa Jowell MP, Minister for the Cabinet Office,  
the Olympics and London and Paymaster General**

Tom Watson MP, who was then the Minister responsible, wrote to me on 7 May 2009 to give the Government's response to the report of the European Union Committee on Civil Protection and Crisis Management in the European Union (6th Report, Session 2008–09, HL Paper 43). The response has now been considered by the Select Committee and by Sub-Committee F, which conducted the inquiry. In the course of that inquiry the Committee heard oral evidence from Mr Watson.

Two points arise from the Government's response on which we would be grateful for your further comments. The first relates to paragraphs 28–29 of the report, and the recommendation in paragraph 30, dealing with security clearance of officials working for EU SitCen, and its application to the activities of NATO. This passage of your response did not seem compatible with the evidence we received from Mr Johnny Engell-Hansen from the Council Secretariat and which appears at Q 104 of the oral evidence annexed to the report. We put this to him, and I attach his comments. It still seems to us that NATO are declining to accept security clearance done on their behalf and on behalf of the EU by the services of a State, which is a member of both NATO and the EU. I would be grateful for your comments on this.

Mr Watson said in his letter: "I made a commitment to visit the area of the 2012 Olympic Games; I plan to do this in June". Our Clerk pointed out to the Minister's Private Office that it was not so much the venue of the Olympics that the Committee wished him to visit, as the surrounding boroughs, and this is what he undertook to do: see QQ 87–90 of his evidence. We hope that, following Mr Watson's departure, you (with your responsibilities for the Olympics) will feel able to honour that commitment.

25 June 2009

## 7TH REPORT: THE UNITED KINGDOM OPT-IN: PROBLEMS WITH AMENDMENT AND CODIFICATION

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

On 25 February 2009 the Committee heard oral evidence from Meg Hillier MP, the Parliamentary Under-Secretary of State at the Home Office, and three of her officials concerning proposals from the European Commission to amend three pieces of legislation and one proposal for codification in the area of Justice and Home Affairs.

The subsequent report highlighted concerns surrounding the application of the United Kingdom's opt-in protocol, especially given the Government decision, notified to you on 6 March 2009, not to opt-in to the Asylum Reception Conditions proposal.

#### ASYLUM PROPOSALS

Paragraphs 18 and 19 of the Report conclude that, in the view of the Committee, 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.

Your Committee provided the Commission with a copy of your report. We understand that the Commission will respond to you directly. At the time of writing this response Commission has yet to reply.

The Government agreed in light of the concerns raised by the Committee to seek clarification and may provide further comments upon sight of the Commission's response.

However, having taken legal advice, the Government remains of the view that the UK will cease to be bound by the old measure once the new one has been adopted. This is because the old measure will have ceased to exist and will no longer form part of the *aquis*.

That would mean that the standard of reception conditions provided to asylum seekers would revert to being a matter for UK law to determine. Nevertheless, Government intends to maintain the existing standard of reception conditions provided to asylum seekers.

An update on negotiations for the Reception Conditions Directive, Dublin and Eurodac Regulations and the European Asylum Support Office are contained in our replies to the Committee's letters of 18 May to Phil Woolas MP in parallel response.

#### CODIFICATION OF LEGISLATION

We agree with the Committee that this is a very complex issue, as they note in paragraphs 27–29. All parties understand this. The very complexity would seem to run counter to the aim of codification, namely to produce the law in a more accessible and easily understood format without in any way changing its substance. The complex drafting in these unusual circumstances, in which the UK has opted in to some but not all measures being codified, would appear to make this proposal and other similar proposals unsuitable for the codification process.

The Commission is currently considering how to deal with the codification proposal in light of the difficulties that have become apparent and we have raised informally with the Commission the Committee's suggested solution at paragraph 30. We have not received a definitive response from the Commission on the withdrawal of the proposal. However we note the proposal has not been progressed at the Codification Working Group and a revised text has not been produced. Due to this issue not being resolved the UK has not opted in. We will continue to press for this matter to be formally resolved and will keep the Committee updated.

3 June 2009

**Letter from the Chairman to Phil Woolas MP**

Thank you for your letter of 3 June 2009 responding to this report. Your letter was considered by Sub-Committee F, which carried out the inquiry, on 24 June, and by the Select Committee on 14 July.

On the question of the repeal and re-enactment of the Asylum Reception Directive, we note that your legal advisers have not changed their views. Nor have we. We continue to believe that there is some doubt as to whether the current version of the Directive will, when repealed, cease to apply to the UK, given that the repealing measure will not apply to the UK.

We sent copies of the report to the Commission, both formally to Vice-President Wallström, who deals with liaison with national Parliaments, and also to the officials involved in DG JLS. As you say, the Commission has yet to reply. When we do receive its response, we look forward to hearing your further views.

You do not mention the problem caused by the fact that the two new Regulations which will constitute the Dublin system, into which the Government has opted, will refer to provisions of the new Reception Directive which will not apply to the UK. Perhaps you could let us know how you intend to handle this matter in the course of the negotiations.

We seem to be in agreement that the Commission proposal on codification cannot proceed in its current form, and are grateful to you for raising with the Commission our suggestion that there should be an agreed technique for drafting codifications of measures where some of them apply to the UK and some do not. We look forward to hearing from you and from the Commission about how this progresses.

From our separate correspondence on the policy issues surrounding the three asylum proposals, you will be aware that we have cleared the EURODAC proposal (document 16934/08) from scrutiny, but continue to keep documents 16913/08 (Reception Directive), 16929/08 (Dublin II) and 5256/09 (Visa codification) under scrutiny.

15 July 2009

**Letter from Phil Woolas MP to the Chairman**

Thank you for your letter of the 15 July 2009.

As you note, we continue to hold a different view to yours on the consequences of the repeal and replacement of the Reception Conditions Directive. Like the Committee I am interested in the Commission response to your report. We shall of course provide the Committee with our views once we have received a copy of their reply.

**ASYLUM PROPOSALS**

In your letter you refer to a possible *“problem caused by the fact that the two new Regulations which will constitute the Dublin system, into which the Government has opted, will refer to provisions of the new Reception Directive which will not apply to the UK.”*

I take it that your reference to the two Regulations which refer to the Reception Conditions Directive is to the Dublin and Eurodac Regulations. That being the case then I would note that only reference to Reception Conditions in the Eurodac Regulation is included in the Commission’s Explanatory Memorandum and not in the Regulation itself, as this instrument deals only with the taking, storage, comparison and transmission of fingerprints.

The current draft of the Dublin Regulation does contain references to what will be the new Reception Conditions Directive—in Articles 27 and 31. This issue has not been raised in negotiations to date.

Articles 27(10) and 27(12) purport to require that standards set out in the Reception Conditions Directive be applied to detainees held in accordance with the Dublin Regulation. Articles 31(2) and 31(3) are part of a mechanism under which transfers under the Dublin Regulation may be suspended by the Commission, including where the Commission considers that circumstances may lead to a level of protection which is not in conformity with the Reception Conditions Directive.

In both cases, we consider the cross referencing to be unacceptable. Our view is that safeguards for applicants subject to the Dublin Regulation should be contained in the Dublin instrument itself, and that a suspension provision which could be triggered by a failure to adhere to standards which do not bind all participating states is nonsensical. Accordingly we will be seeking to negotiate these cross-references out of the current proposal.

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#### CODIFICATION OF LEGISLATION

The Regulation has been proposed by the Commission under an inter-institutional agreement for codifying (i.e. consolidating) existing legislation. It consolidates three existing Regulations on the uniform visa format. The UK participated in the parent Regulation 1683/95 and in the amending Regulation 334/2002, but did not participate in a further amending Regulation 856/2008. However, the current draft provides that the UK will not be bound by the proposed Regulation in its entirety.

As a Schengen building measure related to part of the *acquis* in which the UK does not participate, it is more likely than not, following recent ECJ judgments that the UK would in any event be excluded from being able to participate in the codified measure.

We understand that the Commission intend to withdraw the proposal for a codified Regulation on the uniform format for visas; although this has not yet been confirmed from Brussels. We will continue to press for this matter to be formally resolved and will keep the Committee updated.

*10 September 2009*

#### 9TH REPORT: PROCEDURAL RIGHTS IN EU CRIMINAL PROCEEDINGS—AN UPDATE

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

Thank you for your recent report on EU procedural rights. I am very grateful for a renewed opportunity to discuss this important topic, especially in light of the emphasis which will be placed on this subject under the Swedish Presidency.

I note the Committee's enduring support for a meaningful and worthwhile measure that will enhance minimum standards of criminal procedural rights across the EU.

We agree that action at EU level is needed in this area and I should reiterate the Government's commitment to driving up criminal procedural law standards throughout the EU. We believe that the underlying aim of such action should be to make a real and tangible difference to the lives of our citizens. We believe that action needs to be tailored to solving real problems that are identified at EU level and should improve cross-border co-operation.

We understand that Sweden plans to present a "road-map" for future work on protection of suspected and accused persons in criminal proceedings during their Presidency, setting out priority areas to be considered by the Council and the Commission. We welcome this initiative. A step-by-step approach to the issue will ensure both that there is a proper analysis of where there are problems, and that action is focused on solving them. For this reason, whilst the Government agrees that the rights set out in the third to sixth bullet points of paragraph 11 of the Committee's report are all important elements relating to the protection of the accused, it is unable at this stage to give a view on whether action at EU level is needed in relation to each of these rights. We do, however, agree that there should be an urgent analysis at EU-level of the need for action in each of these areas.

We also understand that the Commission intends to propose legislation and recommendations in the area of interpretation and translation in criminal proceedings at the beginning of the Swedish Presidency. We are keen to read the Commission's impact assessment on this subject to understand fully the scope of the problem. However, our understanding is that there is evidence of a problem, and consequently we welcome action in this area.

We should also say that, as one of the only Member States to audio-record police interviews of suspects, we are keen to discuss with our EU partners the benefits of EU-wide adoption of this practice.

The Government wishes to take further time to consider the Committee's recommendation that action should cover a wide range of offences. Our initial view is that this work needs to be approached on a case-by-case basis and the scope of the action will depend on the particular problem which it is seeking to solve. This is also the case in relation to the issue of whether a standard should be confined to those who have been charged—although there is a further complication here, namely that the concept of "charge" is unfamiliar to many Member States.

I welcome the fact that the Committee, like the Council of Europe, shares our view that it is important to ensure that any legislation in this area should be consistent with the ECHR and not result in conflicting interpretations of procedural guarantees for defendants by the Strasbourg and Luxembourg courts. I agree we need to consider where and to what extent such a measure would go beyond the obligations set out in the Convention.

We look forward to continuing close dialogue with the Committee as matters develop in this area over the course of the next few months.

25 June 2009

#### 10TH REPORT: RECAST OF THE FIRST RAIL FREIGHT PACKAGE

##### **Letter from the Rt Hon Sadiq Khan MP, Minister of State, Department for Transport, to the Chairman**

I am writing to set out the Government's response to Sub-Committee B's report on the Recast of the First Rail Freight Package published on 2 June 2009. The Government welcomes this report and commends Sub-Committee B on its thorough inquiry into how the First Railway Package needs to be amended.

The Government believes that the key principles of the First Railway Package have been transposed properly and comprehensively in the UK. There is a clear functional and structural separation of infrastructure management from train operations. Capacity allocation and charging work in a transparent and non-discriminatory manner, permitting all operators equitable access to the network. We have a functioning regulatory system with a well-resourced, independent regulator, the Office of Rail Regulation (ORR) who has comprehensive powers of economic and safety regulation.

According to the European Commission's 2006 report on the implementation of the First Railway Package, whilst Member States have formally transposed the rail access Directives in national law, a number of important provisions have not been implemented effectively and correctly. From the fact that in June 2008, the Commission issued letters of formal notice for alleged infringement of the First Railway Package to 24 Member States, it appears that this situation may not have improved. The Commission published a table summarising 24 categories of alleged infringements by Member States. Some of the categories alleged not to have been transposed appropriately by a significant number of Member States included:

- the lack of an efficiently working regulatory regime, including insufficient independence and lack of powers; (20 Member States);
- essential functions such as capacity allocation and charging continue to be performed by incumbent railway undertakings; (7);
- insufficient management independence for incumbent railway undertakings; (5);
- the infrastructure manager does not determine the infrastructure charges; (5);
- insufficient incentive for the infrastructure manager to reduce infrastructure costs and access charges; (11);
- the absence of a performance regime to encourage infrastructure managers to minimise disruption; (16); and
- insufficient procedure to determine international train paths. (5).

The Government supports the Commission's determination to ensure correct implementation and enforcement of existing EU legislation by way of infraction proceedings. The UK received a letter of formal notice dated 26 June 2008 from the Commission for alleged non-conformity with the First Railway Package. The alleged infraction was very much a minor technical issue and concerned the time taken by the regulator to approve track access agreements and to hear appeals. In our reply to the Commission of 8 August 2008, the Government stated its belief that our procedures are fully consistent with Directive 2001/14/EC. In subsequent informal meetings with the Commission, we have heard that they were content with the UK's response. However, we are still awaiting formal notification.

With regard to the Commission's imminent review of the First Railway Package, the Government agrees with the recommendation in the Report that the Commission use the recast to ensure that Infrastructure Managers treat all rail freight operators fairly by means of the full separation of rail Infrastructure Managers from railway undertakings. There is evidence that the separation of infrastructure management and train operations, as transposed and practised by a number of Member States in everyday operational situations, has not achieved the desired intention of ensuring transparent, equitable and non-discriminatory access to rail infrastructure for non-incumbent, independent operators. Any recast of the First Railway Package needs to address this lack of unbundling in order to create what is probably the most important pre-condition to allow competition to take place under transparent and non-discriminatory conditions.

The Government also agrees with the conclusion in the Report that more detailed provisions about the powers and remits of regulatory bodies are needed. The Government believes that national regulatory bodies should be given the necessary powers, independence, funding and resources in order to undertake their roles consistent with the spirit of the First Railway Package. This is how we have configured the regulatory system

in the UK. The recast of the First Railway Package needs to address this heterogeneity of the regulatory approach across Europe national regulators need to be empowered to become effectively national enforcers of both the letter and the spirit of the First Railway Package.

The Report also recommends that the recast should include a requirement that Regulatory Bodies should be independent of government. The Commission has already sought to address the issue of independence of Regulatory Bodies by means of Article 2.5 of Directive 2007/58/EC which amends Directive 2001/14/EC. The Directive requires that “the Regulatory Body shall furthermore be functionally independent from any competent authority involved in the award of a public service contract”. Directive 2007/58/EC is part of the Third Rail Package and had a transposition deadline of 3 June 2009. Therefore, it may be too early for the Commission to say what impact this provision has had on the independence of Regulatory Bodies throughout the EU, although it is a step in the right direction. In essence, however, we agree with your recommendation that Regulatory Bodies should be independent of government,

The Report recommends that the Commission does not propose establishing an EU-level regulator. The Government agrees with this recommendation. We believe that increased cooperation between national Regulatory Bodies, with the necessary powers, independence, funding and resources, should be able to oversee cross-border services in an effective way.

The Report recommends that the Commission include in the recast mandatory definitions of which costs can and cannot be included in infrastructure charges. The Government believes that the principles of calculating track access charges differ widely from Member State to Member State. We agree that they should be clarified and be made more transparent.

The Report also recommends that the recast include a requirement for Member States to agree multi-annual contracts with their infrastructure managers. The Government is aware that in some Member States, funding remains exposed to the vagaries of annual Government budgeting. This leads to unforeseen and sudden shortfalls of funds available for infrastructure management. The consequence of this is that infrastructure managers try to recoup funding shortfalls with increased track access charges in order to balance expenditure and income. In some cases, this makes the running of rail freight operations, which often suffer from low margins, prohibitively expensive. The Government, therefore, believes that funding of infrastructure managers should be placed on a more reliable and predictable footing. The UK system of the 5-year periodic review creates the necessary continuity and stability of funding. We think it is an essential pre-condition for sound and efficient infrastructure management.

Regarding rail-related services, the Report recommends that Member States should be required to give Regulatory Bodies the power to act in this area. From a UK perspective, the Office of Rail Regulation has these powers already through measures introduced through the First Railway Package and transposed into UK legislation which have extended the opportunities for freight users to seek access to other operators’ terminals and those terminals previously exempt from regulation. In some other Member States there is anecdotal evidence that access to tracks, terminals, ports and services remains a problem for non-incumbent, independent operators and, in particular, that operators are having difficulty obtaining evidence that the charges which are quoted for access to tracks, facilities and supply of services reflect the cost of providing the service, calculated on the basis of actual use. We, therefore, support the Committee’s recommendation.

The Government fully supports the Commission in their efforts to make the international rail freight market more attractive and competitive. We also endorse the Commission’s dual-track strategy of achieving this objective: by ensuring proper and comprehensive transposition by Member States of existing legislation and by reviewing the First Railway Package with the overall aim of clarifying and strengthening the legislative framework.

We will be engaging closely with the Commission in the coming months leading up to adoption and publication of their proposals.

31 July 2009

## 12TH REPORT: EUROPEAN CONTRACT LAW: THE DRAFT COMMON FRAME OF REFERENCE

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

I am writing to respond on behalf of the Government to the House of Lords European Committee’s Report *European Contract Law: the Draft Common Frame of Reference* that was published on 10 June.

I should like to begin by saying that the Government shares many of the concerns cited in the Report. When I gave evidence to Sub-Committee E, last December, I reaffirmed the Government’s strong opposition to any move towards the harmonisation of contract law. This remains the Government’s position.

The consensus among Member States, with which the Government agrees, is that the CFR should be non-binding guidance (also referred to as a 'toolbox') for use by the European Community lawmakers on a voluntary basis as a source of inspiration or reference in the law-making process. The Government considers that such non-binding guidance would help to improve the quality and coherence of the *acquis* in the area of European contract law.

Last year, as you know, Professor Simon Whittaker, was commissioned by the Government to analyse the interim outline edition of the DCFR. The Government agrees with Professor Whittaker's analysis and conclusion, that the DCFR would not be a suitable model for a CFR intended to provide guidance to European lawmakers. Nonetheless, the Government considers that the DCFR is an impressive piece of academic work that will be one of the sources from which inspiration will be drawn for the content of the political CFR. The Government considers that a better understanding of the respective legal traditions of Member States can only help to develop better legislation.

Like the Committee, the Government doubts the value and feasibility of developing an optional instrument.

As to future developments, I note that Director-General Jonathan Faull confirmed during his evidence session that the Commission is reviewing the work done to date on this dossier before considering what the next stages should be. It seems unlikely that the Commission will produce a White Paper before late in 2010.

22 July 2009

#### **Letter from the Chairman to Lord Bach**

Thank you for your letter of 22 July. This was considered by Sub-Committee E at its first meeting following the summer recess, on 14 October.

We are grateful for the Government's response to our Report and are pleased to note that the Government's view on the CFR project continues to be close to that of the Committee. We note that the Commission is unlikely to take any significant step in this matter for at least 12 months but we would like to be informed of any developments in the Council in the meantime.

15 October 2009

### **13TH REPORT: THE REVIEW OF THE LESS FAVOURED AREAS SCHEME**

#### **RESPONSE FROM THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**

##### *Introduction*

1. The Government welcomes the Report of the House of Lords European Union Committee on the Review of the Less Favoured Areas (LFA) Scheme. We are grateful to the Committee for the work they have done in this area. This well-timed Report is an important contribution to the debate on the future of the LFA measure, and we welcome the opportunity to respond to it formally.
2. Government responses to the Committee's individual views and recommendations are detailed below, but it is worth first setting out in brief terms the Government's overall perspective on the LFA measure, and offering an update on how the Review is progressing.
3. The Government feels strongly that, as a Pillar 2 CAP measure, which sits in Axis 2 of the rural development programme, the LFA measure should have a strong focus on delivering environmental benefits. It is not intended to address socio-economic issues, which are better targeted by other rural development measures. Specifically, any use of the LFA measure should seek to deliver environmental benefits from extensive farming practices in naturally disadvantaged areas, rather than solely compensating for the economic costs of natural disadvantage.
4. In April, the European Commission issued a communication setting out their proposals for a new methodology to delimit Less Favoured Areas across Europe. As the Commission did not have the data to fully analyse the impact their proposals would have across Europe, it asked Member States to carry out domestic mapping on the basis of the new proposals. The Commission said this mapping would not constitute a 'new LFA', rather it would inform a legislative proposal which would be put forward once the Commission had received and analysed the mapping results. The Commission stressed that as well as mapping in accordance with their proposals, Member States could map and put forward alternative criteria and thresholds.
5. The Commission's proposals were discussed at three Working Groups in May, following which, at a session of the Agriculture Council on the 22 June, Member States agreed to carry out the mapping requested by the Commission. Member States now have until 31 January 2010 to carry out the requested mapping and submit their results to the Commission.

6. The UK Government welcomes any work to improve the targeting of the existing Less Favoured Area (LFA) measure, and we support the broad direction of the Commission's proposals. We are currently carrying out the requested mapping, which we will aim to complete by the autumn. We are continuing to work very closely with the devolved administrations in assessing the impact the Commission's proposals would have on the UK's Less Favoured Areas.

*Government response to the Committee's views and recommendations*

## Chapter 2: The Role of the LFA Scheme

### Committee's Views

*127. We endorse the European Commission's stance on the purpose of support for farms in Less Favoured Areas: payments should help farmers in marginal areas to continue farming where their farming activity generates public benefits in the form of positive impacts on the environment and the landscape.*

*128. We emphasise the importance of continuing to assess the public benefits obtained in exchange for this type of aid: society does not owe unconditional support to farmers wishing to farm in areas affected by natural handicaps. Indeed, we anticipate that as climate change begins to take its toll on parts of Europe, support may need to be reassessed. In some instances, currently non-handicapped areas may require additional support, while in other instances, for example where water scarcity becomes particularly acute, land may become so severely handicapped that support should be withdrawn.*

*129. We are conscious that by maintaining farming activity in marginal areas, the LFA scheme also makes a de facto contribution to preserving food production capacity, which could become increasingly important if climate change reduces production capacity elsewhere.*

*130. We recognise that farming activity in marginal areas often brings social, economic and cultural benefits to local communities and the wider public. However, measures available under the other axes of the Rural Development Regulation offer more targeted and cost-effective ways of addressing socioeconomic objectives in rural areas.*

*131. We also consider it important to recognise that neither the LFA payment nor the wider package of financial aid available to farmers in Less Favoured Areas will necessarily be sufficient to prevent a decline in farming activity in marginal and remote areas of the EU. LFA payments may exert a moderating influence, but would-be farmers' career choices are likely to be influenced by cultural and lifestyle factors as well as economic incentives. We view this as an emerging policy challenge that merits consideration as part of the wider review of the CAP post-2013.*

*132. The evidence we received suggests that LFA payments are partly being used to plug a gap created by the way in which Pillar I subsidies are delivered. The productive potential of a holding is either disregarded or, in historic-based systems, positively rewarded. Single Farm Payments also fail to reflect variation in the magnitude and significance of the public benefits delivered by continued farming activity in different settings. For these reasons, we see a distinctive role for the Less Favoured Areas scheme, which offers a means of channelling support in a much more discriminating way, to those farms that are least able to earn compensation from the market, yet contribute most to the maintenance of the landscape.*

### Government Response

9. The Government agrees with the Committee that the LFA measure must be linked directly to the delivery of public benefits. We also recognise, as the Committee notes, that climate change is likely to have a major impact on agriculture and the environment in Europe, and that this needs to be borne in mind by policymakers to make sure rural development programmes evolve to delivering optimal public goods in this changing context. This will be a complex and difficult process.

10. The Committee notes that by maintaining farming activity in marginal areas the LFA scheme makes a *de facto* contribution to preserving food production capacity, and argues this could become increasingly important as food production capacity decreases globally due to climate change. While the impact of climate change is difficult to predict, the Government does not envisage farms in the Less Favoured Areas becoming key drivers of food production capacity across Europe, although it acknowledges the role of LFA farmers with the UK in producing sheep breeding stock for lowland producers. Agricultural productivity in the Less Favoured Areas is typically much lower than elsewhere, and European food production capacity rests primarily with farmers outside the Less Favoured Areas. Increasing production in the Less Favoured areas would have a relatively small impact on overall production capacity, while resulting in an intensification of farming which could have a negative impact on the environment and landscape.

11. We agree with the Committee that the best way to address socio-economic objectives in rural areas is through using the measures under the Rural Development Regulation that are specifically designed for this purpose, rather than attempting to do so indirectly through agricultural support mechanisms.

12. The Government's role in relation to agriculture support is to promote the delivery of public benefits not otherwise provided by the market. It is not the role of government to prop up farming in areas where agriculture is fundamentally uneconomic simply to maintain agricultural production. The importance of farming in these areas should be judged by the quality and quantity of public benefits arising from agricultural production. A future CAP should focus on delivering these benefits, not simply arresting a decline in farming activity. Under the UK Government vision for CAP reform we would like to see Pillar 1 of the CAP eliminated, with EU spending on agriculture based on the current Pillar 2 and delivering public benefits, particularly for the environment, that the market would not otherwise provide. The future of the LFA needs to be considered within this context and therefore not as a substitute for Pillar 1 support. As an Axis 2, Pillar 2, measure, it is designed not as income support related to the Single Payment Scheme, but to pay for the delivery of public benefits. It is worth noting that in the UK, the LFA measure makes a relatively small contribution to farmer income overall.

13. As we approach discussion on the future of the Common Agricultural Policy (CAP) Member States will be presented with an opportunity to take a more holistic review of the LFA measure and examine its role within the CAP framework; to re-examine its objectives; and to ensure that they are delivered in a cost-effective way. This will be an important debate.

### Chapter Three: The Content of the Review

#### Committee's views and recommendations

*133. The Court of Auditors was strongly critical of the existing designation system which has led to a proliferation of criteria across the European Union. In order to provide consistency and transparency, a common set of biophysical indicators to identify disadvantaged areas based purely on natural handicap is welcome.*

*134. The European Union is, however, geologically and meteorologically diverse, a diversity which leads to a range of handicaps that must be adequately captured in the common set of criteria. The criteria proposed by the Commission in its Communication provide an adequate basis for Member States to map the areas with natural handicaps across the EU. When assessing the maps that result, it will be critical to examine whether the specific nature of the UK and Irish maritime climate is adequately captured by the proposed criteria. At that stage, it may be necessary to press for the inclusion of additional criteria such as field capacity days or a suitable proxy.*

*135. The establishment of indicators and the requirement to map is meaningless, however, without the appropriate data. While some Member States may have all of the necessary data to hand, we note that extra efforts may be required of others to ensure that the mapping can be completed within the Commission's deadline. We recommend that the Commission pays careful attention to the availability of data in each Member State and offers assistance to Member States where necessary. Mapping down to land parcel level should be encouraged where such data is available, as this will facilitate the very targeting of aid that the review is intended to promote.*

*136. Diversity of national and regional circumstances is such that it will be necessary to fine-tune the designation that results from application of the common biophysical criteria, but we see a danger that Member States may seek to use the fine-tuning process to replicate existing LFA designations. We therefore endorse the approach advocated by the UK Government, whereby national and regional authorities would be permitted to fine-tune designations only in order to exclude areas where handicaps have been overcome.*

*137. We see a role for the Commission in monitoring this process, and ensuring that the criteria used for fine tuning are related to the objectives of the scheme as laid down by the 2005 Rural Development Regulation.*

*138. We recognise that in many parts of the EU, the LFA scheme is still used to pursue socio-economic objectives. It is our view, however, that the policy levers available under the other axes of the EAFRD—and indeed under other EU, national and regional schemes—are better suited to that task, and that the LFA scheme's implementation must be brought into line with its formal objectives. We consequently support the proposed move away from socioeconomic indicators of disadvantage towards designations based purely on natural handicap.*

*139. If the objectives of the scheme as set out in the Rural Development Regulation are to be met, a common EU-level framework for eligibility criteria is in our view essential. Without such a framework, the scheme risks being undermined by the imposition of a multitude of additional and possibly irrelevant eligibility criteria.*

*140. The EU-level framework must strike a balance between enforcing the scheme's objectives and affording sufficient flexibility to Member States and regions. We welcome the Commission's recognition of the need to clamp down on the use of criteria deemed irrelevant to the objectives of the scheme or contrary to the international commitments of the EU.*

141. *We regret the Commission's reluctance to propose an EU framework for eligibility criteria at this stage. We consider that the focus of such a framework should be on extensive farming systems, the exclusion of any restrictions irrelevant to the objectives of the measure, and WTO compatibility. It should not rule out mixed farming. Reaching agreement among Member States on such a framework is, however, likely to prove challenging.*

142. *We expect that the new method of calculating LFA support will improve transparency and facilitate scrutiny of Member States' payment practices. However, we do not expect that adoption of the formula will eliminate overcompensation in and of itself. In order to address the Court of Auditors' concerns fully, the European Commission must take responsibility for monitoring Member States' implementation of the formula, and for challenging their calculations where necessary.*

143. *We recognise that there will continue to be considerable variation in LFA payment levels across and within Member States. Although this could be viewed as a distortion of the Single Market, it is in our view an inevitable corollary of allowing individual authorities to exercise discretion in how they deploy the rural development funding they receive through the EAFRD, including the freedom not to operate an LFA scheme at all. We believe that this level of discretion is justified on the grounds of subsidiarity, and that the minimum and maximum payment levels set by the Council should exert an additional moderating influence.*

#### Government response

14. As noted in the introduction, we welcome the broad direction of the Commission's review, and the move away from a situation where Member States use a very wide range of criteria to designate their LFA, towards a far more consistent and transparent EU-wide designation. We also support the move away from socio-economic indicators of disadvantage towards criteria based on biophysical criteria and natural handicap.

15. The UK has agreed to carry out the mapping the Commission has requested according to the proposals the Commission set forth in their April Communication. The Committee is absolutely right that the eventual designation rules must account for the maritime climate of the UK. We are working closely with the Commission to establish the best means of doing this. We also agree with the Committee that Member States should be allowed to map their Less Favoured Areas at parcel level if they wish.

16. There is a need for some form of fine-tuning to be carried out in order to exclude those areas where the natural handicap affecting that area has been overcome, such as Champagne in France, or East Anglia in the UK. We are continuing to explore what the best means of fine-tuning might be for the UK.

17. At the third Working Group held in May the Commission announced its intention to establish an EU-level framework for eligibility criteria. The Government is open to the idea of a common EU-level framework for eligibility criteria. Within this framework Member States must be able to set their own eligibility rules, and must retain the flexibility to vary these rules from region to region (thus allowing different approaches to operate in each of the four UK administrations).

18. Discussions of what this eligibility framework might look like are at an early stage. The Government supports the Committee's view that the framework should focus on WTO compatibility and should support the objectives of the LFA measure, by excluding criteria or restrictions irrelevant to those objectives. We think that LFA support should be targeted exclusively at extensive farming which delivers the most environmental benefits.

19. In the UK the current LFA designation often coincides with areas of high nature value. For instance in England, 86% of National Parks are within the LFA. However, there is no direct link between the LFA designation and land of high environmental value, and the nature of the LEA designation varies considerably across different Member States. While the Commission's proposals will resolve the second issue by establishing common criteria to be applied uniformly across Europe, they will not resolve the first, in that the importance of the land in environmental terms does not feature as part of the proposed designation criteria. We would like to see exploration of how LFA eligibility rules can be further narrowed to focus on naturally disadvantaged areas that are also of high environmental or landscape value, and how it can be directed further towards the delivery of environmental benefits. The Government will be developing our thinking on the eligibility framework over the next few months, and seeking to influence the Commission's proposals thereafter.

20. The payment formula for the Less Favoured Area measure is not open to debate in this Review with the reform having been settled with the agreement of the 2005 Rural Development Regulation. Our understanding is that the Commission does not now intend to introduce the new payment formula, or the other elements of the 2005 Rural Development Regulation, until the new designation is brought into force at the beginning of the next Rural Development Programme.

21. While recognising—as the Committee does—the limitations of the new formula, which is based on the income forgone and costs incurred by a farmer in the Less Favoured Areas compared to their counterparts in a non-LFA area, the Government does think it will go some way to making LFA payments across Europe more transparent and consistent, particularly because the elements that are being compensated must be verifiable. The new payment formula will be a useful guard against overcompensation (though it will not absolutely guarantee that overcompensation does not occur).

22. As we noted in the evidence we gave to the Committee, it is important that Member States have the flexibility to pay below the level of costs incurred and income forgone. The LFA measure does not exist in a vacuum. It is part of a number of rural development measures, and Member States will choose to use, or not to use, the LFA measure and will set their payment rates according to the overall objectives and shape of their rural development programme.

## Chapter 4: Implementation and Oversight

### Committee's Views

*144. Many of our witnesses asserted their conviction that the measure has made a critical difference to preventing land abandonment by maintaining farming activity, pointing to the contribution that LFA payments make to the financial viability of farming businesses. However, this does not in itself establish that LFA payments are either necessary or sufficient to prevent abandonment. Like the Court of Auditors before us, we have therefore been unable to draw firm conclusions about the effectiveness of the LFA scheme in meeting its objectives.*

*145. While we recognise that it will be difficult to disentangle the effect of the LFA scheme from other financial aid made available to farmers, we believe that the Commission and the Member States must commit to assembling the evidence base with which the scheme's effectiveness as a mechanism for protecting the environment and the landscape might be assessed and kept under review. We anticipate that the scheme's performance against its objectives will need to be evaluated regularly, both by the Commission and at a local level, to establish whether environmental and landscape benefits continue to be delivered, and whether it is still appropriate to offer support where natural handicaps are either exacerbated or mitigated by climate change.*

*146. We urge the Commission to ensure that the indicators used to assess the impact of the LFA measure reflect its objectives, and can be readily applied by Member States. While we recognise that some Member States may need time to develop systems for collecting the relevant data, we believe that in the medium term, the Commission should consider temporary suspension of payments where evaluation reports are unsatisfactory or not forthcoming.*

### Government Response

23. Wherever public money is spent, it is vital that governments can ascertain what the effects of that expenditure are. Whilst recognising the difficulties in assessing the impact of LFA support, we share the Committee's view that more must be done by the Commission and by Member States to evaluate the effectiveness of the LFA measure. This evidence-based approach is at the heart of effective policy-making, and is particularly important with the review of the Common Agricultural Policy approaching.

24. Further work is needed to establish a robust system of monitoring to ensure LFA schemes across Europe meet the objectives of the measure. We will be working with the Commission, Member States, and the devolved administrations on this, as with all the other aspects of the Review of the Less Favoured Areas raised by the House of Lords European Union Committee, over the months to come.

## 14TH REPORT: THE FUTURE OF EU FINANCIAL REGULATION AND SUPERVISION

### **Letter from Lord Myners, Financial Services Secretary, HM Treasury, to the Chairman**

I am writing to provide the Government's response to the report with evidence of the House of Lords Select Committee ("the Committee") on the European Union, on the future of financial regulation in the European Union.

The responses to the Committee's recommendations that were directed towards the Government are provided below.

#### COMMISSION PROPOSAL ON ALTERNATIVE INVESTMENT FUND MANAGERS

82. *The consensus of our witnesses was that the influence of alternative investment funds in the financial crisis was limited and we recommend that the Government should work to prevent proposals for EU regulations from stifling these markets. There is currently no pressing requirement for rapid EU legislative action in this area.*

The Government will certainly work to prevent EU regulation from stifling these markets. This is why we are conducting a process of detailed and intensive consultation with affected firms to ensure we understand fully the potential impacts of the proposal and can develop where necessary alternative approaches which maintain a high level of regulatory protection but which do not impose unnecessary burdens.

#### THE REFORM OF MACRO-PRUDENTIAL SUPERVISION

143. *We conclude that the Government differs from many witnesses, including M de Larosière, in its version of the role, powers and structure of a new EU-wide macro-prudential body. It appeared to us that the Government's thinking on those important issues was less than fully developed. We recommend the Government clarify its thinking and proposals speedily in order to contribute most effectively to the discussions on the development of a new macro-prudential supervisory structure.*

The Government believes that Europe's ability to identify macro-prudential risks needs to be enhanced to secure financial stability. The Government therefore supports the agreement at the June 2009 European Council to create a new European Systemic Risk Board (ESRB). This would complement the international model prepared by the IMF and FSB, which assesses macro-financial risks and proposes policy responses, by focusing in a greater level of detail on the situation in Europe. The ESRB could assess the build up of risks within the EU, the EU's exposure to vulnerabilities and trends in the global economy, and actions that European institutions and Member States could take to mitigate and address these risks. In turn, the ESRB's detailed analysis may also inform the international Early Warning Exercise.

The Government has been, and will continue to be, actively engaged with the European Commission and other Member States, to ensure that the UK's priorities are reflected in the forthcoming legislation in this area.

#### THE REFORM OF MICRO-PRUDENTIAL SUPERVISION

166. *The treaty and fiscal issues create significant problems for the proposal to upgrade Level 3 Committees into Authorities. However, the de Larosière report made a powerful case for reform when it identified weaknesses and failures of micro-prudential supervision of financial services in the single market (see paragraphs 165–166 of the de Larosière report). We agree that a debate on the powers of any new body is crucial for the reform of the structure and process of EU supervision. There is a need to reconcile the limitations of the EC Treaty and the location of fiscal authority with the need to improve upon micro-prudential supervision of the single market. We recommend the Government set out in further detail its own proposals for achieving this.*

The Government believes that Europe needs a well-regulated, dynamic and globally competitive financial sector. The UK has and will continue to play a key role in shaping the reform of the EU's financial regulatory architecture.

Europe's single market is in many areas underpinned by a strong regulatory framework.

However the crisis has identified some weaknesses and gaps in this framework where action is needed. We have seen that it is necessary to improve the quality and scope of rules applying to firms, and to ensure their proper enforcement.

The European Council, in response to the de Larosière report and recommendations from the European Commission, has agreed a far-reaching package of reforms to strengthen EU supervisory and regulatory architecture. The Government welcomes the European Council Conclusions of June 2009 in this area, which give a clear direction and framework for the legislative negotiations ahead.

The Government has set out its views on strengthening financial regulation and supervision in Europe in its recent paper Reforming financial markets.

205. *We recommend the Government to work towards an EU statement at G20 meetings and the Commission to coordinate EU regulation with international responses. The EU can play a leading role in producing well considered reforms that can provide a standard for global solutions, as long as it recognises that all regulation must be in coordination with global initiatives.*

The EU usually agrees a statement in advance of G20 meetings. The Government agrees that the EU has an important role to play and that European level regulation and supervision should be consistent with global practices, particularly in light of the fact that markets operate globally.

4 August 2009

#### 15TH REPORT: ACCESS TO EU DOCUMENTS

**Letter from Baroness Kinnock of Holyhead, Minister for Europe, Foreign and Commonwealth Office,  
to the Chairman of Sub-Committee E**

I am writing to provide a response to the report prepared by your Sub-Committee on the proposed Access to EU Documents re-cast. I would like to apologise for the delay in replying, following the debate held on the floor of the House on 15 June.

I would like to start by thanking you and the Committee for the diligence and thoroughness in which you have completed this report. As is usual for your Committee's reports, the intentions of the Commission's proposal on this dossier, and the position of the Government, have been accurately analysed and considered. I am pleased to say that we can agree on many aspects. But I wish to respond to a number of the Committee's points, and echo what my former colleague, Lord Malloch Brown, said to noble Lords in his response to the debate in June.

On Council negotiations, the draft texts of acts following key stages of negotiations and the final outcome are of course available publicly. However, as you are aware, the Government believes that there must be space to think and negotiate within the Council, before it comes to a position at each of the key stages of the legislative process. We do not believe that it is helpful, or necessary, for every part of the internal processes to be potentially open to scrutiny. In much the same way as Parliament acknowledged the need to protect the formulation of policy-making in UK in our domestic legislation, so at an EU level there is a need to discuss candidly the pros and cons of particular options.

On the issue of documents submitted to courts, the Commission has now made clear its intention that this would extend to any court. The Government has reservations about this, and is continuing to consider its position in more detail ahead of further discussion in Council Working Group. On court pleadings, I should clarify that our concern is not about Institutions' pleadings per se, but that the substance of third party pleadings can often be obtained from the content of the Institutions' pleadings. We are keen to protect those third party pleadings. Access to third parties' pleadings should be governed by the Rules of the European Court of Justice and Court of First Instance.

If details of those pleadings could be obtained from the Institutions' pleadings, this would undermine the operation of the Courts' rules. Furthermore, there is a risk that third parties may not be as open in submitting pleadings in future if they knew that there was a risk of disclosure by proxy.

With regards to legal advice provided to the Institutions, the Institutions need frank and candid legal advice in order to make informed decisions. This requires a high level of confidentiality and the Regulation must give particular recognition to lawyer-client confidentiality. The Government is concerned that not doing so may deter the legal services from giving frank and open advice, or the Institutions from seeking legal advice, which would impede the effective operation of the institutions. The High Court has recently confirmed that the equivalent Freedom of Information Act exemption recognises a strong inherent public interest in favour of protecting the confidentiality of legal advice, and we would support a similar interpretation in the Regulation.

On the issue of protecting the documents of the Member States, our principal concern is that a Member States' own freedom of information legislation should principally govern access to that Member State's documents. EU legislation should not be used to circumvent or harmonise national provisions by the back door. This is consistent with the principle of subsidiarity and avoids any conflict between national and EU law. The Government do not agree that this would restrict access. If access was sought via the Regulation and the affected Member State objected to disclosure, that objection would have to be reasoned and based upon the exceptions set out in the Regulation, and applicants would still have recourse to challenge the reasons for any refusal to grant access by the Institutions on the basis of a Member State objection before the European Courts. And, significantly, any domestic entitlement to these documents is unaffected by the Regulation.

The report also highlights concerns over the Government's position on access to personal data. The Government believes that any request concerning personal data should be considered under the Community's Data Protection legislation, which provides that personal data may be disclosed where there is a valid justification, and not access to documents legislation. This is consistent with the approach to personal data under the UK's Freedom of Information Act. The right to data protection is subsumed within Article 8 of the ECHR and the Government's concern in this respect is not one of more or less transparency but rather of ensuring one set of rules which would govern the potential release of personal data. The disclosure of personal data should be subject to consistent rules, and not differentiated merely because the data is held by one of the Institutions.

I hope that this, and Lord Malloch-Brown's response in June, assures you and your Committee of the Government's position. I will of course continue to keep the Committee informed of developments as negotiations on this proposal continue.

*12 October 2009*

**Letter from the Chairman to Chris Bryant MP, Minister for Europe, Foreign and Commonwealth Office**

Your predecessor, Baroness Kinnock, wrote to Lord Mance responding to the Committee's Report on Access to EU Documents, and provided an Explanatory Memorandum on 28 September on the application of Regulation 1049/2009I in 2008. These were considered by Sub-Committee E at its meeting of 28 October. We decided to clear document 12191/09 from scrutiny, but continue to retain under scrutiny the proposal for a new Regulation. The rest of this letter concerns this proposal.

The Government's response does not expressly address, and we should be grateful for your view, whether negotiating positions should be disclosed if there is an overriding public interest in disclosure. That of course, is the position under the domestic legislation protecting information concerning the formulation of policy-making in the UK to which you refer.

We should also be grateful if you would explain the reservations to the principle, advocated by the Committee, that courts themselves should regulate the disclosure of all documents submitted to them. We believe that if this principle were to be applied to the pleadings of all parties (including those of the institutions) then the Government's concern that the substance of third party pleadings might be exposed through the disclosure of the pleadings of the institutions would be alleviated, because the courts would have a proper overview and would be able to take a consistent approach. This would not provide absolute protection to third party pleadings, but we do not understand you to be advocating such an extreme position.

The Committee remains sympathetic to amending the proposal to achieve a high level of protection for legal advice, modelled on the approach in the UK under the Freedom of Information Act. But it notes that this Act requires disclosure of legal advice if there is a sufficient overriding public interest. The Committee would not support abandoning this test.

In the light of the response in respect of Member State documents, which envisages a role for both a Community and a national regime, the Committee would be grateful for clarification of the Government's position on proposed Article 5(2), in particular in respect of the following questions:

- Do you consider it likely that the ECJ likely would find that an institution's "appreciation" of those objections to disclosure by a Member State which are based on the exceptions in Article 4 of the proposal is limited to ensuring that the reason falls, linguistically and technically, within the terms of the exceptions set out in that Article?
- If the reason for objecting to disclosure were to fall within the scope both of the Regulation and of specific national provisions, which should apply and which court should resolve any dispute?
- Which court should deal with a challenge arising under this provision, whether brought by a disappointed Member State or applicant, and whether it concerns a refusal based on one of the exceptions in proposed Article 4 or in national legislation?

The Committee is grateful for the Government's confirmation that legislation on the protection of personal data should take priority over access to documents. Do you consider that the effect of this would be that there would be precluded from disclosure the names, titles and functions of public office holders, civil servants and interest representatives insofar as they were acting in their professional capacity in the circumstance that gave rise to the *Bavarian Lager* case?

In addition to your views on the matters outlined above we should be grateful for an update on the progress of negotiations.

*30 October 2009*

## 17TH REPORT: CODECISION AND NATIONAL PARLIAMENTARY SCRUTINY

**Letter from Chris Bryant MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman**

Thank you for your report of 21 July on Codecision and national parliamentary scrutiny. The report expertly sets out the codecision process for the layman, and will I hope help dispel some of the myths that the EU is not democratically accountable. Given that many Government Departments come into contact with the processes your report considers, it has been necessary to consult widely on our response to your report. As a result, this response is somewhat delayed, for which I apologise.

It is clear from your report that you consider the current scrutiny processes to be broadly right, but that we can strengthen them. The Government agrees with the thrust of your report, which is to ensure that the Committee is provided with information at the key stages of the process to allow for effective scrutiny, and that the processes in place are applied consistently. I shall deal with the issues in the order you raise them.

You ask that the Government provide information on changes and proposed changes to proposals, to allow the Committees time to comment before UK Ministers agree to them (paragraph 105). We consider that this is consistent with established guidance on all proposals that are deposited for scrutiny, but we will re-emphasise this point in the Cabinet Office guidance.

In those cases where legislation is adopted very quickly the Government will use the scrutiny reserve, within practical limits, to delay a decision at Council. However, if necessary, Ministers will continue to justify their actions for any override of scrutiny (paragraph 107).

On your suggestion of a cooling off period for the trilogue process (paragraph 108), the Government agrees that the Rotating Presidency system does bring more pressure at the end of a Presidency to close negotiations and deliver the Presidency programme. However, the Government does make every effort to keep the Committees informed, in good time, so that effective scrutiny can be performed. The Government would also hope that the bedding down of the trio-Presidency system would ease such pressures.

We agree that it is important that the system under which the Committees are updated on negotiations is effective and operated consistently and rigorously by all Departments. The Government can also agree that it will be important for those Departments that will gain responsibility for negotiating codecided legislation under the Lisbon Treaty (if fully ratified) to have in place effective systems for ensuring that Parliament is kept fully up to date (paragraph 110). I will therefore be writing to Ministerial colleagues, drawing out the key elements of your report, and underlining the importance of meeting our obligations to Parliament.

The Government agrees that Departments should consult the committees, on a case-by-case basis, as to whether a supplementary Explanatory Memorandum is required or whether a ministerial letter is sufficient. However, the Committees should bear in mind that re-imposing the scrutiny reserve in respect of changes made to legislation, does not guarantee that the UK will not be outvoted at Council (paragraph 113).

With regards to publicising the Cabinet Office's Scrutiny Guidance (paragraph 115), I have asked that the Cabinet Office consider this and, subject to agreement that the guidance be made available, to follow up on this point with your Clerk.

I am pleased that the Committee can agree with the approach outlined by the former Minister for Europe, Caroline Flint, that the Committees be updated where a change in a proposal has "policy implications", and I will also be asking the Cabinet Office to reflect this in strengthened guidance (paragraph 118).

In paragraph 117 you recommend that where the UK Permanent Representation to the EU alerts Departments to a change as part of the ongoing reporting within Government, that this should be a cue to further updates to the Committee. Consistent with the remarks above, I agree that Departments should update the Committee immediately where that change is "significant" i.e. that it has regard to "policy implications". Departments, as policy leads, must take their own view on whether or not that change is "significant" and inform the Committee accordingly. If there is any doubt they should consult your clerk (this would also cover any changes agreed at COREPER—paragraph 121). And, whilst accepting the Cabinet Office has a role in monitoring and enforcing the application of the guidance by departments, individual departments must take responsibility and police themselves. All Ministers will note the Committees' intentions to be more active in seeking explanations from them where their department has failed to live up to their obligations under the guidance.

We agree that the Committees should always be notified in advance when COREPER agrees to send a letter from the Presidency to the Parliament indicating Council's agreement to amendments to be proposed by the Parliament. However, this may not always be possible where the UK Permanent Representation to the EU does not know very far in advance (paragraph 123).

We also agree that Presidency compromise texts, which aim to restart stalled negotiations on a proposal or introduce changes with policy implications, should be made available to the Committee and this point will be covered in strengthened Cabinet Office guidance.

We can see some benefits in an arrangement which would allow the Lords EU Liaison Officer in Brussels to view and forward Council documents related to codecision negotiations to the Committee (paragraph 124). However, the Government would welcome clarification of those documents which the Committee would consider as being ‘related to’ the codecision process, and how the Committee would envisage this arrangement fitting in with the current scrutiny process.

We would hope that consistent application of the processes discussed in this report, aimed at providing the Committee with information at the most appropriate time, would make such requests rare. But consistent with our long-established approach, the Government would consider any request for further information the Committee makes (paragraph 125).

With regards to the provision of documents certified by the EU Institutions as LIMITE to the Committee (paragraph 126), the Government is seeking full clarity from the Council Legal Service (CLS) that this would be acceptable. We would also need to be fully assured that, were the CLS to confirm to us that they accept your approach, any documents provided to the Committee, in confidence, would be handled sensitively, outside of the public domain.

Finally, with regard to paragraph 127, we welcome the Committee’s intention to make the results of its scrutiny on codecided proposals more readily available to MEPs and other national parliaments, who will, I am sure, continue to acknowledge the high quality of the Committee’s analysis.

*27 October 2009*

#### **Letter from the Chairman to Chris Bryant MP**

Thank you for your letter of 27 October responding to my Committee’s report on Codecision and national parliamentary scrutiny. The Select Committee considered it on 10 November. We welcome your response and are pleased that the Government and the Committee are in agreement on most points, in the common interest of ensuring effective parliamentary scrutiny of European legislative proposals. We welcome your undertaking to draw our report to the attention of ministerial colleagues and to remind them of their obligations under the scrutiny system, and your acceptance of several of our recommendations.

You appear however to reject some important recommendations, and on three of them we would like to press you a little further.

First, we welcome your decision to amend the Guidance to Departments so that we will be informed of every proposed change to the draft legislation that has “policy implications”. However, we were concerned to read that you want departments to retain the right to decide which policy implications are “significant”. As set out in paragraph 80 of our report, we are firmly of the opinion that interpretative language such as “significant” or “substantial” should not be included in the Guidance; we regard it as both restrictive and subjective. We consider that whenever a change occurs with “policy implications” details should be provided to Parliament; then the committees can decide what is significant. We would be grateful for clarification of your position on this point.

Secondly, your response indicates that the Committee should be updated on discussions held in COREPER only when the Department takes the view that they are significant. The evidence we received from the secretariats of both the Commission and Council indicates that a discussion in COREPER is always significant. Thus we recommended at paragraph 92 that, for proposals under scrutiny, we should always receive an update on these discussions. Again, we would be grateful for your thoughts.

Thirdly, we recommended that the Government should provide an update or supplementary explanatory memorandum where we deem one to be necessary, and we were surprised to note that you would only “consider” such a request. We consider that departments should always provide additional information promptly when requested by a committee of Parliament. We would be grateful for your further thoughts.

Your response leaves three important matters of process unresolved.

- Publishing the Scrutiny Guidance—you are consulting the Cabinet Office, and we look forward to hearing the outcome. We continue to believe that, in the interests of open, transparent government, this should be done.

- Providing *limité* documents—you are consulting the Council Legal Service, and again we look forward to hearing the outcome. However, given the evidence we took on this point (including from the Council Legal Service) and the established practice of other governments in giving *limité* documents to their parliaments, we would be astonished if there were now to be difficulties. In any case this is a matter for the Government and not the Council Legal Service to decide.
- Enabling our EU Liaison Officer to view and forward Council documents held by UKRep—you seek clarification from the Committee, and our Liaison Officer will contact UKRep to provide it.

You undertake to amend the Scrutiny Guidance in the light of these exchanges, and we expect that your officials will consult ours about that in due course.

11 November 2009

#### **Letter from Chris Bryant MP to the Chairman**

Thank you for your letter of 11 November; please accept my apologies for the delay in replying to you. I understand that your Committee's clerks are in touch with officials at the Cabinet Office, and at the UK Permanent Representation in Brussels, to resolve some outstanding working issues. Rather than wait further for those points to be clarified, I write now to reassure the Committee on the three main points you raise in your letter.

On your first point, I should reiterate that the Government interprets a 'significant' change to be a change that has 'policy implications', so I think that we are agreed here. For further clarity, we shall endeavour to remove phrases such as 'significant' or 'substantial' from the Scrutiny Guidance. Therefore, if any proposed change has 'policy implications', then these developments should be the subject of an update to the Committees, either at Ministerial or at official level. This would include changes which arise following a discussion at COREPER. However, as I believe the Committee recognises, the timing between the meetings of COREPER and the Council is often tight, and in many cases the Committee will have been updated in advance on the Government's expectations for the forthcoming Council, and a further update after the Council would follow in these cases.

On your third point, in stating that the Government would only 'consider' requests for updates or supplementary explanatory memoranda, my intention was to provide a small amount of discretion for those rare occasions where either the Government has reasons for not being able to comply with the request, in which case the Government would need to justify fully why it could not comply; or where a more informal update or discussion with Committee clerks is desirable for reasons of time pressure. I agree entirely that departments should always provide additional information promptly when requested by a committee of Parliament.

14 January 2010

#### **Letter from the Chairman to Chris Bryant MP**

Thank you for your letter of 14 January about scrutiny of Codecision—which we must now call the Ordinary Legislative Procedure. My Committee has yet to discuss it.

However a debate on our report has now been arranged for Thursday 28 January, in the House of Lords Chamber starting around 4.30pm. I would be grateful for an update on two of the outstanding issues in time for that debate. These are:

- Publishing the Scrutiny Guidance—According to your response to our report, dated 28 October, you are consulting the Cabinet Office, and we look forward to hearing the outcome. We continue to believe that, in the interests of open, transparent government, this should be done.
- Providing *limité* documents—According to your response of 28 October you are consulting the Council Legal Service, and again we look forward to hearing the outcome. However, given the evidence we took on this point (including from the Council Legal Service) and the established practice of other governments in giving *limité* documents to their parliaments, we would be astonished if there were now to be difficulties. In any case this is a matter for the Government and not the Council Legal Service to decide.

In the absence of anything further on these matters, I will raise them in the debate, and will listen carefully to the Minister's reply.

20 January 2010

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EXTRACT FROM HOUSE OF LORDS OFFICIAL REPORT FOR THE DEBATE ON THE EUROPEAN UNION SELECT COMMITTEE REPORT ON CODECISION<sup>2</sup>

**Lord Brett:** My Lords, no Minister would ever deliberately seek to mislead the House, but sometimes the truth can be spoken with greater enthusiasm. When I say that I enjoyed the report, I enjoyed the Government's response and I enjoyed this debate as an individual and as a representative of the Government, it is the truth. It has been an uplifting and positive debate, containing some important points—not least some of the points made by the noble Lord from the Official Opposition Front Bench, although many of them seemed to be issues for the House or the committee rather than for the Government, so I am sure that he will forgive me if I do not refer to them in my response.

We have reflected here today that the Lisbon treaty, now in force, renames “codecision” as the “ordinary legislative procedure”. This reflects the fact that this procedure is now the default method for agreeing legislative acts at EU level, giving the directly elected representatives of the European Parliament increased power in such areas as agriculture, which has been mentioned by noble Lords, and justice and home affairs.

The Government welcome that. The terminology may be new, but the established process remains broadly the same. It would be disingenuous to pretend that on occasion the involvement of the European Parliament does not make it harder to achieve our aims in negotiations. But, on the whole, our experience has shown that, as well as improving the democratic accountability of the European Union, the fuller involvement of the European Parliament in the decision-making process results in more balanced—a word that has been used several times in this debate—and focused legislation.

An example is that the European Parliament—along with the UK—champions the principles of the single market, and has consistently resisted attempts by some Member States to take a more protectionist tack, helping to protect UK competitiveness. More recently, MEPs helped to ensure an ambitious outcome on the 2020 climate change package, and pushed forward key ideas such as pilot projects on carbon capture and storage.

As the noble Lord, Lord Roper, emphasised in his introduction, the Government note that there has been an increase in the agreement reached at First Reading or early during Second Reading, and that the use of trialogues, mentioned by several noble Lords, can inhibit the scrutiny process by national parliaments. I was particularly struck and influenced by the contribution from the noble Lord, Lord Brittan, who got it right in his use of the word “balance”—there is a balance between an efficient process taking forward issues that can be negotiated, but not in such a way that denies scrutiny to national parliaments, or the European Parliament.

The Government are therefore pleased to be able to agree, as reflected in the opening speech by the noble Lord, Lord Roper, to many of the recommendations relating to the ordinary legislative procedure and parliamentary scrutiny; namely, the Government will update the committee every time a change with policy implications is agreed or proposed. This point was made by the noble Lord, Lord Howell, and other noble Lords. The Government will provide the committee with all presidency compromise texts, and they will update the committee in advance of decisions taken by the Council, including at COREPER, to agree European parliamentary amendments. We believe that an enabling factor in the increase in early agreements is the vast improvement in the European Commission's consultation process and the need for proposals to be properly and fully justified through full impact assessments. It stands to reason that Commission proposals that better reflect the thoughts of the European Parliament and stakeholders, national parliaments included, should be agreed more quickly. Indeed, the committee looked at this very question as part of its inquiry into the initiation of EU legislation and heard directly from practitioners about the benefits.

Another likely consequence of the extension of the ordinary legislative process is that it will, at least at first, slow down the legislative process—I heard in several contributions in the past 30 minutes or so that that will be seen to be not a bad thing—and afford national parliaments sufficient time to conduct effective scrutiny of legislative acts, which is something that noble Lords will welcome.

The Lisbon Treaty also gives national parliaments, for the first time, a direct say in making EU laws. The Government hope that this House, and the other place, will make use of the new provisions on legislative treatment in Lisbon in this regard and that noble Lords will continue to offer the European Commission the benefit of their considerable expertise and experience through the Commission's consultation process. I thought that point was put rather well by the noble Lord, Lord Bowness, and was echoed, in greater detail, by the noble Lord, Lord Dykes, who said that the Lisbon treaty underlines that the EU has only those competences expressly conferred on it by Member States through the treaties. Taken together with the increased powers for national parliaments, this further embeds the principle of the sovereignty of member states. A key element of this is the ability of a free and robust Parliament to examine government policy.

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<sup>2</sup> HL Deb 28 January 2010 cols 1626–1630.

When we speak of parliamentary scrutiny processes, it is clear that we have one of the most sophisticated scrutiny systems in all EU member states. None the less, there is no room for complacency, and I commend the EU Select Committee for seeking to enhance the system through the report and its recommendations. Much of the ongoing debate about the committee—some of the contributions are not for the Government—was clearly seized of that requirement. The noble Lord, Lord Wallace of Saltaire, testified to that expertise in the comments that he reported were made in Europe yesterday about the value of your Lordships' EU Committee's reports.

I hope that the commitments I have outlined will allow the committee access to the information it requires to keep abreast of the progress of negotiations on individual legislative proposals and will allow it an opportunity to feed its views to the Government.

A number of noble Lords issued a challenge for me to smile, which is easily done, and to meet desires on two points that the noble Lord, Lord Roper, raised in his introduction, which is not as easy as smiling. They were about *limité* and guidance.

We should note that the noble Lord, Lord Roper, and my colleague the Minister for Europe have engaged in further discussions, as the noble Lord made clear in his opening remarks. There are practical issues involved in making *limité* documents—documents with a restricted distribution that cannot be made publicly available—available to the committee, but we are confident that we can devise handling caveats to address the restrictions and accept the desirability of proactively providing the committee with appropriate *limité* documents at critical points in negotiations. Subject to ministerial approval across government, we hope to be able to begin providing the committee with access to certain *limité* documents from the end of next month.

**Lord Brittan of Spennithorne:** I carefully noted the words “appropriate” and “certain”. Can the Minister give any guidance on the criteria that will determine which *limité* documents are appropriate and which are the certain *limité* documents that he is prepared to disclose?

**Lord Brett:** One always says what a very good question it is when, if it does not bowl the batsman at middle stump, it at least provides some difficulty. The answer is that I cannot give any detail. As several noble Lords have said, this is a growing and learning process. The Government are intent that the right information is provided at the right time, as the committee says. That, I am sure, will guide us in taking this forward. If not, I am sure the committee will be very quick to advise the Government.

**Lord Haimay of Chiswick:** I suggest that this is fairly simple, and that the Minister might, with the Minister for Europe, come to the simple conclusion that if the overriding rule is that the EU Select Committee and its sub-committees are informed of any document or any development that has policy implications, presumably that will apply to *limité* documents, too. Let us, for heaven's sake, not introduce by the back door the weasel words “significant”, “substantive” or “appropriate”, having just chucked them out of the front door.

**Lord Brett:** My Lords, the noble Lord gives good advice. I will take the issue back to my colleagues in government and advise them of your Lordships' view.

This leads me to the second point on which my smile and good will were being sought: the question of guidance. I can provide something very similar here. My honourable colleague the Minister for Europe will write to the noble Lord, Lord Roper, shortly on the question of *limité* documents. In the mean time, I shall ensure that he has sight of the debate in your Lordships' House to guide his response. The second area of discussion between the Government and the committee that is still under way is on the scrutiny guidance that we can use within government to set up departments' responsibility in this respect. The guidance is being updated to reflect the new commitments that we have made on the scrutiny of the ordinary legislative procedure. As has been said, it will also need to reflect our approach to *limité* documents. The committee has pressed us to make the whole of this document publicly available and subject to some drafting changes, which I hope are not the weasel words that concerned the noble Lord, Lord Hannay. We have no problem making this document publicly available on the Cabinet Office website, and again we hope to be able to implement that within the next month.

**Lord Kerr of Kinlochard:** I do not want to sound like Oliver Twist, but there was a third request: for improved access to Council documents on the progress of a codecision negotiation, as, say, the French Assemblée has.

**Lord Brett:** I thank the noble Lord for that contribution. Once again, I shall ensure that it is fed into the feedback that I give to my colleagues so that they can respond further to the noble Lord, Lord Roper, on that point when the Minister for Europe writes to him.

As I said, we hope to have the documentation on the website within the next month, and I hope that my assurances, while not necessarily meeting every point that concerns noble Lords, will underline our commitment to taking forward the committee's recommendations.

The most substantive point tonight related to scrutiny override and was made by two noble Lords, one of whom was the noble Lord, Lord Willoughby de Broke. I enjoyed his contribution, but then I do like party political broadcasts, being something of a political nerd. On the more substantive issue, which I think was made by the noble Lord, Lord Howell of Guildford, in the first half of 2009, only one override was used, which is the level to which we aspire. Following the 2009 Summer Recess, this figure increased. However, the UK utilises its parliamentary reserve in Brussels so that we can hear the views of the committee before documents are signed off. When we override, we do so for operational reasons where UK interests are at stake and there is a risk of setting back key EU actions, such as civilian missions being able to carry out important work.

Where there are administrative errors, the FCO is quick to correct them and explain any shortcomings to the committee. In 2008, the Foreign Office provided 135 Explanatory Memoranda for scrutiny, all on fast moving issues. Of these, 20 were overrides, including four on the crisis in Georgia and three on the piracy mission off the coast of Somalia. I hope that that in part meets the points made by the noble Lords, Lord Willoughby de Broke and Lord Howell.

Parliamentary scrutiny is essential in informing and improving our approach to EU policy-making. Debates such as this are a vital part of that scrutiny. I therefore re-emphasise the Government's commitment to getting the scrutiny process right. As the noble Lord, Lord Sewel, said, we need to work at it. In that sense, we are entering and going through a collaborative procedure. I entirely accept the points made from the Liberal Benches that we need to work closely with our international partners. I should like therefore to give the commitment to continue to review that process in the light of developments at the European level. I thank noble Lords once again for their commitment to the parliamentary scrutiny of EU affairs, which I believe is one of the strengths of our House and beneficial to us all. I should particularly like to commend the noble Lord, Lord Roper, and his committee for their timely and constructive reports. I hope therefore that my report of progress shortly to be made on the issues outstanding from the committee's excellent report will be helpful.

I need to make a correction: the overrides to which I referred were reported from the FCO alone and may not cover other departments.

#### 18TH REPORT: EU CONSUMER RIGHTS DIRECTIVE: GETTING IT RIGHT

##### **Letter from Kevin Brennan MP, Minister for Further Education, Skills, Apprenticeships and Consumer Affairs, Department for Business, Innovation and Skills, to the Chairman of Sub-Committee G**

I welcome this Report and would like to thank the Committee for their thorough and well-researched analysis and helpful recommendations.

Like the Committee, the Government supports the aims of the Directive which are to improve the functioning of the business-to consumer Internal Market and ensure high levels of consumer protection. However, we also share your concerns that in some areas the proposal as currently drafted would result in a reduction in protection for UK consumers. We are particularly concerned about reductions in protection which would result from the loss of the right to reject, the introduction of a two-year limit on trader liability for faulty goods and the application of the off-premises selling rules to certain financial services.

The Government supports a full harmonisation approach where divergent laws act as a barrier to trade, but this must not be at the expense of important consumer protections. During negotiations we have been working to achieve improvements to the text which will address many of the concerns raised in the Committee's report. We are optimistic that the negotiation process will result in a much improved Directive which will protect the interests of consumers without placing undue burdens on business.

I attach the Government's response to the Committee's recommendations and conclusions and again thank the Committee for their helpful Report which will inform the UK's negotiating position as discussions on the Directive continue.

*23 September 2009*

#### GOVERNMENT RESPONSE

Paragraphs are numbered as in Chapter 9 of the Report: Summary of Conclusions and Recommendations

##### *Chapter 2: Overall objective*

**197. We agree that there is a need to update the existing Directives, not least due to inconsistencies between them over key definitions and the fragmentation of the business to consumer internal market that has resulted from their minimum harmonisation basis.**

The Government agrees.

**198. However, we consider that the Government should withhold agreement from the proposal as drafted. We recommend that further progress on the Directive should await a more complete impact Assessment. We believe that this could usefully include: a full analysis of existing consumer protection in all 27 Member States, the problems encountered; the differences between the proposal, the existing minimum harmonisation Directives and national provisions; better statistics on cross-border trade; and possible interaction with the Common Frame of Reference for contract law.**

The Government is committed to working with the Commission and other Member States to negotiate improvements to the proposal to ensure that the final text delivers a high level of consumer protection as well as meeting the Internal Market objectives.

We are aware that the Commission is working on a paper providing a fuller analysis of the impact of the proposal on existing consumer protection laws in all 27 Member States and providing clarification of the relationship between the draft Directive and existing Community legislation and general national contract law. This document will help inform discussions as negotiations progress and will supplement Member States' own analysis of the proposals.

The Commission produced an Impact Assessment when they published their proposal. The European Parliament in their Draft Working document of May 2009 requested that the Commission undertake further work on the Impact Assessment to clearly demonstrate the benefits and costs of this proposal and its alternatives.

In the UK we have produced an Impact Assessment to accompany the Government consultation on the Directive which was published in November 2008. This Impact Assessment considered the potential costs and benefits of key aspects of the Directive: distance selling; off-premises selling and consumer remedies. Further analysis will be conducted in future when we have a firmer idea of precisely what the Directive will ultimately contain. In addition the UK Government commissioned ICM to carry out a survey of UK retailers to understand better their redress preferences, particularly in the event that the Consumer Rights Directive were implemented as proposed, and how these preferences might diverge from those of consumers. The research provides insight into possible consumer detriment resulting from consumers not having the legal right to exercise the 'right to reject' and how competitive pressure might mitigate this. The research report is available at: <http://www.berr.gov.uk/files/file51165.pdf>

**199. We recognise the importance of the Directive reflecting both the interests of business and consumers, which are not alternatives but complementary, and we believe that consumers and their interests must be kept at the heart of this proposal. We therefore recommend that any revised or updated Impact Assessment should include greater research into consumer behaviour and the level of desire and demand for cross-border shopping, as well as the extent to which legal harmonisation can foster active use of the internal market by consumers.**

The Government agrees the Directive must balance the interests of business and consumers and that these interests are, if properly balanced complementary. The UK will work with other Member States to achieve a well balanced measure.

In terms of cross-border e-commerce, the Commission's 2nd Consumer Markets Scoreboard published earlier this year found that while online shopping is becoming more widespread, cross-border e-commerce is not developing as quickly as the domestic side as a result of cross-border barriers to online trade. The Commission's e-commerce report<sup>3</sup> published alongside the Scoreboard draws a detailed picture of the current state of e-commerce in the EU. The report found that it is relatively uncommon for consumers to use the internet to purchase goods or services from another Member State. Looking at cross-border shopping in general in 2008, the report found that 12% of European citizens said that they intended to make cross-border purchases worth more than those they made in the previous 12 months (a situation that has remained stable since 2006, at 13%). However, a majority of European citizens (57%) are not interested in making cross-border purchases in the coming year. 33% of European citizens are interested in doing so, which is similar to the level recorded two years earlier. The Commission's retail market report, due to be published in November 2009, will include a chapter on online retailing which will take stock of various initiatives dealing with geographical market segmentation online and describe the hurdles consumers encounter when shopping online across borders and the efforts underway to address these.

**200. We also note Article 95(3) TEC, which requires that any internal market legislation concerning consumer protection should have as its base a high level of protection. We therefore recommend that the protection offered by the existing Directives covered in this proposal should be taken as the base upon which to build. We consider it of utmost importance that the overall level of protection afforded to consumers should not be reduced.**

<sup>3</sup> [http://ec.europa.eu/consumers/strategy/docs/com\\_Staff\\_wp2009/en.pdf](http://ec.europa.eu/consumers/strategy/docs/com_Staff_wp2009/en.pdf)

The Government agrees. We are very concerned that the proposal as currently drafted would result in a reduction of consumer protection in some key areas and are working to secure amendments which will raise the level of consumer protection in these areas. The implementation of the Directive will inevitably require amendment to existing UK consumer laws and in order to achieve agreement some level of compromise and flexibility will be necessary. However, the overall level of consumer protection for UK consumers should not be reduced. What is important is that we achieve the right balance between the rights and responsibilities of consumers and traders to achieve a high level of consumer protection as well as the Internal Market benefits.

**201. Finally, we are not convinced that by itself the action proposed by the Commission (that is, harmonisation of consumer law across the EU) will necessarily boost cross-border retail trade as the Commission desires. We recommend that the Commission gives further consideration to other factors, such as language, culture, distance of delivery and handling of cross-border complaints, and the extent to which these may also be responsible for current law levels of cross-border retail trade.**

The Government believes that divergence in consumer laws across the EU is one of the factors impeding the growth of the business to consumer Internal Market. Divergent laws increase compliance costs for businesses wishing to trade cross-border and mean that consumers are often unwilling to purchase goods from traders in other Member States as they are unsure of their rights. However, this is clearly not the only factor limiting cross-border retail trade. Other factors including language, taxation laws, brand familiarity and distance for delivery are clearly barriers to the growth of the business to consumer Internal Market, but by harmonising laws we can address one of these barriers.

### *Chapter 3: Full harmonisation*

**202. We note that the principle of full harmonisation has already been applied in European Union consumer protection legislation—namely in the Unfair Commercial Practices Directive and in the recent Timeshare Directive. One notable lesson to be learned from the former is the need for clarity in the Directive about the extent of full harmonisation.**

The Government agrees. We are working to ensure that the final text of the Directive is as clear as possible on the extent of full harmonisation.

**203. On that basis, and like many of our witnesses, we acknowledge that full harmonisation, where justified, could increase legal certainty for both consumers and business. But further work is required to clarify the benefits of full harmonisation, taking into account concerns that consumer protection could be reduced but also the view of the business community that profitable businesses will in any case seek to deliver a high level of consumer protection.**

The Government supports full harmonisation where divergent laws create barriers to trade, however this must not be at the expense of important consumer protections. For traders there is an obvious benefit in reducing the need for separate legal advice on the laws of 27 Member States, but for consumers there should be benefits in a greater choice of goods, perhaps especially from SME traders and a more consistent set of rights. It is also right though that these benefits need to be weighed against the possible reduction in consumer protection in some areas.

We note the Committee's recommendation that further work is required to clarify the benefits of full harmonisation. As stated above, the European Parliament has requested that the Commission undertake further work on the costs and benefits of the proposal.

We agree that many businesses will continue to offer a high level of consumer protection that goes beyond the minimum required by law as part of seeking a competitive advantage and establishing brand value. The Government welcomes this. However, we must ensure that the legal minimum standards are set at a sufficiently high level so that all consumers benefit from an adequate level of protection even where a trader chooses not to go beyond the minimum requirements.

**204. Full harmonisation as proposed by the Commission is likely to be politically impossible for Member States and the European Parliament to support, but we also detect little enthusiasm to abandon the full harmonisation principle entirely. In that case, we consider that a “differentiated harmonisation” model may be workable, harmonising aspects such as definitions, the right of withdrawal and the provision of information but allowing Member States room for manoeuvre in other areas. Such flexibility could facilitate swift responses to future challenges.**

As stated above the Government supports full harmonisation in principle where divergent laws create barriers to trade, provided that this is not at the expense of important consumer protections. We believe that many Member States share this view, although some support a “differentiated harmonisation” approach.

‘Differentiated harmonisation’ would, as the Committee concludes, provide greater flexibility for Member States to address issues of national concern and to retain more generous consumer protection provisions in certain areas. However, it will not reduce the current fragmentation of laws to the same extent as full harmonisation. Traders would still be faced with the costs of adapting their business practices to divergent laws and consumers would still be unclear as to their rights when shopping cross-border.

If, however, full harmonisation across the whole Directive cannot be achieved we will need to consider alternative solutions which fulfil the aims of providing a high level of consumer protection whilst not imposing unreasonable burdens on business. It is of course possible that as negotiations progress it will be necessary to consider alternative solutions, including minimum harmonisation in some areas, in order to reach agreement on the Directive. The Government believes that this should be limited and we should work with the Commission and other Member States to find solutions that can be accepted on a full harmonisation basis wherever possible.

**205. The relationship between the relevant provisions contained in national law and those in the Directive is unclear and if there is a conflict between them, which of them takes priority. It is also unclear as to how national contract law might impact on the way in which the proposed Directive will take effect, once it has been transposed. We urge the Commission to clarify these matters. Our preference would be to see the relationship between the Directive and national contract law resolved in the text of the Directive itself. We fear that, otherwise, confusion will reign.**

The Government agrees that the relationship between the Directive and national contract law provisions is at present not sufficiently clear. We agree that this relationship should be clarified in the text of the Directive itself and will be seeking amendments to achieve this.

**206. We note the “blue button” optional instrument suggestion, allowing Member States to retain their own models of consumer protection based on national contract law but allowing consumers to opt into a harmonised system. We recognise some theoretical benefits may be offered by this option but we are concerned that such a system may be excessively complex for the consumer and trader alike. Further work might usefully be done to assess its practicality.**

The Government agrees with the Committee that the ‘Blue Button’ approach may be excessively complex. Although it would mean that traders would not have to familiarise themselves with the laws of all Member States, in order for consumers to know their rights they would need to familiarise themselves with the ‘Blue Button rules’ as well as their own national provisions. Additionally, it would be necessary to amend the Rome I Regulation provisions on consumer contracts to enable this approach to be used.

As stated above, full harmonisation remains our favoured approach. This has the advantage of applying the same rules to domestic and cross-border transactions making it simpler for consumers and traders to understand their rights and responsibilities in all contracts.

#### *Chapter 4: Scope of the Directive*

**207. We note the view expressed by some of our witnesses that the coverage of the Directive should be widened, particularly to include the Package Travel Directive. We recommend that consideration of including other Directives within the scope of this proposal should be revisited following the extended Impact Assessment we have recommended in paragraph 39.**

The Commission intends that the unfair contract terms provisions in Chapter 5 of the Directive will apply to package travel. The existing Package Travel Directive provides rules, including information requirements, which are specifically tailored to package travel products and we suggest that these matters are best regulated through a sector-specific Directive. The Package Travel Directive is up for review shortly and we believe that this is the best procedure for considering amendments to that Directive. In the Government’s view any new Package Travel Directive should be drafted so as to ensure maximum consistency with the Consumer Rights Directive, for example in terms of definitions and information requirements, whilst reflecting the particular requirements of the package travel market.

In respect of the proposed disapplication of the Directive’s coverage of off-premises sales of package travel and services related to transport we are not convinced that the arguments are water-tight. In some cases providing a right of withdrawal may be reasonable, for example, where travel arrangements are made a long time in advance and the trader is able to resell the service to another consumer in the event of withdrawal. In other cases businesses enter into binding agreements with suppliers in respect of reservations packaged for consumers which cannot be rescinded in the event that the consumer withdraws, particularly relatively close to the time of departure. In these cases it would not seem appropriate to provide a right of withdrawal.

**208. We support the idea that there is room to expand the scope of the Directive and recommend that it should extend to digital products. We consider the application to digital products particularly important given the proposal's aim to future-proof consumer law and update the existing *acquis*, which has been introduced over three decades and thus does not sufficiently address issues specific to the digital era.**

We agree that the scope of the Directive should be extended so that all chapters apply to digital products (digital products are not currently covered by Chapter 4 of the proposal). We have suggested such an amendment during negotiations, but it seems unlikely that the scope will be extended in this way. Whilst this is disappointing we welcome the recent commitments by the Consumer Commissioner, Meglena Kuneva, to examine this area and to extend the principles of consumer protection rules that are available for more traditional goods and services.<sup>4</sup> The Commission has recently issued a tender for a study on consumer protection in digital services to determine the scope of the problem and the possible consumer detriment caused by digital content not being sufficiently covered by the existing consumer protection legislation. This study is intended to give a comprehensive overview of consumer experiences and problems with digital services and the related consumer legislation in a number of EU Member States and in the US. It will serve as a basis for a possible, future legislative or non-legislative action, by the Commission.

The recent UK Government White Paper, *A Better Deal for Consumers*, set out the Government's intention to review the existing UK consumer laws in terms of applicability to digital products and make provision to ensure appropriate consumer protection. We are beginning a project in this area and hope that it will be useful in developing a framework of rights both at the national and EU level.

**209. Related to this, we recommend that Chapter IV of the Directive should apply to both the goods and the services elements of mixed contracts. We further recommend that services should be covered by the Directive in its entirety. We recognise that such extensions to the scope will require significant work but consider that there will be few opportunities to reform consumer law and that it is therefore worth spending the time now to produce a future-proofed Directive with clear application.**

The Government agrees that contracts for services only and the service aspects of mixed services and goods contracts should be fully covered by the Directive in its entirety. Like the Committee, we recognise that this would involve significant work but agree that it is worth taking the time to include provisions on services and the service aspects of mixed products in Chapter IV to fully address the whole consumer experience. During the negotiations the UK has suggested that the Directive be redrafted to fully cover mixed products and services under Chapter IV. However, it seems unlikely that the Directive will be amended in this way.

It is the Government's intention to introduce a Consumer Bill of Rights, after the Directive has been agreed, which will be used to implement the Directive and also to simplify UK law on both goods and services.

**210. We note our witnesses' concerns about the exclusion of hire purchase from the scope of the Directive and urge the Commission to reconsider the rationale for this exclusion. This should include consideration of the possibility to disapply the draft Directive where a trader has voluntarily chosen to comply with the Consumer Credit Directive.**

The Directive as currently drafted only applies to sales and services contracts and does not apply to hire purchase agreements. However, it is possible that this may change as a result of negotiations. We are content that hire purchase agreements are outside scope and we understand that Member States will be permitted to apply the same rules to hire purchase agreements if they consider it appropriate. As stated in the Consumer White Paper, the Government proposes to use the resulting Directive as the basis for a wider reform to consolidate the various pieces of legislation on the sale and supply of goods and services to consumers into one measure to make it more accessible to consumers, business and their advisers. This will include removing unnecessary distinctions between goods and services contracts (and combined contracts) and between different types of transaction, for example, sale, hire or hire purchase.

The Government would like to see financial services fully excluded from Chapter 3 of the Directive on distance and off-premises selling (please see response to the recommendation below). However, if this is not achieved we would like to see amendments that would allow Member States to choose whether to apply the Consumer Credit Directive rules or the Consumer Rights Directive rules to off-premises credit agreements which fall outside the scope of the Consumer Credit Directive. We believe that applying different rules to agreements outside the scope of the Consumer Credit Directive will create confusion and complexity. It is the Government's intention in implementing the Consumer Credit Directive to also apply these rules to credit agreements outside the scope of the Directive. This will ensure that one set of provisions will apply to all credit agreements. We think that this approach will benefit both consumers and traders by providing simplicity and certainty and will also reduce costs to businesses who will only be required to familiarise themselves with and apply one set of rules. Furthermore, we feel that as the Consumer Credit Directive rules have been designed

<sup>4</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/702&type=HTML&aged=10&langauge=EN>

specifically to deal with credit agreements, in contrast to the Consumer Rights Directive provisions which will apply to a wide range of goods and services, the sector-specific rules on the Consumer Credit Directive should be applied.

**211. While we consider that this Directive should embrace services generally, we recognise financial services as separate and distinct from this category given the specialist nature of these products. We recognise the concerns of the financial services industry about the application of this Directive to the sector. In particular, we note the industry’s concern that the ban on inertia selling could prohibit the auto-enrolling of pensions. We therefore recommend that it is made clear in the proposal that the provisions on inertia selling do not apply to pension schemes offered by an employer.**

The Government would like to see financial services fully excluded from the scope of Chapter 3 (distance and off-premises selling) and will be putting forward this position during negotiations on the Directive. Application of the provisions of Chapter III to the off-premises selling of certain financial services would require the UK to remove existing consumer protection provisions requiring consumers to be provided with more detailed and extensive information, in some cases in a standard format to aid understanding and comparison of offers. Furthermore, the provisions of Chapter 3 would result in a reduction in consumer protection by reducing the withdrawal period for Payment Protection Insurance and non-insurance based personal pensions. We are also concerned about the implications, for both consumers and traders, of applying different requirements to credit agreements which fall inside and outside of the Consumer Credit Directive. We do however fully support the application of Chapter 5 on unfair contract terms to financial services, assuming Chapter 5 and in particular the contents of the annexes of unfair terms remain appropriate and proportionate.

The Government agrees that the proposal should make clear that the provisions on inertia selling do not apply to personal pension schemes organised through an employer.

**212. We note that the ban on inertia selling would also prevent the tacit renewal of contracts, including Insurance policies, and variation of terms without the consent of the consumer. These matters are contentious and we are not convinced that they should be similarly excluded from the scope of the Directive. At the very least, we consider that the possibility of such changes should be mentioned in the contract, and clear notice must be given in advance of the insurance premium being levied upon renewal.**

The Government believes that tacit renewals of insurance policies, particularly mandatory insurance such as motor insurance, can be beneficial for consumers as it can prevent them from unwittingly breaking the law. Provided that consumers are notified in good time that unless they act to cancel the contract it will be automatically renewed and the cancellation terms are not onerous tacit renewals should be permitted.

Government believes that the proposal should make clear that the provisions on inertia selling do not prevent tacit renewal provided the conditions mentioned above are met.

#### *Chapter 5: Clarity for consumers and provision of information*

**213. We recognise the importance of consumers’ awareness of their rights and consider that a clear and comprehensible Directive is an important part of informing the consumer. However, there is an inherent tension in providing a legal text that is clear to lawyers and is also accessible to all consumers. We recognise that the transposition of the Directive into national laws will provide an opportunity to improve accessibility of the Directive. In the first instance, we consider it essential that the Directive should be sufficiently legally robust and clear for those explaining the provisions to consumers, so that they can do so accurately. We believe it would also be helpful for national authorities to produce comprehensive guidance documents for consumers on their rights.**

The Government agrees. As announced in our White Paper, it is our intention to implement the Directive through a Consumer Bill of Rights which will bring together UK and European consumer rights, including those in the Consumer Rights Directive, into a coherent legislative framework and enshrine these protections in a simpler and clearer way. It is our intention to provide guidance on the new law prior to it coming into force.

**214. We note and support the permissive nature of the provisions on general consumer information. We agree that, where already apparent from the context, the trader should not be obliged to furnish the consumer with such information. Nevertheless, we are concerned about how that might be adjudicated should a dispute arise between the trader and consumer as to whether or not something is “apparent from the context”. We recommend that clear guidelines covering this area are drawn up.**

We agree that traders should only be obliged to provide the information required under Article 5 where it is ‘not apparent from the context’. We also agree that there needs to be clarity on what will be regarded as ‘apparent from the context’ in different circumstances (e.g. face-to-face sales in retail premises, online sales). The recital to the Directive provides some guidance but we note the Committee’s recommendation that further

guidelines are necessary. As stated in our response to the previous recommendation, it is our intention to produce guidance on the new consumer laws stemming from the Directive.

**215. We consider that attention should be paid to the need for guidance on how information should be communicated to provide certainty to businesses and to highlight key information for consumers, possibly through the use of summary boxes.**

We note the Committee's recommendation. Although it may be possible to produce best-practice guidance on presentation of information at either UK or EU level, as currently drafted, Articles 10 and 11 of the Directive (on formal requirements for off-premises and distance contracts respectively) prohibit Member States from imposing any formal requirements on the provision of information other than those set out in those Articles (notwithstanding that the information must be provided in plain and intelligible language and be legible). We understand that the intention is to prohibit Member States from imposing national requirements which relate to the prescribed layout and formatting of the pre-contractual information and contracts. This would prohibit requirements to provide information using a particular size of font or the use of text boxes and similar. Furthermore, Article 31(4) prohibits Member States from imposing any presentational requirements as to the way contract terms are expressed or made available to the consumer.

The Government is concerned that the present drafting of these provisions would force us to remove existing provisions which set requirements on how information must be provided for financial services contracts (for example Key Facts Illustrations) and where information and presentational requirements have been imposed to remedy market failure following a Market Investigation by the Competition Commission. It would also force us to remove requirements under the UK Cancellation of Contracts in a Consumer's Home or Place of Work etc Regulations 2008 which require information on the right to withdraw to be prominent and must be set out in a separate box with the heading "Notice of the Right to Cancel" if the contract is provided in writing. We believe that for certain products and methods of sale it is especially important that information is set out in a clear and easy to understand way which makes it simple for consumers to compare offers. In some cases precise presentational requirements are therefore justified.

We have raised these concerns during negotiations and will continue our efforts to secure amendments to ensure that we can continue to impose formatting and presentational requirements where necessary for consumer protection and the proper functioning of markets.

**216. We are not convinced by the argument that these provisions will overload the consumer with information, though this is conditional on information being deployed sensibly, in line with the requirements set out in Article 5. We consider it important that consumers are given this information, regardless of whether they read it at the time of purchase or not, so that they have access to it in the future, should the need arise.**

The Government agrees.

**217. We are concerned about the possibility created in this Directive for a reduced level of mandatory information to be provided to consumers of financial services products. We note that this is a concern shared across the EU and warn about the potential impact of this on consumers who are sold such products off-premises. We are concerned that this could create an added incentive for businesses to sell financial products off-premises, thus multiplying the adverse effect on consumers. We recommend that financial services are excluded from this part of the Directive.**

The Government agrees with the Committee's recommendation and we believe that other Member States share these concerns. The Government is seeking an amendment to exclude financial services from the provisions on off-premises sales in Chapter 3 of the Directive. Our reasons for this are explained in our responses to previous recommendations.

#### *Chapter 6: Right of withdrawal for distance and off-premises contracts*

**218. We welcome the introduction of a harmonised withdrawal period for the majority of business-to-consumer contracts and consider that this will help to address the problems associated with the varying lengths of withdrawal period which currently exist across the EU. Nevertheless, we note that many of our witnesses were concerned about the detail of the provisions in the Directive on the right of withdrawal and we are concerned that a uniform approach will not work for all situations, such as complex insurance contracts. We therefore consider that the Commission must revisit this chapter, providing in particular greater justification of the choice of a uniform 14 calendar day withdrawal period.**

The Government agrees that a harmonised withdrawal period for distance selling, off-premises selling, consumer credit (under the new Consumer Credit Directive) and timeshare (under the revised Timeshare Directive) will be simpler for traders and consumers and will increase protection for UK consumers.

As set out in our response to the previous recommendation, the Government believes that sector-specific rules should apply to off-premises sales of financial services and therefore supports the exclusion of insurance contracts from these provisions.

**219. We are concerned about how the right of withdrawal might affect existing provisions such as the 45-day cooling-off period for warranties in the United Kingdom and call for this to be preserved under the Directive.**

The Government shares the Committee's concern. The 45-day cooling off period for extended warranties for electrical goods was introduced into UK law following a Competition Commission Investigation which concluded that there was a complex monopoly situation within the extended warranty market which operates against the public interest. Under the Enterprise Act 2002 the Competition Commission is able to impose remedies where market investigations have concluded that there is market failure. It appears that full harmonisation would prevent these remedies being applied if they went beyond or diverged from the requirements of the Directive for areas within scope of the Directive, such as information requirements and withdrawal periods for distance and off-premises sales. The Government believes that this will have a negative impact on consumer protection and the proper functioning of markets and will prejudice a useful remedy flowing from the proper application of this part of the UK competition regime. We are seeking a solution that ensures the Directive's requirements are without prejudice to requirements imposed following a finding of market failure by a competition authority.

**220. We can see the benefit of a harmonised right of withdrawal form such as that included in the Directive, but the use of such a form should constitute only one of several options for the consumer. The Directive should make it clear that the simple act of returning the goods to the trader satisfies the criteria for exercising withdrawal, in addition to the option of notifying the trader in writing on a durable medium (see paragraph 140). We are not convinced that notifying the trader over the telephone of an intention to withdraw from the contract should be similarly accepted as satisfying the criteria for withdrawal, as we do not consider that it would be possible to prove that a telephone call had or had not been made.**

The Government agrees that the standard withdrawal form will benefit consumers, but that it should also be possible for the consumer to withdraw in his or her own words using a durable medium. We agree that withdrawal by telephone should not satisfy the criteria in this Directive because of issues concerning proof. This carries forward the position under the existing distance selling and off-premises rules and the new Timeshare Directive which all require notice of withdrawal to be given in writing or on a durable medium. Whilst in some cases the consumer may be able to prove that a telephone call had been made, for example if the relevant number appears on an itemised bill, it is very unlikely that he or she will be able to provide proof of the content of the telephone conversation as calls are only recorded by a minority of traders and consumers would have to request access to any recordings.

We have concerns about allowing for the act of returning goods to be accepted as a method of withdrawal unless accompanied by a notice of withdrawal on a durable medium. In many cases businesses will receive a large volume of returns each day making it difficult to identify the consumer if a notification of withdrawal is not sent with the returned goods. We do not, however, think that consumers should be required to send notification of withdrawal in advance of returning the goods.

*Chapter 7: Sales contracts*

**221. Earlier in this Report we discussed the principle of full harmonisation, which would have a significant impact on sales contracts. We conclude that the Sales chapter is not fit for purpose in its current form if intended as a full harmonisation measure.**

The provisions on remedies for faulty goods in Chapter 4 are a key area of concern for the Government. As currently drafted the provisions on both consumer remedies and the period of trader liability for faulty goods would result in an unacceptable reduction in consumer rights for UK consumers. The Government is working with the Commission and other Member States to improve this chapter to ensure that the high level of protection enjoyed by UK consumers is retained.

**222. We observed little appetite among our United Kingdom witnesses to see the United Kingdom's "right to reject" removed and, furthermore, we note that this statutory right, or similar, is not exclusive to the United Kingdom. For the sake of clarity, we recommend that these concerns be addressed through an amendment to Article 26 of the Directive. This amendment may need to be flexible, perhaps giving a specific time-limited right to reject, such as the 30 days proposed by the Law Commission, in order to take into account the concerns of Member States which do not currently support the right to reject.**

The Government agrees. We are convinced that it is essential that the "right to reject" faulty goods for a short period is retained. It is a cornerstone of the UK consumer protection regime and is understood and highly valued by consumers. We are working to secure an amendment to the Directive to allow the "right to reject"

to be retained in the UK, including exploring the possibility of introducing a fully harmonised time-limited “right to reject” which will be available to consumers across the EU. We are optimistic that we will be able to achieve a satisfactory solution.

Although the Commission has indicated that it will be possible to retain this right in general contract law in addition to the remedies provided by the Directive, we feel that including the right in the Directive is by far the better option as the alternative approach would not meet the objectives of harmonisation and simplification.

**223. The requirement that a consumer must inform the trader of a defect within two months of detection appears arbitrary and we are concerned that it may not always be practicable to notify the trader within two months, As we do not consider the case has been made for the restriction, and as we are concerned at its impact, we recommend deletion of the two month limit as a mandatory requirement.**

The Government agrees that this provision should be deleted and will be seeking an amendment to that effect. The UK chose not to implement this provision when we transposed Directive 1999/44 on Sale of Goods and Associated Guarantees into UK law and in our response to the Commission’s Green Paper on the Review of the Consumer Acquis we opposed including this measure in the new Directive as in our view it would be unworkable.

We believe that in the majority of cases it would be extremely difficult for the trader to know when the consumer first became aware of the defect and therefore whether they had complied with the two month limit. Therefore enforcement of this requirement would be very difficult. We are also concerned that unscrupulous traders may argue that the consumer became aware of the fault on delivery and refuse to accept liability for faults which appear after two months, thereby effectively cutting the liability period to two months.

Regardless of any formal requirements consumers will generally notify the trader of lack of conformity within a short period as they will see it as being in their best interests to get the lack of conformity remedied swiftly. However, there may be some instances where a consumer does not notify a trader of a defect immediately because they do not realise there is a defect or believe that it will remedy itself.

**224. The two year limit on a trader’s liability for faulty goods could be problematic in relation to the purchase of a range of goods which could reasonably be expected to last longer than two years. We therefore recommend reconsideration of the two year limit, with a view to either extending the period or allowing some flexibility in its application.**

The Government agrees. For complex and expensive products such as cars, heating systems and goods related to home improvements it is not unreasonable that where faults appear after two years, and it can be proved that the fault existed at the time of sale, the trader should be liable. We are negotiating in Council Working Group to find a solution which protects the interests of UK consumers, either through extending the period or allowing flexibility in relation to goods whose expected lifespan is longer than two-years.

**225. The proposal to exclude rescission of contracts in cases of minor defects appears to be fraught with uncertainty and a lack of clarity, which would not assist the trader or consumer. We recommend that this exclusion either be removed or that clarification of what is considered a “minor defect” be included in the Directive.**

The Government agrees. We have substantial evidence that consumers are concerned about minor defects such as scratches and other defects in the appearance of products. In many cases consumers spend a great deal of time selecting goods specifically because of their appearance and pay more for goods because of their appearance. Providing a right to rescind for minor defects avoids disputes between the trader and consumer as to what is and isn’t minor.

We believe that consumers should have the right to rescind the contract in cases of minor defects and support removal of this exclusion from the text of the Directive. We do see that there is a need to clarify the meaning of ‘minor defects’ for the purposes of the Directive and are currently considering possible wording with assistance from the Law Commission. This could make clear that the existence of minor defects, including defects in appearance and finish, is a relevant factor in determining whether goods meet the required standard of quality. However, it should also be made clear that not all faults entitle the consumer to rescind the contract. In some cases the defect might be so minor that it is considered *de minimis* and is too trivial to constitute a breach and there would therefore be no right to rescind.

**226. We are concerned that the circumstances under which the consumer might resort to the second tier of remedies are unclear, The lack of clarity stems from the use of terms such as “reasonable time” and “significant inconvenience”, which could favour the trader over the consumer. For the purposes of the consumer, we recommend that the circumstances under which he may resort to the second tier of remedies be made more explicit in the text.**

We agree that the text of the Directive must provide clarity and certainty for both traders and consumers. However, as the Directive will cover a huge range of goods it is important that the need for clarity and certainty must be balanced against the need to provide flexibility. We therefore support the use of the terms ‘reasonable’ and ‘significant’ as they are flexible enough to be applied to a wide range of circumstances and goods which will be covered by the Directive.

These are terms retained from the present Sale of Goods Directive and implemented in UK law and the Government currently provides some guidance on the application to particular situations of these phrases, but this underlines the diverse situations to which they might apply. Such guidance can be updated in the light of the new provisions brought in to implement the new Directive.

Furthermore, the Commission has sought to give more guidance than was provided in the existing Directive (1999/44/EC) as to what a court should take into account when considering these issues by providing that those phrases should be assessed taking into account the nature of the goods or the particular purpose (made known to the seller) for which the consumer acquired the goods (Article 26(5)).

#### *Chapter 8: Unfair contract terms*

**227. We note that the exclusion of negotiated terms from the content of the provisions on contract terms has the potential to place consumers at a disadvantage. We accept, though, that Article 33 making it incumbent on traders to prove that a term has been individually negotiated is weighted in favour of the consumer. Consideration might usefully be given to strengthening this Article further, but we do not consider that the case has been made to bring negotiated terms within the scope of the Directive.**

The Government is content that the Directive will not apply to individually negotiated terms and that Article 33 provides the correct burden of proof.

As negotiated terms will be outside the scope of the Directive Member States will have the option of applying the rules of the Directive or national rules to negotiated terms, should they so wish. This issue will be considered as part of the Government’s reform of consumer legislation announced in the Consumer White Paper.

**228. We welcome the introduction of “black” and “grey” lists but the devil lies in the detail of their content. We have heard various specific suggestions as to how the lists might be amended, including opposing views. At this stage, we draw no conclusions on the content of the lists but we note that there is substantial concern on this matter. If agreement is to be reached, it will be essential that every term on each of the lists is fully justified, with due regard to current practice in each Member State and to the views of stakeholders.**

The Government also welcomes the introduction of “black” and “grey” lists and very much agrees that the devil will be in the detail. We must ensure that every term included on the lists is precisely and carefully drafted and its inclusion fully justified. In certain areas the drafting requires improvement in order to operate effectively and provide the necessary degree of clarity and legal certainty for businesses, consumers and enforcers.

**229. We were relieved to hear the assurances from both the Commission and the Government that the role of national regulators with regard to unfair terms would be largely preserved under the Directive. We would hope that other Member States might be similarly reassured by clarifications to the Directive. The general principles on assessing the fairness of contract terms might benefit from some clarification in order to provide this reassurance.**

The Government agrees. Whilst we welcome these assurances from the Commission we believe that this should be clarified in the text of the Directive to provide legal certainty.

**230. Substantial concern was expressed about the use of delegated legislative powers (“comitology”) to amend the lists. It was felt that the process could be opaque, excluding stakeholders, and even Member States, from considering the full implications of proposals. Like the Commission, we consider that this process ought to be given a chance to prove itself as it could be a more efficient method of taking these decisions than a full legislative procedure. Its legitimacy will be dependent on a commitment to full transparency by the Commission and by national governments, which should include consultation as appropriate.**

The Government supports full harmonisation of both the “black” and “grey” lists in order to provide certainty for consumers, traders and enforcers and reduce compliance costs for traders wishing to sell cross-border. The Commission takes the view that this would require a mechanism to amend and update lists to ensure that the lists remain current and address any new forms of unfair contract terms which subsequently are found to be unfair by the competent national authorities.

The Commission proposes to use the Comitology procedure (effectively delegated legislation) to amend these lists. The Government has concerns about whether the use of the comitology procedure is appropriate. Comitology can be used to make amendments to non-essential elements of a Directive. We have some sympathy with the view that the contents of annexes II and III are in fact essential to the Directive and should therefore not be subject to the comitology procedure. Furthermore, we share concerns that the procedure could be opaque and may not adequately take account of the views of stakeholders or even Member States. However, we also acknowledge that a full legislative procedure would be a lengthy process and may prevent a rapid response to the emergence of new types of unfair terms. We will seek further clarification about precisely how the comitology procedure would operate before finalising our position on this issue and will work with the Commission and other Member States to ensure that any procedure for amending the annex lists provides the appropriate degree of scrutiny.

## 21ST REPORT: GREEN PAPER ON THE BRUSSELS I REGULATION

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

I am writing in response to your Committee's Report on the Commission's Green Paper on the Brussels I Regulation, published on 27 July,

I attach for your information<sup>5</sup> (not printed) the Government's formal response to the Commission on the Green Paper. Overall, the Government is generally content with the approach that has been taken by the Commission in its identification of the United Kingdom's major concerns. The Government's response does not cover the position on intellectual property. As consultation with experts on this topic is still ongoing, the Government will be responding to the Commission separately on this in October. I would also draw your attention to the response on arbitration. The Government is proposing an alternative solution to that proposed in the Commission's Green Paper. I will explain, later in this letter, the reasons behind our change of approach in this area.

I should begin by saying that the Government generally shares the concerns cited in the Committee's Report. When I gave evidence to Sub-Committee E in June, I emphasised that the Government was fully aware of the significance of the review of the Brussels I Regulation. The Government recognises the important role that the Regulation plays, particularly in relation to commercial litigation, where the legal services provided in the United Kingdom support the country's prominent position as a centre for commercial activity with all the benefits this represents for the economy.

The Government agrees with the Committee that reform of the Brussels I Regulation, in particular its jurisdiction rules, raises a number of issues with significant ramifications for London's role as a centre for international legal dispute resolution and as a respected seat of international arbitration.

The Government shares the Committee's concern about the Commission's approach to the operation of the Regulation in the wider international legal order. As you will note from the response to the Commission, the Government disagrees with the Commission on extending the scope of the grounds of jurisdiction currently available under the Regulation to cover defendants domiciled in third countries and recognising and enforcing judgments from third countries. The Government's view is that such matters would be best considered in the context of multilateral negotiations with third countries, probably at the Hague Conference. However, the Government continues to see a need for a suitable transfer mechanism in the Regulation that would operate in certain situations where a Member State court has assumed jurisdiction under the Regulation, but where no court in any other Member State is able to do so. Such a mechanism would broadly reflect our current doctrine of *forum non conveniens*. This is essential to mitigate the risk of parallel proceedings before the courts in Member States and third state courts.

Since I gave evidence, there has been a change of view in relation to the Government's position on arbitration. The Government's consultation exercise on the Commission's proposals concluded in June and generated differing views from stakeholders. There are also now indications of opposition from some Member States to the Commission's proposals. This opposition reflects concern about the creation of external Community competence in this field where there is currently exclusive Member State competence. It is feared that the former type of competence would inevitably arise as a result of the Commission's approach. This has led the Government to consider whether an alternative solution to that proposed by the Commission could be found that would work for the United Kingdom's stakeholders as well as the generality of the Member States.

In conjunction with academic and arbitration specialists, an alternative proposal has been devised which seeks to clarify the broad scope of the arbitration exception, by reference to how it was generally understood before *West Tankers*. The purpose of establishing such a comprehensive exclusion of arbitration-related issues from

<sup>5</sup> [http://ec.europa.eu/justice\\_home/news/consulting\\_public/0002/contributions/ms\\_governments/united\\_kingdom\\_en.pdf](http://ec.europa.eu/justice_home/news/consulting_public/0002/contributions/ms_governments/united_kingdom_en.pdf)

the scope of the Regulation is to ensure that some of the tatter's machinery for jurisdiction and to recognition and enforcement of judgments cannot interfere with the proper course of the arbitral process. My officials have consulted arbitration specialists who agree that the Government should submit this alternative proposal to the Commission.

As to future developments, we understand that the Commission's legislative proposals will be published in the first half of next year. The Swedish Presidency, however, have indicated their intention to try and reach a measure of agreement in the Civil Law Committee on certain amendments which would be included in the Commission's proposal. The Swedish Presidency is likely to seek endorsement to any such consensus reached in that Committee from the Justice and Home Affairs Council on 23 October. The prospects for the success of this exercise are currently unclear.

*12 September 2009*

## 22ND REPORT: REVISION OF THE EU DIRECTIVE ON THE PROTECTION OF ANIMALS USED FOR SCIENTIFIC PURPOSES

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

I am grateful to the Committee for the report of its inquiry into the revision of Directive 86/609/EEC on the protection of animals used for scientific purposes (HL Paper 164-1).

I attach a memorandum setting out the Government response. I shall arrange for copies of the response to be placed in the library of the House.

*7 January 2010*

### GOVERNMENT RESPONSE

#### *Introduction*

The Government warmly welcomes the House of Lords EU Select Committee Report and its findings. This paper outlines the Government's response to the Committee's specific recommendations.

The Commission's proposal published in November 2008 sought to establish revised measures for the protection of animals used for scientific purposes to replace those set out in Directive 86/609/EEC. This is very significant as animal experimentation continues to be a vital tool in developing improvements in healthcare, and protecting man and the environment.

Getting this legislation right is key to the long term competitiveness of academic and commercial research in the UK and Europe. It is also key to ensuring consistent high animal welfare standards across Europe.

In negotiating the proposal we have aimed to ensure that the revised directive makes proper provision for the welfare of experimental animals and at the same time avoids imposing disproportionate or unjustified regulatory burdens which could undermine the success and sustainability of European research.

The European Parliament adopted its first reading report in May 2009. The Council of Ministers has not yet adopted an agreed position. However, trilogue discussions between the Presidency, the Commission and the European Parliament have made significant progress towards agreement of a common text. This progress is reflected in the current Presidency compromise text (Document 17299/09).

This text is more flexible and less prescriptive than the Commission's proposal and, overall, provides a regulatory framework which, we believe, is balanced and will allow the UK to maintain high standards of welfare and animal protection after transposition and implementation without the imposition of unnecessary bureaucracy.

We believe the compromise text provides a sound basis for the future regulation of animal research in Europe.

#### *Committee Recommendations*

##### Rationale for a revised directive

**100. We agree that the 1986 Directive should be revised; a new Directive should contain effective safeguards to ensure consistent implementation. (para 15)**

We share the Committee's view that Directive 86/609/EEC should be revised. Directive 86/609 has not succeeded in creating a level European economic playing field as it was intended to do. It is also necessary to bring its provisions into line with progress in science, animal welfare and the development of alternatives.

We agree also that the success of the new Directive will depend on effective and consistent implementation and enforcement both at national level and by the Commission. We support the provisions enabling the Commission to carry out ‘controls’ of the infrastructure and operation of national inspections in Member States where there is reason for concern supported by evidence.

#### Scope

**101. Based upon the available scientific knowledge about sentience, we consider that, while cephalopods should be included, decapods should be excluded. We also take the view that independently feeding larval forms of invertebrates should be excluded. We consider that cyclostomes should be included. (para 19)**

We agree. We have previously explained our reservations about the strength of the evidence presented to support the inclusion of invertebrate species within the scope of the new Directive. Other Member States have taken a similar view and decapod crustaceans have now been excluded from scope in Document 17299/09, as has reference to independently feeding larval forms of invertebrates. Cyclostomes and live cephalopods remain within scope.

One species of cephalopod—the common octopus—is already covered by current UK legislation and although the evidence of sentience is not in our view conclusive, we believe the inclusion of other cephalopod species will not create a significant additional regulatory burden for scientific research.

**102. We think that it should be possible for the emergence of new, scientific evidence pertaining to sentience to lead relatively readily to the inclusion (or exclusion) of invertebrate species in the control regime of the Directive; we would hope that further consideration of the framing of these provisions would allow a more flexible approach to be followed. (para 20)**

We were advised during the initial negotiation of the Directive that comitology cannot, generally, be used to effect changes to essential elements of a Directive, such as its scope. However, we agree that it would be desirable for Member States to be permitted to extend protection to other animals where this is justified by new scientific evidence. We will explore further whether this might be achievable, for example under the new arrangements for delegated and implementing acts introduced in the Lisbon Treaty by articles 290 and 291, the operational details of which are still being negotiated by Member States.

**103. We support the proposal that independently feeding larval forms and embryonic or foetal forms (from the last third of their normal development) of live non-human vertebrate animals would also be included. (para 21)**

We agree. Such forms are included within scope in Document 17299/09.

**104. The provisions of the Directive should be amended to ensure that the breeding and humane killing of animals for their tissues and organs should not be regarded as a “project” within the terms of the Directive. While the care and welfare of these animals should be ensured, we regard it as disproportionate to require that work involving them should be subject to the authorisation processes required of projects. (para 23)**

We agree that a proportionate approach is required to the controls applied to the breeding and killing of animals for their tissues and organs. This principle is reflected in the text of Document 17299/09 which makes clear that the killing of animals for this purpose is not to be defined as a ‘procedure’. As a result, such killing would not require authorisation as a project.

#### Severity classifications

**105. We consider that the definitions for severity classifications proposed in July 2009 by the expert working group could appropriately be adopted in the revised directive. (para 25)**

We agree. Annex IX in Document 17299/09 sets out the criteria for the assignment of severity categories and incorporates the relevant material from the report of the expert working group.

**106. The European Parliament amendments to Article 15 allowing exceptions to the prohibition on prolonged severe procedures imply a lower level of animal welfare than is currently maintained in the UK. We would see any such change as unacceptable. (para 26)**

We intend to ensure that current standards of welfare and animal protection are maintained and, where possible, improved when the new Directive is transposed and implemented in the UK. We can think of no examples of legitimate animal use which could not be accommodated within the upper limit on severity set out in article 15 and have pressed for the derogation in Article 15(2) to be deleted. Some Member States take a different view and discussion is continuing on the best way forward. The expected compromise solution will be to make exceptional cases subject to the safeguard clause at Article 50.

### Re-use

**107. The re-use provisions must be amended in order to avoid unintended consequences for animal welfare. As presented in the Commission's proposal, the provisions would be likely, in certain specific circumstances, to increase the number of animals and degree of suffering that would need to be used. (para 31)**

Responsible re-use is fully consistent with the principles of reduction and refinement. We were, therefore, also initially concerned that the framework for the re-use of animals in the Commission's proposal would have increased the number of animals used in the UK and the suffering caused to the additional animals.

Document 17299/09 now provides for the re-use of animals where the previous procedures were 'mild' or 'moderate'; the animal's health and well-being has been fully restored; the further procedure is classified as 'mild', 'moderate' or 'non-recovery'; and it is in accordance with veterinary advice. A derogation would exceptionally allow re-use of an animal following veterinary examination where it has previously been used in a single procedure entailing severe pain, or equivalent suffering.

While, in general, we believe that these changes make better provision for the responsible re-use of animals, we have concerns regarding the derogation. In any further discussions, we will be pressing to ensure that it will only be invoked in genuinely exceptional circumstances, for example where the higher level of suffering was brief and completely resolved.

### Care and accommodation standards

**108. The timescale for implementation of these standards in the academic sector should be extended. We think that the timescale for the introduction of the stocking densities proposed for rodents at breeding establishments should also be extended, since it is unclear that the resulting increase in cage sizes will offer any measurable animal welfare benefits. More generally, we accept the case made to us that explanatory text which accompanied the standards as first embodied in Council of Europe guidelines should be restored. (paras 39, 40)**

Annex IV in Document 17299/09—setting out mandatory care and accommodation standards—has been substantially amended (with detailed technical input from the UK) to correct the numerous errors and omissions in the original Commission proposal. The technical content is now broadly acceptable from a UK perspective, as is the implementation date. This has been set at 1 January 2017, allowing almost seven years for establishments to adapt.

### Promotion of the 3Rs

**109. We support the general promotion of the 3Rs: the replacement, reduction and refinement of the scientific use of animals, through the development and implementation of relevant methods. The specific proposal that national reference laboratories be set up is too prescriptive; we see a risk that such a centralised model would fail to draw on the expertise and innovation that are found in the wider scientific community. We are persuaded that a system of national centres along the lines of the UK's National Centre for the 3Rs might well be a better route to follow. (para 47)**

We strongly support measures to promote the development, validation and use of alternatives. This is an area in which the UK already plays a leading role. The 3Rs framework was developed in the UK, is a key component of the harm-benefit assessment in our current legislation, and is supported by our National Centre for the 3Rs.

Articles 45 and 46 have been substantially revised and restructured in Document 17299/09. Article 45 now requires the Commission and Member States to contribute to the development and validation of alternative approaches. It also places a new requirement on the Commission to consult Member States in setting priorities for validation studies and Member States will assist in placing validation studies in suitable laboratories.

There is no longer a requirement for national reference laboratories. Article 46 instead creates a requirement for a Community Reference Laboratory, the duties and tasks of which are set out in a new Annex VIII.

These revised provisions, which, we believe, are consistent with the Committee's recommendation, are a substantial improvement on the proposal as originally presented and provide a sound basis for the further development of alternatives.

### Use of non-human primates in research

**110. We firmly support a robust ethical review process in the case of all species used in scientific procedures, but we see the need to go further in respect of non-human primates. While we recognise that, at present, there is a need to continue the use of non-human primates in research, we think that it is appropriate for the revised Directive to set clear limits beyond those applicable to other species. In the light of the evidence which we heard from the**

**Commission's representative, we are persuaded that the proposed restriction of such use to life-threatening or debilitating clinical conditions in Article 8 strikes the right balance between animal welfare and scientific research. While the wording of Article 8 could be clarified to reflect the understanding in Recital 16 that these conditions include those which have a substantial impact on patients' day-to-day functioning, we would still look to the new Directive to place tighter limits on the use of non-human primates than on the use of other species. (paras 55, 56)**

We agree that non-human primates should be given special protection—as they already are under current UK legislation—and support the inclusion of similar measures in the new directive.

We were concerned that the proposed restriction of non-human primate use to research into life-threatening or debilitating clinical conditions in human beings could have ruled out a number of important areas of work involving unmet clinical needs, such as vision research and research into infertility and fertility control. Document 17299/09 now includes a definition of 'debilitating clinical condition' which we believe encompasses almost all essential uses of non-human primates.

Document 17299/09 also includes provision for borderline cases to be provisionally authorised by a Member State and subject to final decision by the Commission via comitology (under Articles 50 and 51). The Commission has also given a commitment to convene an expert working group to provide further guidance on the interpretation of the restrictions in Article 8.

Taken together, we believe the safeguard clause and guidance will provide the clarity we require and a suitable mechanism to resolve any areas of uncertainty.

**111. We endorse the aspiration that supply of non-human primates should be restricted to F2 animals, and it may be that this can be achieved against the time-limits suggested in Annex III of the proposal. We consider it crucial that this aspect of the Directive be monitored closely, and that the feasibility of the time-limits should be reviewed on a species-by-species basis. (para 63)**

We agree that it is appropriate that all reasonable steps should be taken to move towards the use of F2 and F2 + non-human primates. We also agree that Member States should encourage breeders, suppliers and users to adopt strategies to achieve this aim. However, it is essential that the feasibility of achieving full use of F2 and F2 + animals within the specified timescales is considered carefully and that there is a mechanism to allow those timescales to be amended, where necessary.

Document 17299/09 includes a requirement that the Commission should undertake and publish a feasibility study, including an animal health and welfare assessment, on the required move to the use of F2 and F2 + non-human primates within five years from transposition of the Directive. We welcome this.

Document 17299/09 also requires the Commission to keep under review the sourcing of non-human primates from self-sustaining colonies and to conduct a study to establish the feasibility of ultimately sourcing animals exclusively from such colonies. This study is to be published no later than 10 years after transposition. This is also welcome.

#### Data-sharing

**112. Mutual acceptance between Member States of data from tests required under Community legislation is highly desirable; we consider that Member States should implement legislation to ensure that, at least, the use of animals for ratification of such data will be sanctioned only in exceptional circumstances and for strictly scientific reasons. (para 71)**

We agree. Document 17299/09 requires the mutual acceptance by Member States of data generated by procedures recognised by Community legislation unless further procedures need to be carried out for the protection of public health, safety or the environment.

**113. We consider that the case has not been made that there is widespread duplication of procedures. In the absence of cogent evidence, and bearing in mind the principle of proportionality, we have reservations about the provisions of Article 44(2). By the same token, we consider the European Parliament amendments on data-sharing to be undesirable. (para 72)**

While recognising the need to guard against complacency, we share the Committee's view that the case has not been made that there is widespread duplication of procedures and note that the Commission's impact assessment provides no evidence that this is a significant problem in practice. The requirement for data sharing in Article 44.2 of the Commission's proposal was not supported by Member States and has been deleted in Document 17299/09. Similarly, there has been no support amongst Member States for European Parliament Amendments 134 to 137 and 180.

#### Authorisation or notification

**114. We are concerned over the concept of “tacit approval” which, in our view, may open the way to importing notification arrangements into the control regime. We therefore support the authorisation requirements set out in the Commission’s proposal and reject any move to require notification, or tacit approval (rather than authorisation), for “mild” procedures. (para 88)**

Whilst we are fully committed to efficient regulation, we share the Committee’s concerns about the concept of ‘tacit approval’ of specified categories of project and its potential to allow notification of projects to be imported into the Directive. Member States agree that all projects should be subject to ethical evaluation and prior authorisation and have expressed little support for European Parliament Amendment 167, which would allow projects involving mild and non-recovery procedures to be notified to the competent authority.

We are pleased that Document 17299/09 has dropped the provision for ‘tacit approval’. Instead Member States will be free to introduce ‘simplified administrative procedures’ for projects containing procedures classified as ‘non-recovery’, ‘mild’ or ‘moderate’ where they are necessary to satisfy regulatory requirements. Projects using animals for production or diagnostic purposes with established methods may also be subject to this approach. However, all such projects would be subject to project authorisation, including ethical evaluation. Projects using non-human primates would not be eligible for such simplified procedures.

These revised provisions are a substantial improvement on the proposal they replace and provide welcome flexibility allowing a proportionate approach to the submission, assessment and authorisation of project applications.

#### Authorisation and competitiveness

**115. We support calls for the authorisation processes contained in the proposal to be justified by the scientifically demonstrated needs of animal welfare. (para 91)**

We have noted the concerns of the research community that implementation of the Directive might lead to the imposition of unjustified administrative burdens affecting EU competitiveness. We are committed to ensuring this does not happen. We are confident that the regulatory framework provided by Document 17299/09 is workable and would allow current UK standards of welfare and animal protection to be maintained. We believe also that in some areas they will allow administrative processes to be simplified and made less burdensome.

**116. The ethical review process proposed must be dovetailed into the procedure, including specifying time-limits for that process which are consistent with the 30-day time-limit for authorisation. (para 92)**

We agree that authorisation processes must be efficient and should not hinder or delay new lines of scientific inquiry as they emerge. Document 17299/09 provides for project authorisation decisions to be communicated to applicants within 40 working days. This period includes the time required for ethical evaluation. An additional 15 working days will be allowed for decisions in respect of more complex projects.

#### Inspection and review

**117. Given the importance of ensuring the application of common standards across all Member States, we fully endorse the need for effective national inspection arrangements, including a minimum frequency which ensures that all relevant sites are visited at least once a year. We support the European Parliament amendment which would oblige, rather than permit, the Commission to undertake controls of the infrastructure and operation of national inspections in Member States. Without this, we fear that a new Directive will do little to remedy the widely varying approaches of Member States, including standards of animal welfare, which currently exist. (para 97)**

The original text of Article 33 requiring at least two inspections at each establishment each year was viewed by many Member States (but not the UK) as too resource intensive and prescriptive. The emphasis in this article in Document 17299/09 is instead now placed on a risk-based approach.

The revised Article 33 requires that regular inspections are carried out and that an appropriate proportion are unannounced. One third of users are to be inspected each year, but breeders, suppliers and users of non-human primates will be inspected at least once a year. These provisions are acceptable from a UK perspective.

We agree that the success of the new Directive in harmonising national measures will depend, in part, on effective enforcement by the Commission. However, the European Parliament amendment which would have obliged, rather than permitted, the Commission to undertake controls of the infrastructure and operation of national inspections in Member States has not been adopted in Document 17299/09. Instead, the Commission will be under an obligation to carry out controls where there is reason for concern.

**118. The Commission should review the Directive no later than five years after it has come into force (and not 10, as proposed). (para 99)**

We agree that the Directive should be kept under review. Document 17299/09 now provides for the Directive to be reviewed five years after transposition. Separately, we strongly support the provision in Article 53 for periodic, thematic reviews of the use of animals.

25TH REPORT: THE STOCKHOLM PROGRAMME: HOME AFFAIRS

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

Thank you for your letter of 10 December. I am writing to update you on the finalised Stockholm Programme that was agreed at the European Council on 10–11 December 2009 and to respond to your report “*The Stockholm Programme: Home Affairs*”. The Stockholm Programme is an excellent document for the UK and will enable us to build on the many successes of JHA collaboration.

Phil Woolas wrote to you on 22 October with an overview of the first draft of the Council Conclusions. This noted that we had been successful in arguing for various points not originally in the Commission’s Communication (document 11060/09) and I can confirm that we have safeguarded the issues set out in that letter in the Programme.

Intensive negotiations followed on from the publication of the first draft Council Conclusions with, at some points, a new text circulated by the Presidency every other day. The final Stockholm Programme shows that our negotiations brought further successes—much of the document contains UK drafting and reflects our priorities, although naturally there were points on which we had to compromise in order to secure wider negotiating objectives. I have outlined at Annex A a list of where the final document differs from the original draft Council Conclusions sent through to you in October, including commenting on the text relating to the two points raised in your letter of 10 December, namely the regulation of financial markets and the European Public Prosecutor. The final Stockholm Programme is at Annex B (although at the time of writing we understand that the Swedish Presidency is planning on providing an index and therefore the pagination and presentation may yet alter).

Subsequent to the first draft of the Council Conclusions, the following insertion on **trivialising certain crimes** was added to section 2.1:

The European Council invites the Commission

- to examine and to report to the Council in 2010 whether there is a need for a legal instrument covering publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.

This was inserted in order to address issues arising from Soviet war crimes. It was clearly important to some delegations, although so far as our own position is concerned, the Government believes that our domestic law strikes the right balance between protecting individuals from hatred and violence and upholding the right to freedom of expression. We took the view that the case had yet to be made for further EU legislation in this area. As such, we were successful in removing the term “legal instrument” and replacing it with “additional proposals”.

On **police and judicial training**, we considered that the text included arbitrary targets without a clear evidence base. The final text (moved from section 3.2.1 in the first draft to section 1.2.6 in the final Programme), following representations from the UK and others, helpfully limits ambitions in this area to those who are directly involved in judicial co-operation and renders targets merely aspirational.

AREAS WHERE THE GOVERNMENT’S LANGUAGE HAS BEEN ADOPTED

There are various insertions that were the direct result of UK negotiations that the Government is pleased to have seen incorporated since the first draft.

On **better regulation**, we were successful in incorporating wording in 1.2.2 calling for non-legislative solutions such as handbooks, sharing best practice and regional projects.

On **free movement of EEA nationals** we succeeded in inserting text in section 2.2 “to combat actions of a criminal nature with forceful and proportionate measures, with due regard to the applicable law.”

Concerning **child protection** we were successful in gaining an action point in the final Programme in 2.3.2 for the development of “criminal child abduction alert mechanisms, by promoting cooperation between national authorities and interoperability of systems” (also see comments on 4.4.3).

In 4.2.2 we argued successfully for a reference under **managing the flow of information** to the EU Information Management Strategy based on a strong data protection regime consistent with the strategy for protection of personal data as set out in Chapter 2, as well as an evaluation of the existing instruments.

Your letter of 10 December expressed regret that we had not offered a more detailed analysis of the text. I am sorry that we were unable to provide a more rigorous assessment of the revised programme in my letter of 24 November. We judged that the need to let you have a copy of the text given the speed of negotiations outweighed the delay that would have been required to have provided the more detailed analysis that is now attached. As already indicated, changes to the text were moving so fast that any analysis would have been out of date by the time the letter issued.

In your report you criticised the fact that the work of the High Level Advisory Group on the Future of European Home Affairs Policy was conducted without any sort of public consultation or involvement and that the report it produced in June 2008 received scarcely any publicity. The Group was an informal initiative taken forward by the then Germany Presidency on which the UK had observer status on behalf of all common law Member States. We did however seek to ensure that Parliament was aware of its work and Baroness Scotland sent Lord Grenfell a letter on 17 July 2008 enclosing the report and noting that the report would be only one of several influences for the Commission in drafting their initial Communication.

Your report also recommends early action on any proposals leading from the Programme coming from the Commission. The Government supports this recommendation. The next stage will be an Action Plan which the European Council on 10–11 December invited the Commission to present and which had a deadline for adoption by June 2010 at the latest. We shall keep you informed of the details as this process takes place.

Your report notes that the Committee may wish to debate the Programme. I should be delighted to appear before the Committee to discuss its merits with you. I await proposed timings for such a debate through the usual channels.

*4 January 2010*

#### ANNEX A

The following note summarises the changes made since the first draft of the Council Conclusions on the Stockholm Programme were presented by the Swedish Presidency in October and the final version agreed at the European Council on 11 December. It covers the issues that the Home Secretary and Justice Secretary raised at the JHA Council on 30 November to 1 December; the areas where the Government's language was accepted by other States and incorporated within the Programme since the first draft; the areas on which the Government will wish to proceed with caution; and a list of other alterations.

Overall the Government is very satisfied with the Stockholm Programme. We believe that this is a useful roadmap for the next five years of JHA cooperation. The previous work programmes have heralded the current Dublin and Eurodac arrangements for returning asylum seekers to their port of first entry into the EU and the European Arrest Warrant that have been of significant benefit to the UK. We hope that the new work programme will see the creation of new mechanisms to improve the security of British citizens both at home and those resident or visiting other EU countries.

There were some particularly difficult negotiations where we had to focus our efforts to secure an acceptable outcome. In particular on **asylum** the first draft of the Conclusions (5.2.1) called for "mutual recognition of decisions granting protection". This could have had the potential to open up free movement rights within the EU to people with protection, and to remove the decision on who should receive protection from receiving Member States. We successfully argued that free movement should be restricted to EU citizens and their family members, and decisions on protection should be made at Member State level. We were successful in deleting mutual recognition of asylum decisions from the Programme, and replacing it with a reference to "the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law" (6.2.1). This text allows for those limited circumstances in which we acknowledge it could be appropriate for individuals to transfer their protection to another Member State, such as, for example, when a refugee's language skills meant they were more likely to gain employment in a Member State other than that they had first entered, or where they wanted to move to be able to marry.

We were also successful in inserting significant caveats around a proposal to explore "new approaches concerning access to asylum procedures targeting main transit countries, such as protection programmes for particular groups or certain procedures for examination of applications for asylum" (6.2.3). We were concerned that this would mean that asylum claims could be lodged at consular posts outside the EU; we successfully argued for any such measure to happen on a voluntary basis only, and there is now no explicit mention of consular protection.

Subsequent to the first draft of the Council Conclusions, the following insertion on **trivialising certain crimes** was added to section 2.1:

The European Council invites the Commission

- to examine and to report to the Council in 2010 whether there is a need for a legal instrument covering publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.

This was inserted in order to address issues arising from Soviet war crimes. It was clearly important to some delegations, although so far as our own position is concerned, the Government believes that our domestic law strikes the right balance between protecting individuals from hatred and violence and upholding the right to freedom of expression. We took the view that the case had yet to be made for further EU legislation in this area. As such, we were successful in removing the term “legal instrument” and replacing it with “additional proposals”.

On **police and judicial training**, we considered that the text included arbitrary targets without a clear evidence base. The final text (moved from section 3.2.1 in the first draft to section 1.2.6 in the final Programme), following representations from the UK and others, helpfully limits ambitions in this area to those who are directly involved in judicial co-operation and renders targets merely aspirational.

#### *Areas where the Government’s language has been adopted*

There are various insertions that were the direct result of UK negotiations that the Government is pleased to have seen incorporated since the first draft.

On **better regulation**, we were successful in incorporating wording in 1.2.2 calling for non-legislative solutions such as handbooks, sharing best practice and regional projects.

On **free movement of EEA nationals** we succeeded in inserting text in section 2.2 “to combat actions of a criminal nature with forceful and proportionate measures, with due regard to the applicable law.”

Concerning **child protection** we were successful in gaining an action point in the final Programme in 2.3.2 for the development of “criminal child abduction alert mechanisms, by promoting cooperation between national authorities and interoperability of systems” (also see comments on 4.4.3).

In 4.2.2 we argued successfully for a reference under **managing the flow of information** to the EU Information Management Strategy based on a strong data protection regime consistent with the, strategy for protection of personal data as set out in Chapter 2, as well as an evaluation of the existing instruments.

Again fitting in with the Government’s prioritisation of better regulation, section 4.2.3 on **mobilising the necessary technological tools** now calls for an evaluation of the exchange of information under the newly established European Criminal Records Information System (ECRIS).

The Government pushed for and was particularly pleased to see included reference to a new **Organised Crime Strategy** within section 4.4.1 on combating serious and organised crime. The UK has been invited to send the Commission proposals within the framework of an expected Spanish initiative for an EU Internal Security Strategy, a copy of which will be provided separately when it emerges in the new year. Our aim will be to consider how we can deliver elements of the existing UK Serious and Organised Crime Strategy “Extending our Reach” through an EU strategy on organised crime.

The Government is also very pleased to see an expanded section 4.4.3 on **sexual exploitation of children and child pornography**. This now incorporates key UK additions including an exploration of how to disrupt the money transfers related to websites with child abuse content and for the Commission to explore whether to create an EU-wide Child Abduction Network and exploring ways of enhancing cooperation in response to the movement of child sex offenders.

The Government also argued successfully for a broad approach to **solidarity** (6.2.2) to assist Member States experiencing migratory pressures; for explicit language to emphasise the need to ensure solidarity mechanisms do not undermine the principles of the Common European Asylum System (CEAS); and for inclusion of UK language which reflects the need for Member States to take responsibility for building capacity in their own asylum systems.

The Government argued successfully for progress on migration to be based explicitly on the framework set out in the European Pact on Migration and Asylum and the Global Approach to Migration (chapter 6), and for greater emphasis throughout the Programme on the need to tackle **illegal immigration** (6.1.6). In support

of this aim we are pleased to see inclusion of the UK request for a reference to the need for new border technologies to be “interoperable” in the final draft of the text (6.4.1).

The UK was successful in arguing for the Programme to include a separate section (chapter 7) covering priorities for JHA action outside the EU, to bring greater coherence to this work.

*Areas where the Government will wish to proceed, with caution*

Lord Roper wrote on 10 December commenting that in his Committee’s view it would not be “appropriate to include in this Programme a call for regulation of the financial markets”. The Government agrees that the reference in 3.4.2 to common rules on **supporting economic activity** including regulating financial markets and insolvency for banks is not strictly within the purview of JHA. For example, the Communication on an EU Framework for Cross-Border Crisis Management in the Banking Sector published by DG MARKT on 20 October 2009 addresses the issue of company law and a bank insolvency framework. The consultation period for that Communication has not yet elapsed, and will not do so until late January 2010. The Government made these points during negotiations. However, the action point in this section is relatively muted, calling on the Commission to “consider whether there is a need to take measures in these areas”. In light of this, of the presence of more pressing issues within the Programme, and of the fact that proposals on this will need to proceed via ECOFIN under any circumstances, the Government concluded that this reference was extraneous rather than harmful.

Equally, whilst the Government does not support the creation of a **European Public Prosecutor** as foreseen in section 3.1.1, we were prepared to accept the reference on the basis that such a proposal could only follow on from an evaluation of the operation of Eurojust. This reflects our view that legislation should only be presented where a need has been identified and where existing measures do not meet that need. This language reflects a compromise where other Member States wished to press ahead without any evaluation. We are also satisfied that any proposal to create an EPP would have to be agreed by unanimity and would be subject to the UK’s extended opt-in arrangement so we would not be obliged to participate in its creation.

Section 4.2.3 contains a new call for a feasibility study concerning setting up a **European Police Records Index System (EPRIS)**. The Government hopes that this will facilitate the sharing of useful police information but we shall continue to advise against the creation of any large new European IT systems.

Sections 6.1.4 and 6.1.5 call for a more vigorous integration policy aimed at granting migrants rights and obligations comparable “to those of EU citizens. We will continue to support measures to improve the integration of migrants, but remain clear that the rights of citizenship must be earned and certain rights, such as the right to free movement, must be reserved for EU citizens.

*Other Alterations*

Other alterations are listed below. In terms of structure, there was a partial re-organisation of the chapters including moving all references to training into 1.2.6 and a split of the original chapter 5 into two chapters.

The section on **free movement** (2.2) has been expanded not only to reflect UK wording on EEA criminality but to call for abolition of internal borders with remaining Member States wishing to join Schengen, and monitor the application of free movement rules and exchange information to prevent their abuse.

Section 2.3.3 on **vulnerable groups** now contains reference to victims of genital mutilation and those in need of greater protection.

2.3.4 on victims of crime now recognises the need to pay special attention to **victims of terrorism**.

Section 2.5 on **data protection** now references the 1981 Council of Europe Convention on data protection. This section is now linked to the EU Information Management Strategy set out in Chapter 4.

Section 4.1 on the **Internal Security Strategy** has been expanded to include a feasibility study to consider setting up an Internal Security Fund to promote the operational implementation of the Strategy.

Section 4.3.1 on **more effective European law enforcement cooperation** now goes into greater detail, such as recommending the use of Joint Investigative Teams and examining how operational police cooperation can be stepped up.

Sections 4.4.6 on **drugs** and 4.5 on **terrorism** have now been complemented in section 7.5 on **geographical priorities** with specific references on Afghanistan on the former and both Afghanistan and Pakistan on the latter.

The section on **management of the external borders** (now 6.4.1) has been significantly extended to give much more detail about how the expansion of the role of Frontex should proceed, and to call for better co-ordination of external border checks and the efficient evaluation and use of new technologies and IT systems.

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Section 6.2.3 now sets out that the proposed joint EU **resettlement scheme** will be voluntary, and the introductory part of section 6 calls for exploration of ways to better record and, where possible, identify migrants trying to reach the EU in relation to tragedies at sea.

The UK supports the additional language in the final text on the close links between **internal and external security** (chapter 7 introduction) and the need to address threats originating outside the EU, including in countries far from the EU's borders.

During the negotiations, the UK secured additional language to reflect the important contribution made by **ESDP missions** to JHA objectives (section 7.1) and the need for greater cooperation between JHA external actions and those missions.

The UK supports the additional language in section 7.3 on **migration and asylum**, which deals with border controls, the fight against illegal immigration and the importance of returns and readmissions agreements.

On section 7.5, we support the additional text on the situation with regard to illegal immigration in the **Mediterranean**, particularly the need for stronger cooperation with countries of origin and transit. This is also supported in the additional text on tackling migration routes in **Africa**. We are content with the new language on the **Black Sea** region. The UK pushed for and strongly supports the additional language on **Afghanistan** and **Pakistan**, recognising that both countries are priorities for work on counter terrorism and migration.

Concerning section 7.6, the UK supports the additional language on the Hague Conference on **Private international Law** in the section on international organisations and standards.

# Part II: Commission Responses

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## 4TH REPORT: HEALTHCARE ACROSS EU BORDERS: A SAFE FRAMEWORK

### Letter from Margot Wallström, Vice President of the European Commission, to the Chairman

Thank you for sending us your Report *Healthcare across EU borders: a safe framework*.

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply. I hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

29 April 2009

### COMMISSION RESPONSE

COM(2008)414—*Proposal for a directive on the application of patients' rights in cross-border healthcare*

The Commission would like to thank the House of Lords European Union Committee for their report *Healthcare across EU borders: a safe framework*, which sets out the position of the House of Lords regarding the proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (COM(2008) 414). We have carefully analysed all the comments provided by the House of Lords and will take them into consideration in the future.

The Commission shares the opinion of the House of Lords on the main principles of the EU action on cross-border healthcare, in particular that the directive should clarify the application of Treaty provisions to cross-border healthcare and that the directive should strike a proportionate balance between individual choice on the one hand and effective delivery of healthcare, within limited budgets and reflecting different national and regional practices, on the other. As clearly stated in the proposed directive, this directive aims to establish a general framework for provision of safe, high quality and efficient cross-border healthcare and to ensure high level of protection of health, whilst fully respecting the responsibilities of the Member States for the definition of social security benefits related to health and the organisation and delivery of healthcare and medical care and social security benefits in particular for sickness.<sup>1</sup>

The Commission also fully agrees with the House of Lords, that the proposed directive may have a positive effect on the efficient delivery of healthcare in the Member States, that it may result in hospitals and healthcare providers becoming much more responsive to patient needs and may have also a positive effect for example on specialties with long waiting lists in some Member States. At the same time, the Commission is conscious of the fact that effective healthcare delivery at the local level must remain a key objective of the national and regional authorities. The communication accompanying the proposed directive<sup>2</sup> states clearly that in any event providing care to patients from other countries must not undermine the primary purpose of the health systems of the Member States, which is to provide healthcare to their own residents. But where another country has capacity to treat patients more quickly than at home without increasing waiting times for others, and the patients concerned are willing to incur the inconvenience of travelling to another country to have that treatment, then this means more efficient care for everyone.

The Commission also agrees that it is important to have accurate and up-to-date data on the volume of cross-border healthcare mobility and its impact on the national healthcare systems. We note the House of Lords' suggestion to review the operation of the directive in a report within three rather than five years after its transposition to the Member States laws. The Commission believes that five years is a reasonable time as the practical effects of the directive will be fully developed only around that time to be meaningfully evaluated. However, we are open to discuss together with all the Member States and the European Parliament what is the exact point in time when such a report should be drawn up.

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<sup>1</sup> Recital 8.

<sup>2</sup> Communication from the Commission *A Community framework on the application of patients' rights in cross-border healthcare*, COM(2008)415.

The Commission has also noted the House of Lords' comment that the guidance of the European Court of Justice should be used whereby prior authorisation requirement can only be justified by overriding reasons of general interest. This issue is currently being intensely discussed by the Council and the European Parliament. In the course of these discussions, the Commission has always emphasised the need to respect the reasoning and principles established by the Court.

Finally, the Commission has also carefully noted the specific comments of the House of Lords regarding, in particular, the pathway of care and transfer of patients' records across borders; redress and compensation for harm caused by cross-border healthcare; professional liability insurance or similar guarantees; cross-border recognition of prescriptions; European reference networks; and the electronic interoperability of ICT systems in healthcare.

The Commission remains available to provide any further information on these issues if needed.

#### 5TH REPORT: MOBILE PHONE CHARGES IN THE EU: FOLLOW-UP REPORT

##### **Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

Thank you for sending us your Follow-up Report *Mobile Phone Charges in the EU*.

In line with the Commission's decision to encourage National Parliaments to react to its proposals in order to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

4 June 2009

#### COMMISSION RESPONSE

*COM(2008)580—Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (SEC/2008/2489, SEC/2008/2490)*

The European Commission thanks the House of Lords for its report on the proposal for the review of the Regulation on roaming on public mobile networks within the Community. The Commission welcomes the support of the House of Lords in improving transparency and protection for consumers in relation to SMS and data roaming services.

The European Parliament and Council specifically charged the Commission with reviewing, by the end of 2008, the functioning of the current Regulation, as well as analysing the developments in wholesale and retail charges for data communication services, including SMS and MMS, and, if appropriate, to include recommendations regarding the need to regulate these services.

It was on the basis of this review, together with a detailed impact assessment, that the Commission adopted its proposals for amending the Regulation on roaming on public mobile telephone networks. As members of the House of Lords will be aware, the Commission has proposed to extend the regulation in time, for a further period of three years, and in scope to address the high prices paid for roaming SMS and the transparency problems in relation to data roaming services.

Detailed analysis of the functioning of the current Regulation can be found in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the outcome of the review of the functioning of Regulation (EC) No 717/2007 (COM(2008)579). The document is available at the following address:

[http://ec.europa.eu/information\\_society/activities/roaming/docs/regulation/comm\\_en.pdf](http://ec.europa.eu/information_society/activities/roaming/docs/regulation/comm_en.pdf)

Furthermore, the detailed Impact Assessment on the different policy options envisaged for the review of the Regulation, as well as its Executive Summary, can be found at the following addresses respectively:

[http://ec.europa.eu/information\\_society/activities/roaming/docs/regulation/impact\\_en.pdf](http://ec.europa.eu/information_society/activities/roaming/docs/regulation/impact_en.pdf)

[http://ec.europa.eu/information\\_society/activities/roaming/docs/regulation/summary\\_en.pdf](http://ec.europa.eu/information_society/activities/roaming/docs/regulation/summary_en.pdf)

After a thorough examination of the data gathered, the Commission concluded that competition in relation to voice roaming services was at this stage not sufficiently developed and that, for this reason, it was necessary to extend the Regulation for a further period of three years. The Commission notes the House of Lords' concerns regarding the introduction of an absolute price cap, as expressed in the Minutes of Evidence. The Commission considered that the most appropriate solution was to continue the same regulatory approach

adopted in the current Regulation, i.e. average prices at wholesale level and maximum price caps at the retail level. As also highlighted by the Minister for Communications, Technology and Broadcasting, the maximum price caps introduced by the current Regulation, as well as by the proposals currently under discussion, are not set at cost-oriented levels, and leave enough room for competition to develop below the caps.

The Commission also evaluated the situation relating to SMS roaming services where no development on prices had taken place. The Commission concluded that the structural problems existing with regard to these services are essentially the same as for voice roaming services and that, accordingly, regulation was needed in order to ensure consumer protection and the development of the internal market. In relation to data roaming services, however, given their evolving nature and the developments taking place in particular at the retail level, it was considered that only wholesale regulation was necessary. In addition, measures to increase transparency and to protect consumers from “bill shocks” which arise when consumers use data roaming services abroad were also considered necessary.

Furthermore, as stated by the Minister of Communications, Technology and Broadcasting in the Minutes of Evidence, there is no evidence of any adverse effects from the introduction of the Roaming Regulation on innovation in the mobile industry or on domestic mobile prices. This was also the conclusion based on data gathered by the European Regulators Group and was further examined in the detailed Impact Assessment published by the Commission.

The Commission therefore considers that its proposals are proportionate and strike the right balance between the need to ensure consumer protection and to strengthen the internal market.

As Members of the House of Lords will be aware, discussions on the Commission’s proposals are evolving rapidly within the context of the co-decision procedure. The Council and the European Parliament agree with the Commission on the need to achieve an agreement at first reading. Some of the points raised by the House of Lords in its report have been discussed in the context of these negotiations, in particular that of a sunset clause.

Already at their meeting in Brussels on 27 November 2008 under the chairmanship of the French Presidency, Ministers in the Telecommunications Council signalled very broad agreement with the Commission’s proposal and adopted a general approach.

The European Parliament’s Industry, Research and Energy (ITRE) and Internal Market and Consumer Protection (IMCO) committees made some valuable suggestions in their reports which were discussed with the Council in order to reach an agreement on the amended Roaming Regulation.

As Members of the House of Lords may be aware, the European Parliament’s first reading opinion was adopted on 22 April 2009 and political agreement at the Council was reached at Coreper level in late April. The revised measures include an extension of the Roaming Regulation in time until June 2012, and in scope to cover not only voice roaming services but also SMS and data. These measures establish further reductions of the price caps for calls made and received and they also set price caps at wholesale and retail levels for sending an SMS while travelling within the EU. In relation to data roaming services, a wholesale safeguard price cap is introduced and its level will gradually decline on a yearly basis, using a similar approach to that adopted for voice services. Finally, bill shock measures will be put in place to enable consumers to specify in advance the maximum financial limit they wish to spend on data services while travelling abroad.

The Commission will monitor the developments on the roaming sector and prepare an interim report in June 2010. The Commission will also review and report to the European Parliament and Council on the functioning of the Regulation no later than 30 June 2011. The revised Roaming measures are expected to come into force in summer 2009.

## 6TH REPORT: CIVIL PROTECTION AND CRISIS MANAGEMENT IN THE EUROPEAN UNION

### **Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

Thank you for sending us your Report *Civil Protection and Crisis Management in the European Union*.

In line with the Commission’s decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission’s reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

*13 October 2009*

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**COMMISSION RESPONSE**

The Commission welcomes the interest that the House of Lords is showing in the work of the Community Civil Protection Mechanism (the Mechanism). The Commission notices that the report the Commission has been invited to comment on relates to the implementation of the Council Decision of 23 October 2001 establishing the said Mechanism.

Regarding the coordination between the Commission's Monitoring and Information Centre (MIC) which is entrusted with the implementation of the Council Decision establishing the Mechanism and NATO's Euro-Atlantic Disaster Response Coordination Centre (EADRCC), the Commission has the following remarks:

1. The only relations which have been established so far between NATO and the Council of the EU are based on the "Berlin Plus" arrangements. This framework does not cover relations between the MIC and the EADRCC, and a unanimous decision by the Council would be required to authorise the establishment of such relations.
2. The MIC and the EADRCC have similar functions, but there are also important differences in the way the two operate. On the one hand, the EADRCC is part of an essentially military organisation, whose members are not the same as the EU Member States and which focuses mostly on emergencies within its mandate area. In contrast the Mechanism is implemented by a civilian organisation and has a world-wide mandate, which enables it to respond to requests for assistance from any country inside and outside the EU. Moreover, there are important differences in the type of services offered by both systems, with the MIC facilitating coordination both at headquarters level and on site through the despatch of small expert teams. Finally, the Commission may also provide financial support to the Member States for the transportation of their civil protection assistance.
3. Cooperation between organisations active in the response to a specific disaster is essential to avoid wasteful duplication of resources and ensure an efficient provision of assistance to affected countries. The Commission has therefore taken a number of initiatives to promote cooperation with NATO's EADRCC. This subject has been addressed at several occasions by the relevant Council Working Party (PROCIV). Given the lack of unanimity on the appropriate level of coordination between the MIC and the EADRCC, no overall approach for MIC-EADRCC cooperation has been agreed. At the request of the Commission, however, the PROCIV working party has recently given its agreement for the MIC to exchange information with the EADRCC when both the Mechanism and the EADRCC have been activated for the same emergency.
4. Should the conditions for a consensus for deepening the cooperation with the EADRCC be met in Council, the Commission is willing to propose activities to be included in this cooperation. This could cover *inter alia* information sharing, early warning and mutual participation in training, exercises and lessons-learned events.

Regarding the suggestion for rationalising the EU existing alert systems (point 19 on "coordinating the coordinators"), the Commission Communication<sup>3</sup> on Reinforcing the Union's Disaster Response Capacity sets as priorities to strengthen its capacity across policies and instruments, and to improve the inter-institutional collaboration. To this end, the Commission will soon make available a comprehensive report on the Community Capacity for Management of Crises addressing *inter-alia* exercises, training and alert systems.

From a more general perspective of the implementation of the Mechanism, the Commission would like to express its willingness to make full use of the Mechanism should the UK request assistance for dealing with major disasters or the imminent threat thereof.

**7TH REPORT: THE UNITED KINGDOM OPT-IN: PROBLEMS WITH AMENDMENT  
AND CODIFICATION**

**Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

Thank you for sending us your Report *The United Kingdom opt-in: problems with amendment and codification*.

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

28 October 2009

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<sup>3</sup> COM(130)2008 final.

## COMMISSION RESPONSE

The Commission is grateful to the House of Lords for its report *The United Kingdom opt-in: problems with amendment and codification*.

This report underlines certain issues of concern regarding the UK's participation in the two Commission proposals amending respectively the Reception Conditions Directive and the Dublin Regulation. It also refers to the Commission's proposal codifying the three Council Regulations laying down a uniform format for visas.

### *Background*

The effect 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 is that those Member States do not take part in the negotiation and adoption of Title IV measures, and are not bound by them, unless within three months of a proposal for legislation being presented to the Council they notify the Council that they wish "to take part in the adoption and application" of the proposed measure.

In the event that the UK and Ireland decide not to take part in the negotiations on a proposed measure, they nevertheless may, at any time after the proposed measure has been adopted, notify the Council and the Commission that they intend to accept it.

The Protocol does not address situations where Title IV measures to which the UK has opted in are amended by subsequent measures.

By contrast the Treaty of Lisbon recognises the difficulties which might arise from the application of the current "opt-in" system in cases of amended measures: Article 4a of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice provides that if the UK or Ireland do not opt-in to any amendment of legislation which already applies to them, the Council, should it determine that the non-participation of those Member States makes the application of the measure inoperable for the other Member States, may decide that the original measure, and any subsequent amendments, cease to apply to them. The Council may also require the UK or Ireland to bear any financial consequences which may result from their ceasing to participate in the existing measure.

### *Specific issues raised by the Report*

#### The Reception Directive and the Dublin Regulation

The Commission presented a proposal to amend (recast) the Reception Conditions Directive (2003/9/EC of 27.1.2003) and a proposal to amend (recast) the Dublin Regulation (343/2003/EC of 18.2.2003).

On 6 March 2009 the UK officially notified the Council that it wished to take part in the adoption of the proposal amending the Dublin Regulation but not to the adoption of the proposal amending the Reception Conditions Directive.

#### Codification of legislation

On 18 December 2008 the Commission presented a proposal for the codification of three Regulations laying down a uniform format for visas.

The three Regulations are: 1683/95 (adopted before the Treaty of Amsterdam and therefore before any opt out regime, and applicable to the UK in the same way as in every other MS); 334/2002 (which amends the previous Regulation and the UK opted in to it); 865/2008 (which deals with the numbering of visas to make them compatible with the VIS, Ministers decided that the UK should not opt in given the fact that it is not part of the VIS.) In other words, the first regulation applies to the UK automatically, the second applies because UK opted in to it and the third does not apply.

The only purpose of a codification is to reproduce the law in a more accessible way without changing its substance. Accordingly, the codified measure will contain certain provisions that are applicable to the UK and others that are not.

### *Legal issues at stake*

1. The first issue is linked to the possible consequences arising from the UK's decision not to opt in to the Reception Conditions Directive proposal which, according to the recast technique, will replace and repeal the Directive which is currently in force and which is binding on the UK. The question therefore is whether the provisions of the current Directive could still be applicable to the UK once the new Reception Conditions Directive is adopted.

The Report of the House of Lords is of the opinion that “there is at least some doubt” as to whether the repeal/ replacement of the Directive currently in force will be effective in the UK once the Reception Conditions Directive proposal is adopted, or whether the initial measure will continue to apply to the UK because, according to the Report, the repealed legislation will cease to exist and will disappear from the *acquis*.

The Commission considers that the UK would remain bound by the unamended form of the Reception Conditions Directive. That directive would not be repealed for the UK since the UK has not opted into the proposal amending the Reception Conditions Directive and has not participated in the negotiations that will lead to the adoption of the final text. The other Member States would of course be bound by the amended version of that Directive.

In any case, precisely what this will entail in practice will depend to a large extent on the outcome of the current negotiations and on the content of the text which is finally approved and adopted.

Another point that could arise is whether the non-participation of the UK in the amended version of the existing measure makes the application of that measure inoperable for the other Member States within the meaning of Article 4a of the above-mentioned protocol annexed to the Treaty of Lisbon. Should the Treaty of Lisbon enter into force before the conclusion of the negotiations, this will have to be analysed in due course.

2. The second concern is linked to the cross-references to the Reception Conditions Directive proposal which were inserted into the Dublin Regulation proposal.

The House of Lords expressed doubts as to whether the above-mentioned provisions would be applicable to the UK given that it is not participating in the adoption of the proposal amending the Reception Conditions Directive.

The Commission considers that by opting into a measure, UK accepts the measure as a whole. The opt-in system has never, and should never be seen as giving the Member States that are within that system the possibility of “cherry picking”. Therefore, the UK will be bound by all the provisions of the amended version of the Dublin Regulation.

Again, the fact that the technique chosen is one of making cross-references rather than reiterating in the Dublin Regulation the relevant provisions of the Reception Conditions Directive should not lead to divergences in the scope of the amended version of the Dublin Regulation.

3. Finally, the codification of the three Regulations laying down a uniform format for visas, the last issue mentioned by the Report of the House of Lords, would appear to raise a number of legal questions, particularly in relation to the application of the codified instrument to the United Kingdom. Taking this into account, the Commission will give consideration as to whether it is appropriate to withdraw the codification proposal.

## 10TH REPORT: RECAST OF THE FIRST RAIL FREIGHT PACKAGE

### **Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

Thank you very much for transmitting to the Commission the report of the House of Lords European Union Committee on the Recast of the First Railway Package (COM(2008)852).

This report provides a number of interesting and useful conclusions for the ongoing work of the Commission on the Recast of the First Package. At the moment, the Commission is working on the preparation of such a proposal. Therefore, at this stage, it is not possible to comment on details of the proposal.

We take good note of the conclusions in your report. In particular, the House of Lords advocates full separation of infrastructure managers from railway undertakings and the strengthening of powers of national regulators. We are also interested in the House of Lords’ proposal to include mandatory definitions on cost categories to be taken into account for infrastructure charging, and to give power to the regulators to control access to rail-related services.

The House of Lords also recommends to the Commission to proceed with infringement procedures where it has grounds, in parallel with the recast. On this issue, the Commission has decided on 8 October to send reasoned opinions relating to the implementation of the First Railway Package to those Member States which

still did not implement all provisions of this Package. I can therefore assure you that the Commission will continue its enforcement of the Community legislation in the railway sector in order to remove obstacles to competition and to create a truly European market for railway transport services.

*12 November 2009*

### 13TH REPORT: REVIEW OF THE LESS FAVOURED AREAS SCHEME

#### **Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

The Commission would like to thank you for sending us your report of 4 June 2009 on the *Review of the Less Favoured Areas Scheme* (COM(2009)161).

We note with interest your conclusions and recommendations and we welcome the Committee's support for a clear, transparent and objective scheme for farmers in areas with natural handicaps.

The Commission Communication "Towards a better targeting of aid to farmers in areas with natural handicaps" is seeking to assess the impact of a number of suggested biophysical criteria, for delimiting areas in Europe suffering from natural handicaps and where these are a hindrance to normal agricultural practice. To ensure that any proposed delimitation of areas is based on the most pertinent evidence available, the Commission called on Member States to simulate the impact of a new delimitation methodology using the data sources available. The results of these simulations will feed the preparatory work within the Commission. This exercise does not preclude further continuing the debate on any of the elements of the scheme.

With regard to the specific conclusions and recommendations presented in the report, it is worth noting that a number of them are already taken into account in the current Rural Development Regulation, Council Regulation (EC) No 1698/2005.

It is suggested in Chapter 5 that a criteria to capture the handicap related to maritime climate should be added. The Commission considers with interest this proposal and at this stage, we will not preclude any additional evidence that is provided by Member States in the simulation of the suggested criteria or any additional criteria that they might suggest. However, in assessing any new proposed criteria, the Commission will adopt the same standards that have inspired the system proposed in the Communication, which has been developed by an expert panel managed by the Commission's Joint Research Center based on sound science and backed by a large body of evidence and literature.

Some of the views expressed in the report on the scheme and its future in the CAP are mirrored by the Commission's interest in taking forward the implementation of a robust mechanism which will meet the objectives of the policy instrument to prevent land abandonment. This will ensure that some of our most treasured areas and landscapes continue to be sustainably managed for the foreseeable future.

The Commission appreciates your support and notes all the work that went into the investigation and writing of the report and its conclusions and recommendations.

We look forward to continuing the policy dialogue in the future.

*7 September 2009*

### 14TH REPORT: THE FUTURE OF EU FINANCIAL REGULATION AND SUPERVISION

#### **Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

Thank you for sending us your Report on the Future of EU financial regulation and supervision (COM(2009)252).

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

*26 October 2009*

#### COMMISSION RESPONSE

The Commission welcomes this Report on the Future of EU Financial regulation and supervision which is intended to contribute to an in-depth review of the current regulatory and supervisory regime ("the Report") and notes that the Report will now be made available for debate. We would also like to thank the Committee for the good cooperation which defined relations throughout the course of the inquiry.

The Commission has been and will continue to promote a common EU—and a global—response to the financial crisis. The EU’s response to the global economic crisis has been a test of resilience and of speed of reaction. This situation has also presented challenges of co-ordination and reinforced the need for solidarity among the 27 Member States. The Commission and Member States have responded positively to the need to take measures to deal with the crisis and prepare for recovery.

The Report considers the reform of regulation and supervision in the light of the financial crisis and the Commission’s response as of the date of publication of the Report (9 June) including the following proposals adopted by the Commission namely changes to the capital requirements regime, deposit guarantee schemes, credit rating agencies and alternative investment funds.

However, the Report was completed before the Commission’s further proposals in this area could be assessed by the Committee. These proposals are set out in the Commission’s 27 May Communication *European Financial Supervision*<sup>4</sup> and further details are given below. Some of the issues raised by the Committee are addressed therein.

As the Commission also stated in its response to the Committee in December 2008 on another of its reports, *A Single Market for 21st Century Europe*, the Commission has made considerable efforts to effectively address the financial crisis. The Commission’s strategy involves short term measures, to calm and restore market confidence, as well as medium term measures, aiming at strengthening the resilience of the EU financial system. The latter include the Commission amendments to the Capital Requirements and the Deposit Guarantee Schemes Directives, the proposed regulation on credit rating agencies and the proposal on alternative investment funds. The Commission also envisages long term measures as part of its strategy over the remainder of 2009 and beyond.

The Commission will continue to implement the ambitious reform of the European financial system which is set out in the Commission’s 4 March Communication *Driving European Recovery*,<sup>5</sup> taking account of the views from all stakeholders. The reform will set a clear course for the EU to lead and shape the process of global change in particular through the work of the G-20.

We intend to provide the EU with a supervisory framework that detects potential risks early, deals with them effectively before they have an impact and meets the challenge of complex international financial markets.

The financial supervision package outlined in the Commission’s 27 May Communication *European Financial Supervision* comprised of:

- a European Systemic Risk Board (ESRB) which should monitor and assess risks to the stability of the financial system as a whole. It will provide early warning of systemic risks that may be building up and, where necessary, recommendations for action to deal with these risks. The creation of the board would address one of the fundamental weaknesses highlighted by this crisis, which is the exposure of the financial system to interconnected, complex, sectoral and cross-sectoral systemic risks; and
- a European System of Financial Supervisors (ESFS) for the supervision of individual financial institutions, consisting of a network of national financial supervisors working with new European Supervisory Authorities. The ESFS will combine nationally-based supervision of firms with specific tasks at the European level. It aims to foster harmonised rules and coherent supervisory practice and enforcement. This network should be based on the principles of partnership, flexibility and subsidiarity and should work to enhance trust between national supervisors by ensuring, for example, that host supervisors have an appropriate say in setting financial stability and investor protection policies so that cross-border risks can be addressed more effectively.

Following the broad endorsement given by the June European Council to this proposed new supervisory architecture, the Commission will present the necessary detailed legislative proposals in early autumn. We note the Committee’s support for the establishment of a new body at EU level to assess and monitor macro-prudential systemic risk arising from financial markets and institutions.

We note also your concerns in a number of areas, and will ensure that our proposals take into account the views of all stakeholders and institutions. In particular, the conferral of competences will be in full conformity with the Treaty. Without prejudice to the application of Community law, and recognising the potential liabilities that may be involved for Member States, our proposals will also ensure, in line with the June European Council conclusions, that decisions under the above mechanisms should not impinge on the fiscal responsibilities of the Member States. Moreover, any decision by the European Supervisory Authorities or the Commission in this regard will be subject to review by the Community Courts, The implementation of these

<sup>4</sup> [http://ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm#communication](http://ec.europa.eu/internal_market/finances/committees/index_en.htm#communication)

<sup>5</sup> [http://ec.europa.eu/commission\\_barroso/president/pdf/press\\_20090304\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/press_20090304_en.pdf)

arrangements will have to be monitored, and their effectiveness carefully assessed. We propose that the system should be reviewed within three years.

We have taken careful note of the doubts and concerns the Committee has signalled in relation to alternative investment funds. The latter has the objective to create a comprehensive and effective regulatory and supervisory framework for AIFMs at the European level. The proposed Directive will provide robust and harmonised regulatory standards for all AIFM within scope and will enhance the transparency of the activities of AIFM and the funds they manage towards investors and public authorities.

We consider that the proposal is proportionate in the requirements imposed, which differentiate between different instruments according to the level of risk they pose. It takes into account the ongoing work at global level to tackle the issue of off-shore centres, whilst avoiding closing the door to funds and service providers located outside the EU. Finally, the proposal opens new internal market opportunities for industry through the new passport, whilst ensuring that investors are properly protected. The proposal is now the subject of political discussion between the Parliament and the Council and in that context many of the issues the Committee has raised are being examined carefully.

Our programme also aims to fill gaps where European or national regulation is insufficient or incomplete, based on a “safety first” approach. For example, we also published in July a consultation on the safety of derivatives markets.<sup>6</sup> We are also planning further significant prudential changes in the banking sector. On 13 July, we presented proposals to amend the Capital Requirements Directive to increase capital charges for the trading book in line with the Basel process and to ensure that banks take due account of the risks associated with resecuritisation and remuneration policies. In October we will present further proposals to introduce dynamic provisioning for banks and to address leverage and liquidity concerns. We are consulting<sup>7</sup> on a number of these potential changes at the present time and welcome your views. We also intend to issue a Communication in October on the EU’s cross border crisis management framework which requires significant upgrading.

A stable and sound financial sector is a prerequisite for building a sustainable recovery. Last autumn, coordinated European action to increase access to liquidity in the system, recapitalise and provide guarantees for banks liabilities across the EU prevented the meltdown of the European banking industry and helped restore liquidity in interbank markets. We must continue to ensure that these support packages are effectively implemented to secure financial stability and at the same time, they minimise distortions to competition. In parallel, the Commission will continue to apply the framework for urgent rescue relief as well as long-term restoration of viability in application of the existing state aid guidance. In this context, we welcome the Committee’s supportive comments on the issue of state aid control.

Finally, we must also ensure that European investors, consumers and SMEs can be confident about their savings, access to credit and their rights as concerns financial products. We recently published a Communication on retail investment products,<sup>8</sup> a consultation on responsible borrowing and lending in the EU<sup>9</sup> and will soon review the adequacy of existing deposit guarantee schemes and make appropriate legislative proposals including in some of the areas where the Committee has signalled ongoing problems. We also want to strengthen consumer and user views in our policy making process.

We are committed to working with all concerned to build a stronger, more reliable financial system for the future. We welcome your continued views and contributions to the debate around how to ensure this.

## 18TH REPORT: EU CONSUMER RIGHTS DIRECTIVE: GETTING IT RIGHT

### **Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

Thank you for sending us your Report *EU Consumer Rights Directive: getting it right*.

In line with the Commission’s decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission’s reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

9 October 2009

<sup>6</sup> [http://ec.europa.eu/internal\\_market/financial\\_markets/derivatives/index\\_en.htm#consultation](http://ec.europa.eu/internal_market/financial_markets/derivatives/index_en.htm#consultation)

<sup>7</sup> [http://ec.europa.eu/internal\\_market/consultations/2009/capital\\_requirements\\_directive\\_en.htm](http://ec.europa.eu/internal_market/consultations/2009/capital_requirements_directive_en.htm)

<sup>8</sup> [http://ec.europa.eu/internal\\_market/finservices-retail/investment\\_products\\_en.htm](http://ec.europa.eu/internal_market/finservices-retail/investment_products_en.htm)

<sup>9</sup> [http://ec.europa.eu/internal\\_market/consultations/docs/2009/responsible\\_lending/consultation\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2009/responsible_lending/consultation_en.pdf)

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**COMMISSION RESPONSE**

The Commission thanks the European Union Committee of the House of Lords for its detailed and valuable contribution on the proposal for a Directive on Consumer Rights.

Without prejudice to the current negotiations in the European Parliament and the Council of the European Union, the Commission can respond to the conclusions and recommendations of the Committee as follows:

*Chapter 2 of the report—Overall objective*

The Commission welcomes the Committee's support to **update the existing directives**, with a view to removing the inconsistencies between them and the fragmentation of the business to consumer internal market that has resulted from minimum harmonisation.

The Commission takes note of the fact that the Committee sees the need for a more detailed Impact Assessment and to revisit certain aspects of the proposal. The Commission wishes to address the Committee's concerns by clarifying certain aspects of the proposal and providing detailed comments on the remarks expressed in the Opinion.

The Commission's **impact assessment** accompanying the proposal is based on multidisciplinary research spanning a number of academic disciplines (e.g. law, economics and psychology), as well as specific evidence-gathering activities undertaken to establish the knowledge- and evidence-base for the impact assessment.

Among other sources, the observations made in the impact assessment have been drawn from consumer focus groups, examining legal issues such as the length and modalities of the cooling-off period and practical problems such as language, delivery and tax regimes. Furthermore the Commission held dedicated workshops with consumers and business representatives as well as several individual interviews with key businesses and business organisations. The Commission was assisted by an expert panel on selected, more controversial legislative proposals; this panel included academic and legal experts.

The Commission analysed, as far as possible, the existing consumer protection in the Member States. For this purpose, it used, amongst other sources, the Consumer Rights Compendium (Annotated Compendium including a comparative analysis of the Community consumer acquis) and the preparatory work on the draft Common Frame of Reference. The comparative analysis in the Compendium included a complete description of the transposition of the relevant consumer protection directives in all the Member States and showed in particular where Member States had made use of the right to adopt stricter rules. Any deviations in the proposal from the existing four Directives were preceded by careful analysis in the impact assessment.

The Commission has made use of research into consumer behaviour in the impact assessment. The proposal is indeed one of the first examples of use by the Commission of the results of behavioural economics in its policy work. This resulted, e.g., in the proposed ban on pre-ticked boxes in Article 31 of the proposal.

Furthermore, during the initial stages of the legislative process, it appeared that further evidence and more insights on consumer behaviour and preferences in relation to sales remedies were needed. The Commission has therefore launched a qualitative study on this matter, with the view of gathering evidence as a result of in-depth interviews with consumers and traders. The results of the study should be available in the course of 2009.

In addition, the Commission services will issue a document explaining the impact of the proposal on the national level of consumer protection and its relationship with national general contract law as well as with other Community legislation. This document will list the most relevant issues addressed in the proposal and illustrate their impact on the existing levels of consumer protection across the EU. It must however be borne in mind that Member States, and not the Commission, are most competent for screening their legislation in order to check its compatibility with the Directive. The Commission considers that the above-mentioned documentation will complement the existing Impact Assessment.

The Committee considers it of utmost importance that the **overall level of protection** afforded to consumers should not be reduced.

The Commission attaches high importance to ensuring a high level of consumer protection and an effective enforcement of consumer rights. At the same time, the Commission seeks to find an **appropriate balance between a high level of consumer protection and a competitive market for businesses** in order to enhance consumer confidence in the internal market and to reduce businesses' reluctance to engage in cross-border trade. The proposal aims to unlock the potential of cross-border trade within the internal market for the benefit of consumers.

As suggested by the Committee, the Commission took the **existing Directives** as the base upon which to build. In the Commission's view, the proposal enshrines a high level of consumer protection which compares favourably with the existing directives. Compared to their minimum harmonisation standards, the

Commission has aimed to maintain the level of consumer protection or to increase it by adding new provisions such as the ban on hidden charges and default pre-ticked boxes, the prolongation of the cooling-off period for off premises sales or the widening of the definition of off-premises and distance sales.

The Commission is of the opinion that the proposal will contribute considerably to boosting cross-border retail trade. The wide-ranging impact assessment has demonstrated that **legal fragmentation** results in low level of consumer confidence in shopping cross-border. There are a number of reasons for low consumer confidence, including an insufficient knowledge by consumers of their rights; their perception that they are less protected if they buy from foreign traders and that enforcement and mediation are more difficult to carry out abroad. The problem of consumer perception is difficult to tackle. Indeed, legal fragmentation and the consequent uneven level of consumer protection across the EU make it difficult to conduct pan-European education campaigns on consumer rights, or to carry out mediation or other alternative-dispute resolution (ADR) mechanisms. Introducing a set of harmonised contractual rights valid across the EU will contribute to remedying this problem.

Furthermore, the effects of the fragmentation are felt by business because of the conflict-of law rules, and, in particular, the Regulation on the law applicable to contractual obligations (Rome I—No. 593/2008), which obliges traders not to go below the level of protection afforded to foreign consumers in the consumer’s home country. Traders wishing to sell cross-border into another Member State will incur legal and other compliance costs to make sure that they are respecting the level of consumer protection in that country. Such costs are either passed on to consumers or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.

In sum, the fragmentation of national laws hinders businesses from selling across borders and considerably increases the costs of such cross-border sales. It restricts the development of enterprises which would like to expand their business across the EU, especially small and medium enterprises. Consequently, this deprives consumers from reaping the benefits of the internal market, such as increased choice and better price competition from cross-border offers.

### *Chapter 3: Full Harmonisation*

The Commission welcomes the view of the Committee that full harmonisation could increase legal certainty for both consumers and business. It shares the view that a “differentiated” or, in Commission terms, a “targeted” full harmonisation has the best prospect of success.

In this sense, the proposal is limited to harmonising certain aspects of consumer protection law in contracts between businesses and consumers (B2C). These aspects concern mainly the trader’s obligation to provide the consumer with (pre-contractual) information, the right of withdrawal for distance and off-premises contracts, the legal rights and guarantees for sales contracts and the unfair terms in consumer contracts. The proposal is not designed to harmonise the Member States’ general contract law nor all aspects of consumer protection. For example, the rules on the conclusion of contracts (offer and acceptance), on invalidity of contracts or on damages for late delivery or for faulty goods will still be regulated by national law.

The impact assessment and the thorough consultation of stakeholders have shown that the above mentioned aspects—and only these aspects—are crucial to improve the functioning of the Internal Market in the interests of consumers and businesses. Their positive impact on the retail market would be considerable. The savings in terms of administrative burden on business wishing to sell cross-border would be high. The Commission has refrained from regulating any other aspect, even to the detriment of greater uniformity of European Consumer Law. On the other hand, limiting full harmonisation to issues of a technical nature would not achieve the intended improvements for the retail internal market.

Full harmonisation is the only regulatory option satisfying the dual objectives of the review i.e. the improvement of consumer confidence in cross-border shopping and the reduction of compliance costs for businesses wishing to sell cross-border. Minimum harmonisation in combination with the applicable private international law (Article 6 of the Rome I Regulation) and (positive) competition between national consumer laws might at the first sight favour consumers. However, as explained above, it would hinder the development of competitive businesses which wish to expand their business across the EU, thus resulting in less choice and higher prices for consumers.

The legal fragmentation problem cannot be solved by the Member States individually since it is the very same uncoordinated use by the Member States of the minimum harmonisation clauses contained in the existing Directives that is at the root of the problem. The proposal’s objectives cannot therefore be sufficiently achieved by the Member States.

As explained in the Impact Assessment Report, the Commission has observed the principle of proportionality in pursuing the objectives under the EC Treaty in the field of consumer protection. The Commission's goal was to propose a legal instrument that strikes the right balance between business' interests and consumer rights, on the basis of a high level of consumer protection.

However, the Commission agrees with the Committee that clarity is needed about the extent of full harmonisation.

For this purpose, as explained above, the Commission will issue a note explaining the impact of the proposal on the national level of consumer protection and its relationship with national general contract law as well as with other Community legislation. This document will list the most relevant issues addressed in the proposal and illustrate their impact of on the existing levels of consumer protection across the EU.

The Commission agrees with the Committee that the relationship between the Directive and national contract law should be resolved in the text of the Directive itself.

Concerning the "blue button" optional instrument, the Commission shares the concern of the Committee that such a system will not adequately address the needs of both consumers and traders.

The limited positive effects of applying this non-legislative tool would be diminished by the remaining regulatory fragmentation and the negative effects of legal fragmentation would not be remedied.

#### *Chapter 4: Scope of the Directive*

The scope of the Directive has been thoroughly analysed in the preparatory phase of the proposal. In view of the findings of the Impact Assessment, the Commission decided to limit the scope of the proposal to four Directives from the existing consumer acquis.

The Review of the Consumer Acquis, of which the proposal in the most important outcome, covered eight directives: the Doorstep Selling Directive 85/577/EEC; the Package Travel Directive 90/314/EEC; the Unfair Contract Terms Directive 93/13/EEC; the Timeshare Directive 94/47/EC; the Distance Selling Directive 97/7/EC; the Price Indication Directive 98/6/EC; the Injunctions Directive 98/27; the Consumer Sales Directive 1999/44/EC. However, in line with the bottom-up approach to the policy making, the proposal addresses only issues which are crucial for opening up the EU retail market and which were broadly supported in the public consultation. Therefore, the proposal covers all core issues for cross border B2C sales, which are key elements for the conclusion of a contract and its execution. The Commission has carefully analysed the possible impacts of the various issues on consumers and their relevance for the EU retail internal market. The analysis of the responses to the Green Paper formed an important part of this exercise.

Four directives that deal with horizontal matters were therefore incorporated in the proposal, i.e. the Doorstep Selling Directive, the Unfair Contract Terms Directive, the Distance Selling Directive and the Consumer Sales Directive. The Timeshare Directive as well as the Package Travel Directive deal with very specific products; they require specific vertical regulation (e.g. on information requirements) and for that reason do not fall into the remit of this horizontal instrument. Both the Price Indication Directive and the Directive on Injunctions do not concern contract law but marketing and procedural law. These two directives therefore fall outside the scope of the proposal, which deals with business-to-consumer contract law. Although the scope of the proposal is limited to four existing directives, it will contribute, in line with the Commission's better regulation objective, to significantly reducing the fragmentation of the European and national consumer law.

The provisions on information requirements and unfair contract terms (chapters II and V) are applicable in their entirety to **services**, including **digital services** (i.e. software, downloaded music, etc). As regards the rules on distance selling, the proposal retains the derogation from the right of withdrawal in the existing Distance Selling Directive for services where performance has begun with the prior consent of the consumer. It follows that the consumer is no longer able to withdraw once he/she has started downloading the digital service. Conversely, the rules on sales in chapter IV only apply to "tangible movable items"; pure services or digital services are not covered by these rules. In fact, the remedies foreseen in chapter IV are not suitable for services. Furthermore, the Commission is not aware of any evidence that fragmentation of the rules on remedies and guarantees for services create problems for cross-border trade. Concerning software and data, the public consultation in the Green Paper on the Review of the Consumer Acquis has shown that it will require further data gathering in order to extend or adapt the liability for lack of conformity to them. The Commission will study this matter carefully, in particular by carrying out a comprehensive study, which the Commission recently launched with a call for tender (*see* [http://ec.europa.eu/eahc/consumers/consumers\\_tenders.html](http://ec.europa.eu/eahc/consumers/consumers_tenders.html)). In addition, the Swedish Council Presidency will hold a European conference on 3 and 4 November 2009 which will in particular focus on consumer policy in relation to digital services, including software and data, and will tackle market developments, consumer habits and problems in relation to digital services. This preparatory work has to be finalised before it will be possible to propose any new legislation on digital services.

**Mixed-purpose contracts**, i.e. contracts having as their object both goods and services are treated as sales contracts under the proposal by virtue of the definition in Article 2(3). This means that all chapters of the proposal may apply to such contracts. E.g., if a mixed-purpose contract is concluded at a distance, the consumer will be protected by the rules on distance contracts for the whole contract (i.e. he will be able to withdraw from the mixed-purpose contract). Chapter IV, however, applies only to goods supplied under the mixed-purpose contract and not to the service element (Article 21(1)). In the case of a contract for the purchase of a mobile phone combined with a subscription to mobile phone services, it is clear that the rules on delivery and remedies for lack of conformity apply only to the mobile phone itself and not to the mobile phone services to be supplied. The Swedish Presidency and the Commission are currently working to improve the text of the proposal with a view to the negotiations in the Council Working Party.

The Commission can give the following clarification on the extent to which **financial services** are covered by the proposal. Chapter V on unfair contract terms applies to financial services in general. Chapter III on consumer information and right of withdrawal for distance and off-premises contracts only applies to some specific financial services contracts concluded off-premises (insurance contracts, financial services whose price depends on fluctuations in the financial market and consumer credit covered by the Consumer Credit Directive 2008/48/EC are not covered by Chapter III). In practice the most important financial services contracts that will be covered are mortgage credit contracts and consumer credit contracts for less than EUR 200 or more than EUR 75,000. For these financial services contracts, the information requirements in Chapter II Article 5 and 7 will apply by virtue of the reference in Article 9.

The Commission will encourage and support the discussion and clarification of provisions related to financial services. However, in the Commission's opinion, the solution of the Committee not to apply the proposal where a trader has voluntarily chosen to comply with the Consumer Credit Directive would not lead to legal certainty. As to hire purchase or other combinations of sale, hire and financial service elements (e.g. leasing), the Commission considers that the qualification of such contract should be left to national law, due to the complexity and the diversity of such forms of contracts. Furthermore, the Commission cannot follow the reasoning of the Association of British Insurers on inertia selling: It is clear that if a trader engages in inertia selling, which is an unfair commercial practice banned by Annex I no. 29 of the Unfair Commercial Practices Directive (unsolicited supply of a product), he may not request any consideration. Automatic renewal of contracts, including insurance policies, would be possible under the proposal if the contract terms governing the renewal are deemed to be fair (respecting, e.g., the presumption of unfairness in Annex III (1) (f) of the proposal).

#### *Chapter 5: Clarity for consumers and provision of information*

The Commission agrees with the Committee that efforts should be made to explain the Directive to consumers and traders once it has been approved. This could be through information campaigns, guidance documents or other means of information. In this context it should be noted that the Commission has introduced an optional standard withdrawal form for consumers (see Article 14 (1) and Annex 1 of the proposal). During negotiations in the European Parliament and the Council of the European Union, the Commission will encourage any useful further clarification in the recitals or the text of the proposal itself.

#### *Chapter 6: Right of withdrawal for distance and off-premises contracts*

For the purpose of simplification and legal certainty for consumers, the length of the withdrawal period should be uniform; the Council Working Party is discussing a common starting point of the period for both distance and off-premises contracts. The 14 day period has been found by the EU legislator to be appropriate in the case of two recent directives—the Consumer Credit Directive and the Timeshare Directive. There would be therefore strong reasons to apply the same period in the present Directive. In the light of full harmonisation, Member States would not be able to keep longer periods for certain products, but traders would be free to grant a longer period.

In its proposal, the Commission suggested to exclude insurance contracts concluded off-premises from the scope of chapter III, see Article 20(2)(a). However, Member States seem to be opting for generally excluding financial services from the scope of chapters II and III (see above).

The Commission agrees with the Committee that it is important for both consumers and traders to have a clear and unequivocal proof of the withdrawal from the contract. Therefore, the proposal requires that the withdrawal be made on a durable medium, the withdrawal form being one option amongst others. Simply sending back a good may not be considered as unequivocal; this could also be interpreted as request of repair or replacement.

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*Chapter 7: Sales contract*

The Committee expresses its concern about the **relationship between the consumer sales remedies** referred to in Article 26 and the **traditional contract law remedies** of the Member States, such as the right to reject in the UK.

In the course of the negotiations in the Council Working Party, some Member States expressed their wish to include further remedies in the proposal, such as a right to reject. The Commission is not opposed to the idea of expanding consumer rights with regards to faulty goods.

However, should the right to reject not be included, the Commission would support the insertion of a provision in the proposal unequivocally confirming that the UK would be able to retain its right to reject.

The Commission considers that the **duty to notify the lack of conformity** does not necessarily lead to lowering the level of consumer protection. On the one hand, a duty to notify brings legal certainty for both consumers and business and prompting the consumer to notify shortly after the discovery of the defect may protect consumers from possible damages. On the other hand, the Commission acknowledges that a duty to notify is an additional burden for consumers. Similarly, the Commission recognises that several Member States would prefer a longer **liability period of the trader** for certain products or increase the flexibility in the application of this provision. The Commission will not object to other solutions on which the Member States agree, provided that sales remedies are fully harmonised and an adequate balance between traders' and consumers' interests is achieved.

Concerning the exclusion of rescission in cases of minor defects, the Commission notes that a majority of Member States currently apply this provision and lack of clarity or uncertainty do not seem to be an issue. The same applies to the terms "within reasonable time" or "significant inconvenience". The Commission is aware that this legal term might be interpreted differently between or within Member States. However, this applies to all abstract legal terms and only abstract terms give sufficient discretion to do justice to the individual case.

*Chapter 8: Unfair contract terms*

The Commission agrees with the Committee that **negotiated terms** should not be included in the scope of the Directive. When transposing the Directive, Member States will not be precluded from extending the scope of their national law to negotiated terms.

The Commission wishes to reassure the Committee that the content of "**grey**" and "**black**" list will be meticulously examined within the Council Working Party. The screening of Member States' national lists may lead to the inclusion of additional terms or a transfer between the grey and black list in the course of the negotiations.

The Commission shares the opinion of the Committee that the process of **comitology** should be given a chance to prove itself. Indeed, the Commission considers it to be the most efficient method of amending the grey and black list.

In conclusion, the Commission wishes to reiterate its commitment to maintaining a constructive and open discussion on the proposal. It remains open to clarifying, improving and strengthening the provisions of the proposal. In the course of the negotiations in the European Parliament and the Council of the European Union, concerns and suggestions such as the ones brought forward by the Committee will be discussed and evaluated. The Commission assures the Committee that, insofar as the Commission can influence the negotiations, sufficient time will be allocated to discuss these issues in detail. Finally, the Commission wishes to stress that the proposal offers a unique opportunity to create a single set of rules which will apply across the board to all businesses and all European consumers. In this light, the Commission trusts that the explanations provided above will clarify the main concerns highlighted in the Opinion and will enable the Committee to extend its support to the proposal.

**19TH REPORT: MONEY LAUNDERING AND THE FINANCING OF TERRORISM****Letter from Margot Wallström, Vice President of the European Commission, to the Chairman**

The European Commission is grateful to the House of Lords Select Committee on the European Union for its interest in the area of anti-money laundering (AML) and combating the financing of terrorism (CFT) which remains a priority of the European Commission. The report *Money laundering and the financing of terrorism* makes very interesting reading and it will undoubtedly serve to advance work in this field at the national as well as at the international level. It will also assist in assessing the overall effectiveness of the EU fight against

money laundering and terrorist financing including as regards the application report on the 3rd Anti-Money Laundering Directive<sup>10</sup> due in 2010.

Concerning implementation issues, the European Commission is aware of the fact that the implementation of several EU instruments is not entirely satisfactory. The European Commission, in its capacity as guardian of the Treaties, is committed to ensuring proper implementation and application of the EU *acquis*. Experience shows that the implementation of secondary legislation can greatly benefit from a continued dialogue between national administrations and the institutions as well as from input by external experts such as academics and practitioners. This dialogue allows for the anticipation of problems stemming from implementation and avoids diverging interpretations between Member States, which is detrimental to the uniform application of EU law by Member States.

Regular experts' meetings have proved useful for giving impetus to implementation work by providing Member States' authorities with guidance and assistance. The first instruments dealt with in the context of the implementation strategy launched by the European Commission are the Framework Decision 2003/577/JHA on freezing property or evidence and the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties. The focus will move to the Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders in 2010. The implementation report on this subject will be published at the end of 2009.

In the case of confiscation, the implementation of legal acts may not be sufficient to achieve the intended results. The Commission thanks the House of Lords for its support to the Communication on the proceeds of organised crime, which proposes 10 strategic priorities to enhance confiscation, including an increased cooperation among Member States and a recasting of the EU legal framework. Such recasting could be necessary in order to clarify existing provisions, address inconsistencies between provisions which prevent them from being applied in practice and widen the scope and effectiveness of existing EU acts. In particular, as most of the EU provisions cover only criminal proceedings, a recasting could introduce provisions allowing the execution of non-conviction based confiscation/civil recovery orders in other EU Member States. Such provisions are already foreseen by the Council of Europe Warsaw Convention, which to date has been signed by 19 Member States and the European Community. Initial discussions on the possible recasting and its scope will continue to take place within the informal EU Asset Recovery Offices Platform chaired by the Commission.

The Commission intends to take forward work on analysing the impact of the 3rd Anti-Money laundering Directive. This will include costs of compliance, taking account, *inter alia*, of the recent study on the cost impact of six key EU Directives including the 3rd Anti-Money Laundering Directive for certain types of firms within the financial industry (including banks).<sup>11</sup> The next step in this process will be the preparation, within the framework of the 3rd Anti-Money Laundering Directive, of the application report mentioned here above in paragraph 1.

The Commission supports the Committee's recommendation to consider steps to increase the effectiveness of public-private cooperation on countering terrorist financing. In our Communication to the European Parliament and the Council of 10 June 2009 "*An area of freedom, security and justice serving the citizen*" we stressed that the instruments for combating the financing of terrorism must be adapted to the new potential vulnerabilities of the financial system and to the new payment methods used by terrorists. It is our understanding that this should include close cooperation with the private sector, not just with the "traditional" stakeholders, such as financial institutions, but also with market players which are, for example, relevant for new and alternative payment methods, like internet service providers. In addition, the Communication addresses the role of the charitable sector in the context of the financing of terrorism. The Commission is determined to continue its cooperation with charity organisations with the aim to prevent their abuse for terrorist financing purposes.

As regards the link between the proceeds of piracy and terrorist financing, we very much welcome the Committee's recommendation to discuss this issue within the EU and with the FATF with a view to establishing the extent of such link.

Concerning FIU.NET, the European Commission wishes to emphasize the importance given to this project in its AML/CFT policy. Yet, FIU.NET requires time to mature and grow. This process is ongoing and progress is being made: e.g. during the current grant period 2007–09, the number of EU-FIUs connected to FIU.NET increased from 16 to 22. The FIU.NET project 2009–11 will primarily focus on intensifying cooperation between FIUs, extending FIU.NET to other Member States and further professionalise its IT environment. FIU.NET users, most notably the members of FIU.NET Boards of Partners, are being closely involved in the

<sup>10</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

<sup>11</sup> This study is available at [http://ec.europa.eu/internal\\_market/finances/docs/actionplan/index/090707\\_cost\\_of\\_compliance\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_cost_of_compliance_en.pdf)

drafting of the new project. They are therefore in a position to provide direct input on the project thus enhancing its value for money. Lastly, negotiations are currently taking place on the future of the FIU.NET. Various options are under consideration and the European Commission is pro-actively supporting the FIU.NET participants in improving FIU.NET to become a powerful tool for the FIUs of all Member States. I look forward to developing our policy dialogue further in the future.

*7 October 2009*