HOUSE OF LORDS
European Union Committee

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

This edition includes correspondence from 1 October – 31 December 2017

EU HOME AFFAIRS SUB-COMMITTEE

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Letter from Stephen Barclay MP, Economic Secretary to the Treasury, HM Treasury

Thank you for your letter of 14 September regarding the proposal for amending the Fourth Money Laundering Directive (4MLD) and the First Company Law Directive, following our letter of 24 July. I am writing to update you on the most recent political trilogues and respond to the questions you asked.

Trilogues

At the most recent political trilogue on 3 October, all three parties continued to put forward their position on the key outstanding issues. Issues including high risk third countries, politically exposed persons (PEPs) and the extent of access to national registers of trust beneficial ownership were discussed. On the issue of access to trust beneficial ownership registers, the Presidency continue to put forward the Council's position that access should be granted to competent authorities, obliged entities and those with a "legitimate interest" in the information (with Member States having flexibility to define "legitimate interest"). Both the European Parliament and Commission are continuing to push for a greater degree of public access to information held on such registers. The next trilogue is scheduled for 14 November.

As you noted in your letter, the Government's priority is to grant a proportionate level of access to trust beneficial ownership registers. In this context, a proportionate level of access should be limited to those who meet the "legitimate interest" test described above. If such a test is included in the final amending Directive, I anticipate that our consultation on transposition of the amendments will invite views from industry, civil society and other interested parties on this point.

The 36-month implementation period for bank and payment account registers

You asked about whether the recent discussions have clarified the 36-month implementation period for bank and payment account registers. No further detail has been agreed regarding this implementation period, which we expect to be conclusively agreed following the substantive amendments being finalised. It is known, however, that certain Member States missed the transposition deadline for 4MLD, and have similarly not established registers required by 4MLD within the permitted timeframe. In view of this, we anticipate that Member States will continue pushing for a suitable timeframe to fully implement national registers of bank and payment accounts.

At the trilogue of 3 October, all parties expressed the aim of reaching a political agreement on the amendments in the trilogue scheduled for 14 November. If all parties reach agreement, they will then seek sign-off from Member States. If the proposal is in line with the Government's objectives, I would like us to be in a position to support its agreement. I would therefore request that the Committee clears this proposal from scrutiny.

29 October 2017

Letter from the Chairman to Stephen Barclay MP, Economic Secretary to the Treasury

Thank you for your letter of 29 October about the proposed amendments to the Anti Money-Laundering Directive (Document 10678/16), which the Home Affairs Sub-Committee considered at their meeting on 15 November.

We are content to clear this document from scrutiny and we do not require a response.

19 December 2017

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, ON THE EUROPEAN AGENCY FOR THE OPERATIONAL MANAGEMENT OF LARGE-SCALE IT SYSTEMS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE, AND AMENDING REGULATION (EC) 1987/2006 (10820/17)

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Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service, Home Office

Thank you for your letter received on 21 September 2017 about the proposed Regulation for the operational management of large-scale IT systems, which the Home Affairs Sub- Committee of the Select Committee on the European Union considered at a meeting on 11 October 2017.

We note that the opt-in and opt-out deadlines are approaching and would ask whether the Government intends to request a Council Decision under the Schengen Protocol. We would also invite you to provide further updates on the negotiations that were due to enter their next phase in late September.

The UK's post-Brexit relationship with eu-LISA remains a concern. The Government emphasised the importance of remaining part of data sharing systems such as SIS II in its future partnership paper, Security, law enforcement and criminal justice but we are unclear about how the Government intends to achieve this aim. The Articles referring to third-country participation in eu-LISA, Articles 38, 17(4) and 23(2), outline "participation by countries associated with the implementation, application and development of the Schengen acquis and Eurodac-related measures". This suggests that third-country participation will depend on entering an association agreement covering both the Schengen acquis and Eurodac-related measures. We would welcome further clarification on this point, including whether the Government intends to seek changes to the provisions relating to third country participation in eu-LISA.

We will continue to hold document 10820/17 under scrutiny. I look forward to hearing from you within 10 working days.

11 October 2017

Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter of 11 October.

The Government has decided to opt in to the new eu-LISA Regulation to the extent that it is not Schengen building, and not to opt out to the extent that it builds on those parts of the Schengen system in which the UK takes part. We informed the Presidency of our opt-in decision on 23 October.

The Government believes it is in the national interest to continue participating in eu-LISA while we are EU members and thus are bound by the legislation governing some of the IT systems it either manages or is likely to be commissioned to build.

You ask whether the Government intends to seek a Council Decision under the Schengen Protocol, extending our participation in the Schengen system so we could take part in the Agency as a whole for the purpose of management of systems, including those from which we are excluded.

As the Committee is aware, we negotiated a similar Council Decision when the current Regulation governing eu-LISA was being agreed. Our impending departure from the EU is likely to make it more difficult to get a similar agreement this time, especially as the Decision in question would need to be agreed unanimously by the other Member States. We will therefore keep the matter under review and seek a Decision if it appears we would benefit from the legal certainty that it would give to our participation in the Agency while we are still Members.

Negotiations on the proposal have been continuing in Council, with the most contentious issues being whether eu-LISA should be permitted to establish additional back-up sites, and the procedures to be followed under Article 12(2) before a group of Member States can ask eu-LISA to assist them in implementing certain pieces of EU JHA legislation that are based on decentralised IT systems (for example, in creating a joint system to operate the Passenger Name Records Directive). We do not think the case has been made for additional backup sites, a view the Commission shares. Our principle objective on Article 12(2) is to make it clear that the Member States commissioning this work from eu-LISA will meet the full cost. The latest compromise text from the Presidency contains satisfactory wording on this point.

The Presidency is attempting to make progress quickly on the negotiations, and may seek a General Approach by the end of the year.

The proposal will be considered in the European Parliament's Civil Liberties Committee (LIBE), but no date has yet been set for this.

In practice, it will be impossible to separate our post-Brexit relationship with eu-LISA from consideration of options for future cooperation arrangements in the field of security and law enforcement once the UK has left the EU. As I said in my letter of 21 September, it would be wrong to set out unilateral positions on specific measures that currently facilitate our practical cooperation. I note the Committee is aware, from the reference to it in your letter, that the Government has recently published its paper on "security, law enforcement and criminal justice: a future partnership" proposing a new treaty on security, law enforcement and criminal justice with the EU. This was also referred to by the Prime Minister in her recent speech in Florence.

As a separate point, we are of the view that the eu-LISA Regulation should allow the participation of non-Member States that are associated with any of the IT systems the Agency manages. We have proposed amendments to this effect, and these are still being considered.

I will place a copy of this letter in the House library.

31 October 2017

Letter from the Chairman to Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter received on 31 October 2017 about the proposed Regulation for the operational management of large-scale IT systems, which the Home Affairs Sub- Committee of the Select Committee on the European Union considered at a meeting on 15 November.

As you mentioned in your letter, we are aware that a Council Decision was required for the UK to participate in the current Regulation governing eu-LISA. It would seem that the same is true this time. We note your suggestion that the UK's imminent departure from the EU might make an agreement on the requisite Council Decision difficult, and we ask you (i) to explain what the implications will be if the UK does not obtain a Council Decision for participating in the Regulation and (ii) to provide us with more information about the concerns that Member States might have about supporting a Council Decision.

On the update to the negotiations for the proposed Regulation, we note that the Government does not believe that the case has been made for additional back-up sites. We would invite you to explain more about the pros and cons of additional back-up sites and why the Government thinks that they are not necessary.

On the basis of cooperation with third countries, we note that the Government has proposed amendments to enable the participation of non-Member States that are associated with any of the IT systems that the Agency manages. How has this amendment been received by other Member States?

We will continue to hold Document 10820/17 under scrutiny. I look forward to hearing from you within 10 working days.

16 November 2017

Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter of 16 November.

Seeking a Council Decision to secure the full application of the measure to the UK

You asked what the implications would be if we did not secure a Council Decision securing the full application of the draft Regulation to the UK.

The question of seeking a Council Decision arises because the draft Regulation provides for eu-LISA to manage several systems that build on the parts of the Schengen aquis from which we are excluded. These consist of the Visa Information System (VIS) and the border control aspects of the Schengen Information System (SIS II), which it already manages, and the proposed Entry and Exit System (EES) and European Travel Information and Authorisation System (ETIAS).

Council Decision 2010/779/EU authorises us to participate in the existing eu-LISA Regulation to the extent that it covers the border aspects of SIS II, and VIS. It is arguable that this authorisation will continue to apply once the new Regulation is in force. However, a further Council Decision would confirm our participation in the new Regulation to the extent that it gives eu-LISA responsibility for managing the EES and ETIAS

It is not entirely clear what would happen if we did not secure a further Council Decision, but we do not believe we would be excluded from participating in the Regulation to the extent that it gives eu-LISA responsibility for managing all the systems it operates except EES and ETIAS. This means, in particular, we would be able to participate in the

Agency's management of the systems that we take part in or have opted into (Eurodac, the police and judicial cooperation aspects of SIS II and the proposed system governing the use of the European Criminal Records Information System (ECRIS) for third country nationals (ECRIS-TCN))..

A new Council Decision would provide additional legal certainty, but we are not convinced such a Decision is essential in order to obtain the practical benefits we gain from taking part in the Agency. Nevertheless, we will keep the situation under review and will seek a Council Decision if we conclude that the additional legal certainty would benefit us.

Any Council Decision we sought would need to be agreed unanimously. No Member States have raised any specific concerns about it to my knowledge.

Backup sites

Eu-LISA's IT systems are based in Strasbourg, with a single backup site in Sankt Johann im Pongau, Austria. Building further backup sites would be expensive and time consuming and would risk diverting eu-LISA's resources from its core tasks of managing and developing the systems for which it is responsible. We would therefore need convincing evidence that the existing arrangements created a risk to the effective 24/7 operation of the systems that would justify the creation of extra sites.

The text of the draft Regulation has been amended in negotiations to require the Commission to conduct a review, within 15 months of the date of the Regulation coming into force, of the capacity of the existing sites to keep the systems eu-LISA manages operating effectively on a 24/7 basis. The Government can support this text and would be happy to consider any arguments resulting from the Commission's review.

Cooperation with third countries

The text has been amended to provide for greater consistency between the various Articles that govern or refer to the participation of third countries in the Agency. Article 38 remains the key part of the Regulation on this issue. It currently provides that participation in the Agency will be open to third countries that have entered into agreements with the EU associating them with the Schengen aquis and with Dublin and Eurodac-related measures, and specifies that those agreements shall make arrangements for the detailed rules governing the participation of those countries, including their voting rights. Article 38a also allows eu-LISA to "establish and maintain cooperative relationships" with third countries, "to the extent related to the fulfilment of its tasks".

The Government would have preferred the Regulation to provide for participation by third countries that take part in any of the systems that eu-LISA manages, as that would have made it clearer that a

third country does not have to take part in the whole Schengen aquis, plus Dublin and Eurodac, in order to participate in eu-LISA.

However, we note that a third country agreement concluded by the EU under may provide for an EU measure, or provisions within such a measure, to apply to that third country, with or without modifications or adaptations, even where the EU measure being applied does not itself expressly provide for participation by non Member States. For example, the 2013 Eurodac Regulation does not on its face provide for or permit direct access by a third country to the Eurodac system. Nevertheless, Norway applies that regulation and has access to the system it governs, under that country's agreement with the EU of 19 January 2001 [OJ L 093 , 03/04/2001 P. 40 – 47]. As such, the scope of a third country's participation in eu-LISA will be determined by the agreement that provides for that participation, and not by the eu-LISA Regulation itself. As the Committee will be aware, we have proposed a treaty with the EU on security, law enforcement and criminal justice.

Progress of the negotiations

Negotiations on the proposed Regulation have made rapid progress and we expect the Estonian Presidency to bring it to the 7 December JHA Council for a General Approach to be agreed. We do not yet have the final text that the Presidency will present, but I set out below how we expect it to compare with the text we deposited on the most important issues (other than those dealt with earlier in this letter).

- The provisions on eu-Lisa's role in improving data quality (Article 8) have been amended to make it clear that they are without prejudice to Member States' responsibilities to ensure the data they enter is of sufficient quality.
- As originally drafted, Article 12(2) would have allowed allow a group of at least six Member States to commission eu-LISA to develop (at their expense) centralised solutions to help them implement obligations of certain JHA legislation, such as those relating to the processing of Advance Passenger Information or Passenger Name Records. The text has been amended to reduce the minimum number of Member States to five, to make it clearer that the Member States concerned must meet all the costs of the work and to leave open the possibility of other Member States participating in the centralised system at a later date.
- Article 13(4) still specifies the seat of eu-LISA and its technical and backup sites. As we indicated in the EM, the Government has concerns about this because of our view that the location of EU Agencies should be decided by "common accord" of the Member States' Governments (Article 341 TFEU) rather than being specified in the legislation governing the Agency. We have not been able to make progress on this, largely because these are also specified in the existing Regulation governing eu-LISA.
- Article 21 sets out the provisions for appointing the Agency's Executive Director. He or she will be appointed by the Management Board from a shortlist drawn up by the Commission. The text now provides that the shortlist should contain at least three names, but does not allow the Management Board to reject the shortlist. The text does now allow the Management Board to initiate the process for dismissing the Executive Director by a two thirds majority. This is a welcome change from the original text, which would have allowed only the Commission to start this process.
- The text now provides for the appointment of a Deputy Executive Director.

Although there are some negotiating objectives that we have not achieved in full, the Government considers the text being submitted for General Approach to be broadly acceptable. However, as the text has not cleared Parliamentary Scrutiny in either House we will abstain in the vote on it. We expect all other Member States to support the text.

Once the General Approach has been agreed, we expect negotiations between the Council and European Parliament to begin quickly. There is a good chance of Political Agreement being reached on the text in the first half of next year, under the Bulgarian Presidency.

1 December 2017

Letter from the Chairman to Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter received on 1 December 2017 about the proposed Regulation for the operational management of large-scale IT systems, which the Home Affairs Sub- Committee of the EU Select Committee considered at a meeting on 13 December.

The Committee is concerned that the letter is not entirely clear about what will happen if the Government does not secure a new Council Decision. I also note that in previous correspondence, and in your letter to the Common's European Scrutiny Committee dated 1 December, you mention that discussions for seeking a Council Decision are likely to be more difficult because of the UK's impending departure from the EU. However, you also note in your most recent letter that, as far as you are aware, no Member States have raised any concerns about the UK seeking a new Council Decision. Could you clarify whether the Government has sought the opinions of other Member States, or if the Government is planning to approach other Member States to find out if they have any particular objections to the UK seeking a new Council Decision?

You imply in your letter that the UK might seek continued access to databases managed by eu-LISA, such as Eurodac, via the proposed treaty on security with the EU. Are you able to outline in more detail what you expect the proposed treaty to cover in terms of law enforcement and criminal justice, and which databases currently managed by eu-LISA the Government would seek to have continued access to?

We welcome the update on the negotiations and ask that you continue to send us updates as the negotiations progress.

We continue to hold this document under scrutiny and look forward to hearing from you within 10 working days.

14 December 2017

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A UNION RESETTLEMENT FRAMEWORK AND AMENDING REGULATION (EU) NO.516/2014 OF THE EUROPEAN PARLIAMENT AND THE COUNCIL. (11313/16)

Letter from Rt Hon Brandon Lewis MP, Minister of State (Immigration and International), Home Office

Thank you for your letter dated 14 September 2017.

I will respond to each of your questions in turn. You have asked for an update on whether funding will continue to be available for national resettlement schemes under this Regulation. It would be wrong to presuppose the outcome of ongoing negotiations, but we expect that funding will continue to be available for national schemes. The current indication is that Member States will receive a lump sum of EUR10,000 for every person resettled in accordance with the Regulation, and within the limits of resources available, EUR6,000 for every person resettled under national schemes. However, I must stress again that these provisions remain subject to negotiations and, as indicated in previous correspondence, the impact on funding for the UK as a result of these specific provisions will depend on a number of factors, primarily the timing of the adoption of this Regulation in relation to the UK's exit from the EU.

You have also asked what impact this Regulation will have on the UK's cooperation with the EU on resettlement. It is the UK's long-standing position that resettlement schemes are best operated at the national level, but we will continue to work closely with our European partners on resettlement where appropriate, for example in sharing of experience and expertise or on in-country operational coordination.

As requested, we will continue to send updates on the progress of the negotiation and the UK's position.

11 October 2017

Letter from the Chairman to Rt Hon Brandon Lewis MP, Minister of State (Immigration and International)

Thank you for your letter received on 11 October 2017 about the proposal for a Regulation establishing a Union Resettlement Framework, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 25 October.

We are grateful for the update that you provided on the progress of the negotiations and look forward to receiving further updates as the negotiations move forward. In our last letter we asked whether the Government is considering opting-in to the measures post-adoption and we would welcome your answer to that question.

We will continue to hold this document under scrutiny. We look forward to hearing from you in due course.

26 October 2017

Letter from the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International)

Thank you for your letter dated 26 October 2017.

You have asked whether the Government is considering opting into this measure post-adoption. At the current time, the Government does not anticipate opting into this Regulation post-adoption. Negotiations on this Regulation are, however, ongoing, and we will not pre-judge the results of these negotiations. The Government's position is therefore reserved.

30 November 2017

Letter from the Chairman to the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International)

Thank you for your letter received on 30 November about the Union Resettlement Framework, which the Home Affairs Sub-Committee of the EU Select Committee considered at a meeting on 13 December 2017.

We note that the negotiations are ongoing and that some of the issues discussed in previous correspondence, such as future funding arrangements, voluntariness of the scheme and inclusion of Internally Displaced People, are still subject to negotiations. We would therefore ask that you continue to keep us updated on the progress of the negotiations.

In the meantime we will continue to hold this document under scrutiny and look forward to hearing from you in due course.

14 December 2017

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE EVALUATION OF THE EUROPEAN UNION AGENCY FOR NETWORK AND INFORMATION SECURITY (ENISA) (12208/17)

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE EVALUATION OF THE EUROPEAN UNION AGENCY FOR NETWORK AND INFORMATION SECURITY (ENISA) AND PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON ENISA, THE "EU CYBERSECURITY AGENCY", AND REPEALING REGULATION (EU) 526/2013, AND ON INFORMATION AND COMMUNICATION TECHNOLOGY CYBERSECURITY CERTIFICATION ("CYBERSECURITY ACT") (12183/17)

Letter from the Chairman to the Rt Hon Matthew Hancock MP, Minister of State for Digital, Department for Culture, Media and Sport

Thank you for your EM received on 18 October 2017 about the Report from the Commission to the European Parliament and the Council on the evaluation of the European Union Agency for Network and Information Security (ENISA) and Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act"), which the Home Affairs Sub- Committee of the Select Committee on the European Union considered at a meeting on 15 November 2017.

We note that the Government largely agrees with the findings of the ENISA evaluation, and that any concerns that it might have are related to the proposed Regulation. We would therefore welcome more information about your concerns about the proposed role of ENISA in crisis management, as the EM does not contain much detail in this regard.

We would also request that you keep us informed about the negotiations on the Regulation, and especially the suggested role of ENISA in cybersecurity certification. We would welcome an update once you have developed a firmer position on subsidiarity, and when you have more information about the timings of the negotiations.

We will continue to hold these documents under scrutiny. I look forward to hearing from you within 10 working days.

16 November 2017

Letter from the Rt Hon Matthew Hancock MP, Minister of State for Digital

Thank you for your letter received on 16th November 2017 regarding the EMs about the Report from the Commission to the European Parliament and the Council on the evaluation of the European Union Agency for Network and Information Security (ENISA) and Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency" and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act"). I am grateful to the Committee for its consideration of these.

Your letter sought more information about our concerns of the proposed role of ENISA in crisis management. The proposed Regulation would give ENISA a permanent and strengthened mandate and as such sets out a number of renewed tasks and functions. This includes a number of tasks relating to operational cooperation at Union level which are to:

- Support operational cooperation among public bodies and between stakeholders.
- Cooperate at an operational level with Union institutions, bodies, offices and agencies, including the CERT-EU to address the exchange of best practice, provide advice and guidance and establish practical arrangements.
- Provide the secretariat to the CSIRTs network.

- Contribute to operational cooperation within the CSIRTs Network providing support to Member states by advising on how to improve their capabilities to prevent and respond to incidents, providing technical assistance (on request) for handling incidents and analysing vulnerabilities.
- Provide support to carry out an ex-post technical enquiry or carry out an enquiry following incidents affecting more than two Member States.
- Organise annual cyber security exercises at Union level.
- Prepare a regular EU Cyber Security Technical Situation Report on incidents and threats based on open source information.
- Contribute to developing a cooperative response to large-scale cross-border incidents or crisis by: aggregating reports, ensuring information flow, supporting technical handling, supporting public communication, testing the cooperation plans.

We assess the general intent to support increased cooperation and information sharing as positive. However the use of the term 'operational' and the detailed content of some of the tasks listed above, in particular in preparing technical situation reports and providing technical assistance, could be viewed as representing a shift towards an extension of powers towards a more operational role, which we would view as activity which is the preserve of national intelligence bodies. My officials understand that most large Member States are likely to share similar concerns. We will work with like-minded Member States and the Commission to consider a compromise which allows ENISA a supporting role with which we are satisfied does not impinge on Member State Competence.

I note your request to keep you informed regarding the negotiations on the Regulation and especially the suggested role of ENISA in cyber security certification, which I will of course do. I will also provide an update once we have developed a firmer position on subsidiarity, which we expect to be mostly concerned with the points raised above on ENISA's proposed 'operational' tasks.

In regards to timing, negotiations on the regulation have begun at an official level and will continue in the new year. We have recently had sight of the Council's draft action plan for delivering its cyber security objectives which proposes that they are aiming for negotiations to finalise in December 2018. This is more ambitious timetable than we had originally anticipated. I will keep you informed of any updates to the timetable.

4 December 2017

Letter from the Chairman to the Rt Hon Matthew Hancock MP, Minister of State for Digital

Thank you for your letter received on 4 December 2017 about the Report from the Commission to the European Parliament and the Council on the evaluation of the European Union Agency for Network and Information Security (ENISA) and Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act"), which the Home Affairs Sub- Committee of the Select Committee on the European Union considered at a meeting on 20 December 2017.

We are grateful that you engaged constructively with the Committee's queries, and provided detailed answers to some of our questions. We understand that you can give less detail in certain other areas before your negotiating position for Council becomes clearer. As a result, we will hold the documents under scrutiny; we ask that you provide us with a further update once you have a firmer understanding of the approach that you intend to take to address the subsidiarity implications of the proposed Regulation.

I look forward to hearing from you in due course.

21 December 2017

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS ON THE DELIVERY OF THE EUROPEAN AGENDA ON MIGRATION (12702/17)

Letter from the Chairman to the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International), Home Office

Thank you for your EM received on 17 November 2017 about 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 Delivery of the European Agenda on Migration (Document No. 12702/17), which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 13 December 2017.

The Communication covers an important area of policy in which coordination with the EU will continue to be necessary post-Brexit. However, while the EM suggests that the Government is very supportive of the Commission's proposals, it gives no indication of the extent to which the UK might engage with the proposed structures once it has left the EU.

Furthermore, while the Commission's proposal to produce consolidated reports on the European Agenda on Migration is indeed helpful, we would welcome more information about how this consolidation will affect the parliamentary scrutiny process. From now on, will you deposit EMs relating only to the consolidated reports, or continue to analyse separately the various legislative instruments that you list in the annex to your EM?

We would welcome clarification on these points. We look forward to hearing from you within 10 working days. In the meantime, we will hold the document under scrutiny.

14 December 2017

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: ACTION PLAN TO SUPPORT THE PROTECTION OF PUBLIC SPACES (13489/17)

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: ACTION PLAN TO ENHANCE PREPAREDNESS AGAINST CHEMICAL, BIOLOGICAL, RADIOLOGICAL AND NUCLEAR SECURITY RISKS (13484/17)

Letter from the Chairman to the Rt Hon Ben Wallace MP, Minister of State for Security, Home Office

Thank you for your EMs received on 13 November 2017 about the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan to support the protection of public spaces (Document No. 13489/17) and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan to enhance preparedness against chemical, biological, radiological and nuclear security risks (Document No. 13484/17), which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 6 December 2017.

The Communications cover an important area of policy in which coordination with the EU will continue to be necessary post-Brexit. However, while the EMs suggest that the Government is very supportive of the Commission's proposals, they give no indication of the extent to which the UK might engage with the proposed structures once it has left the EU. There is also no indication of how the two Communications that these EMs cover relate to each other.

We would welcome clarification on these points. We look forward to hearing from you within 10 working days. In the meantime, we will hold the documents under scrutiny

6 December 2017

Letter from the Rt Hon Ben Wallace MP, Minister of State for Security

Thank you for your letter of received on 7 December where you asked how the UK might coordinate with European Union work on preparedness against Chemical Biological Radiological and Nuclear threats and protection of public spaces after the UK has left the European Union. You also asked how the two Commission Communications relate to one another.

How the UK might coordinate with European Union work on preparedness against Chemical Biological Radiological and Nuclear (CBRN) threats and protection of public spaces after the UK has left the European Union?

I agree that these are very important areas where we have a mutual interest in coordination and cooperation with the European Union. Security cooperation is a key element of the deep and special partnership we will build with the European Union. However, details of how future cooperation will work will be agreed as part of negotiations with the EU.

How the two Commission communications relate to one another?

Both of the communications are part of a counter terrorism package that was published by the European Commission on 18th October. The package was primarily a consolidation of existing work streams but did include some new announcements such as 18.5 million euros protect by design fund and 6 million euro fund to support civil society groups develop effective communication campaigns. Other areas the CT package focusses on include countering radicalisation, terrorist finance and cooperation with third countries.

21 December 2017

RECOMMENDATION FOR A COUNCIL DECISION AUTHORISING THE OPENING OF NEGOTIATIONS ON AN AGREEMENT BETWEEN THE EUROPEAN UNION AND CANADA FOR THE TRANSFER AND USE OF PASSENGER NAME RECORD (PNR) DATA TO PREVENT AND COMBAT TERRORISM AND OTHER SERIOUS TRANSNATIONAL CRIME (13490/17)

Letter from the Chairman to Rt Hon Brandon Lewis MP, Minister of State (Immigration and International), Home Office

Thank you for your letter received on 11 October 2017 about a Recommendation for a COUNCIL DECISION authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime (Document No. 13490/17), which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 22 November.

We understand that at this stage you are unable to provide much more detail than the information that you included in your Explanatory Memorandum. We would welcome an update from you once the timetable for the negotiations is clearer, as well as an update on the negotiations themselves and your discussions about an opt-in decision. In particular, we would be grateful if you could outline how the Government's concerns about how well the retention of PNR data by Canada have been addressed, once the discussions reach that stage.

You also state that in making the opt-in decision on this proposal, the Government will have particular regard to the Court's Opinion that Canadian authorities should only make disclosures of PNR data to a third country if the third country has an equivalent Agreement with the EU or an adequacy decision of the European Commission covering the authority to which the PNR data is to be disclosed. This has clear ramifications for the UK's own potential data protection arrangements

with the EU post-Brexit. Will you take these future arrangements into account when considering whether to opt-in?

We will continue to hold this document under scrutiny. We look forward to hearing from you in due course.

23 November 2017

Letter from Rt Hon Brandon Lewis MP, Minister of State (Immigration and International)

Thank you for your letter of 23 November 2017 about the Recommendation for a Council Decision authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime (Document No. 13490/17).

Since the I last wrote to you, the Estonian Presidency have confirmed their intention to seek agreement to the Council Decision at the next EU JHA Council meeting on 7-8 December. Given the UK's acknowledged leadership on PNR matters I am minded to opt-in to the Council Decision and vote in favour of its adoption - I would be grateful if you could clear Document No. 13490/17 from scrutiny before 7 December so that I can support the adoption of this Decision. Future Council Decisions on signature and conclusion of the Agreement will be subject to scrutiny and the opt in will apply in the usual way.

The decision to opt in has been informed by our concerns as you noted around the Court's Opinion on data retention and the conditions for onward disclosure of PNR data to third countries by Canadian authorities. If implemented in a rigid manner, not only would they significantly impede Canada's present operational capabilities, they would also set precedent for the renegotiation of the EU PNR Agreements in place with Australia and the US, and potentially for the UK which could be party to such an agreement post-Brexit. This approach could also impact on the EU's own PNR policy to which the UK is presently party through the EU Directive on the use of PNR.

Participating within the Council during the negotiations on this Agreement will provide the UK with some influence to address our concerns. The Council Decision provides that *"[the] negotiations shall be conducted in consultation with the relevant Council Working Party .., subject to any directives which the Council may subsequently issue to the Commission"*.

As requested, I will provide you with an outline of how the Government's concerns about how well the retention of PNR data by Canada have been addressed, once the discussions reach that stage.

30 November 2017

Letter from the Chairman to the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International)

Thank you for your letter received on 30 November 2017 about a Recommendation for a COUNCIL DECISION authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime (Document No. 13490/17), which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 6 December.

We are content to clear this document from scrutiny and do not require a response

19 December 2017

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE USE OF THE SCHENGEN INFORMATION SYSTEM (SIS) FOR THE RETURN OF ILLEGALLY STAYING THIRD COUNTRY NATIONALS (15812/16)

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ESTABLISHMENT, OPERATION AND USE OF THE SCHENGEN INFORMATION SYSTEM (SIS) IN THE FIELD ON POLICE COOPERATION AND JUDICIAL COOPERATION IN CRIMINAL MATTERS (15814/16)

Letter from the Chairman to Nick Hurd MP, Minister of State for Policing and the Fire Service, Home Office

Thank you for your letter received on 26 September 2017 about the proposal for a Regulation on the use of SIS II for the return of illegally staying third-country nationals, and the proposal for a Regulation on the use of SIS II in the field of police and judicial cooperation in criminal matters, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 25 October.

We welcome your update on the negotiations, but note from previous correspondence some areas in which we are still awaiting updates. These are as follows:

a. On removing the requirement to create an alert where a person or object is sought in relation to a terrorist offence so that the creation of alerts is discretionary and not mandatory, and on the type of circumstances in which the Government would wish to exercise such discretion (Article 21)

b. On the new inquiry checks and the Government's efforts to ensure that safeguards remain in place so that, when conducting checks, police can only ask questions if this is allowed by the national law of the country in which the subject is located (Article 37)

c. On the definition for 'high-value' and whether the impact of adding in motor vehicle components and other high-volume objects would outweigh the resources required to do this (Article 38)

d. Any potential overlap between the provisions under Chapter XI for the new category of 'unknown wanted persons' and the Prüm System (Chapter XI, Articles 40-42)

e. What response the Government has received about the idea that participating States be allowed to use the information in an alert for wider law enforcement purposes (Article 53(1))

On the matter of setting out the test for creating alerts for a child in danger of going missing at the national level, could you outline the basis for this position and whether this is supported by other Member States? Are there concerns that leaving the criteria to Member States would lead to wide discrepancies in determining when an alert should be created for a child at risk?

We were not content with your response about the resource implications of participating in the Regulation. You note in your letter that it is not possible to determine the resource implications because it is unlikely that the Regulation will enter into force before we leave the EU. In the event that the UK enters a transition period of around two years, is it possible that this could come into effect during that time?

Turning to the Regulation on the use of SIS II for the return of illegally staying third-country nationals, in our previous letter we asked about the rights that UK citizens would have to access to remedy in the case of being wrongly identified as illegally staying in an EU country. This question was not addressed in your reply.

We are holding both of these documents under scrutiny. In the meantime I look forward to hearing from you within 10 days.

18 October 2017

Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter dated 18 October.

The Estonian Presidency of the Council now wishes to agree a General Approach on these proposals, together with the draft proposal for a Regulation on the establishment, operation and use of SIS in the field of border checks (document 15813/16, which the Committee has cleared from scrutiny), at COREPER on 8 November.

We intend to vote against the proposed General Approach on the police and judicial cooperation measure (document 15814/16) because the proposed legislation has yet to clear Parliamentary Scrutiny and because the text does not adequately address our concerns about the current restrictions on purpose for which the information in SIS II alerts can be used. We do not have a vote on the General Approach on the Returns Measure (or on the border checks Regulation) as we are not participating in it.

You have asked for progress reports on a number of our objectives in the negotiations on the police cooperation measure.

We have secured amendments to Article 21 of the proposal, which would (as originally drafted) have made it compulsory to create an alert in cases where a person or object is sought in relation to a terrorist offence (Article 21). The text now contains an exception that provides that Member States will not need to create an alert in cases where doing so "is likely to obstruct official or legal inquiries, investigations or procedures related to public or national security". I consider this will give us sufficient discretion over the creation of alerts in practice.

Our efforts continue to ensure that police officers are only allowed to ask questions as part of the new inquiry check if such questioning is allowed under their domestic law. The text currently being negotiated does provide that an inquiry check cannot be performed where the national law does not allow it. But Article 37(7) as drafted then provides that this is "without prejudice" to a Member State's obligation to obtain all the information requested, which could imply that they should conduct a search if that is the only way of getting it. We are continuing to press the Presidency and other Member States for clarity on this.

The current text now provides that the definition of "high value" will be decided by "implementing measures" laid down by the Commission after consulting Committee of Member State experts. We think this is acceptable.

The Commission has provided further information on the risk of overlap between the "unknown wanted person" alert (now Articles 40-41 of the proposed legislation) and Prüm, and we are satisfied that the new alert would add value. Key differences between the proposed new alert and Prüm include that the alert would remain on SIS II for up to five years, while a fingerprint sent to Prüm is deleted as soon as the Member State it was sent to has checked it against its national systems, and that Prüm checks will only in practice detect people who do not already have their fingerprints on a police system in a participating state, while SIS II (on the Commission's proposal) would not be restricted in this way.

We have not made progress in moderating the purpose limitation rules (Article 53(6)). The current text of the proposal maintains the position in the existing SIS II legislation that we must seek the issuing Member State's prior permission before using the alert for a purpose other than that for which it was created, even if we need to do so to avoid an imminent threat to national security when it would in practice be impossible to seek such permission in advance. Without this issue being addressed, we do not consider the text to be ready for negotiations at the European Parliament.

We have been concerned about an EU-level test for creating alerts for a child at risk of abduction, because we see this as a procedural matter that should be left to Member States. We have had some support from other Member States and although we have not succeeded in removing the test, we have managed to make the requirements that must be met more general. The current text states that an alert may be created "where a concrete and apparent risk exists that the child may be unlawfully removed" from the Member State in question.

This would require few, if any, changes to our practice, so I believe we can support it. The inclusion of an EU-level test does at least mean that alerts will only be placed on the system by other states where

that test is met, therefore potentially avoiding the possibility of alerts being placed in lesser circumstances and UK authorities having to act on these.

I am sorry you are not content with my earlier response to your question about the resource implications of participating in the proposed Police Cooperation Regulation. We do not anticipate that the running costs of new Police Cooperation Regulation will be significantly different to those attached to the existing SIS II legislation in which we participate. The details of any future relationship we may have with SIS II after we leave the EU in March 2019, including any associated resource implications, will be subject to negotiation so it is not currently possible to be more precise about them.

Turning to the Returns Regulation, you referred to your previous question about the remedies UK citizens would have access to after Brexit if they were wrongly identified as staying illegally in an EU Member State. As I said in my reply of 26 September, the status of UK nationals in EU law after we leave the EU is a matter for the Brexit negotiations. It would be wrong to speculate on that outcome, including by assuming that British Citizens would be treated as third country nationals and thus liable to be made subject to alerts under the Regulation.

I can inform the Committee though that third country nationals will have significant protection against the wrongful circulation of alerts under the Regulation. Returns decisions against such nationals must respect the provisions of the 2008 Returns Directive before they can give rise to an alert that can be circulated under the Regulation. The Returns Directive requires participating Member States to provide third country nationals with the right of appeal to a judicial or administrative authority (or a "competent body composed of members who are impartial and who enjoy safeguards of independence") against a return decision.

7 November 2017

Letter from the Chairman to Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter received on 7 November 2017 about the proposal for a Regulation on the use of SIS II for the return of illegally staying third-country nationals, and the proposal for a Regulation on the use of SIS II in the field of police and judicial cooperation in criminal matters, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 22 November.

We welcome the update on the points raised in our previous letters but note that some issues that we asked about are yet to be clarified. In particular on (i) new inquiry checks and the Government's efforts to ensure that safeguards remain in place with regards to ensuring that, when conducting checks, that questions can only take place if it is allowed under national law; and (ii) whether participating States will be allowed to use the information in an alert for wider law enforcement purposes. I would invite you to keep us updated on the negotiations, and these areas in particular.

We also note that the General Approach was agreed during COREPER on 8 November. Can you confirm that the Government voted against this proposal? Are you confident that the UK can continue to influence the negotiations on the areas of outstanding concern during this phase of the negotiations?

We are content to clear document 15812/16 from scrutiny but will continue to hold document 15814/16 under scrutiny. We look forward to hearing from you in due course.

23 November 2017

Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter dated 23 November.

In relation to the proposed new category of 'inquiry checks' you asked about our efforts to "ensure that safeguards remain in place with regards to ensuring that, when conducting checks, that questions can only take place if it is allowed under national law". Despite our efforts during negotiations, the proposed text of the Article 37(7) has not changed. We feel that the text as it currently stands is

confusing and contradictory when read together with other articles. While there are respectable legal arguments that a Member State will not be required to take action contrary to national law at the request of another Member State, our view is that this should be made clear on the face of the regulations.

Equally, the text on Article 53(6) on purpose limitation has not changed. This concerns whether Member States can use certain information in an alert for wider law enforcement purposes. Under the text agreed in the General Approach, Member States will not be allowed to use the information in a SIS II alert for a purpose other than that for which it was created without the prior authorisation of the issuing Member State, even if this was necessary to avoid an imminent threat to national security. Our concern here remains that in practice it may be impossible to seek such permission in advance of using the information.

Given the importance of these two issues, the Government decided to vote against the proposed General Approach, which was nevertheless agreed by a Qualified Majority. Negotiations on the text have now begun between the Presidency and European Parliament. We are fully engaged in the further negotiation between the European Parliament, the Council and the Commission.

We will of course update you of any development in these issues.

11 December 2017

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONTROLS ON CASH ENTERING OR LEAVING THE UNION AND REPEALING REGULATION (EC) NO 1889/2005 (15819/16)

Letter from the Rt Hon Mel Stride MP, Financial Secretary to the Treasury, HM Treasury

I am writing in response to your letter dated 26 April in relation to the proposed changes to the EU Regulation on controls of cash entering or leaving the European Union (Document 15819/16).

You asked to be kept up to date with developments at the EU level and advised that the file remained under scrutiny, pending further information you requested.

Update on EU Discussions on Cash Controls

As we previously advised your committee, we had anticipated that the Maltese Presidency would seek a "General Approach" on the draft Regulation at ECOFIN Council. Concluding the initial Council position was a key Maltese Presidency priority, meaning there was significant pressure to reach agreement by the end of the term. Based on this timing and the evolution of the negotiations, the Maltese Presidency decided to obtain endorsement of the initial Council position at the Council's Committee of Permanent Representatives (COREPER) and seek a mandate to move to trilogues with the European Parliament on the basis of that position. Consequently COREPER agreed the mandate on 28 June and this Council text will form the basis for discussion with the European Parliament, which we expect will commence in late Autumn.

The agreed text does not depart significantly from the original draft Regulation of the European Commission, with which the UK was broadly content. Discussion in Council focussed primarily on the below points;

- The possible inclusion of pre-paid cards in the definition of cash. To define pre-paid cards in the main text would have caused significant enforcement challenges. A satisfactory compromise was reached by retaining pre-paid cards within a Delegated Act, that can be developed at a point only when a body of evidence and technology is available to justify and enable their control.
- a case put forward from some Member States to move from a disclosure system to a mandatory declaration system for cash moved in freight and post. We opposed this move as it would introduce an unnecessary administrative burden on legitimate traders and border authorities alike. We successfully worked with other Member States to exclude this requirement.

- a minority of Member States sought to extend the purpose of the Regulation to include tax evasion. This was opposed by the European Commission, the Council Legal Services and Member States including the UK on the basis that the Regulation was not the correct legal instrument to address this issue. No new text was included on this point.
- concerns were raised about the timing of the implementation of the new Regulation and which IT system(s) would underpin it. It was decided that an existing system could be used, and Member States would have an implementation period of roughly two years, depending on the timing of negotiations with the European Parliament.

We will work with the Estonian Presidency to make sure that UK objectives, as secured in the Council text, are preserved as the negotiations progress with the European Parliament on any compromise text.

Further Information Requested

You asked for clarity on certain issues:

- Further details on the JHA Opt In decision. We exercised the JHA Opt In in April following consultation with Home Office who expressed a clear position that the substance of the regulation triggered JHA Opt In. We collectively agreed there were significant benefits in the fight against terrorism and money laundering of opting in. We formally gave notice of our position that the JHA Opt In applied, in line with the three month opt in deadline provided following the publication of the proposal. Following discussion and informal agreement on the draft text in the Council we have not been successful in persuading either the Council or other Member States that the proposal has a JHA legal base. If we wish to pursue this further, we will have to defer the decision to the ECJ once the proposal has been through the trilogue process, but the advice is that we are unlikely to succeed.
- Whether there were any impacts on data security. The Council's Legal Service have confirmed that the proposal meets existing European Data Security legislation, and we agree with that position.

Next Steps

The file now becomes subject to further discussions between the Council and Parliament. We are aware there may be attempts from other Members States to make changes to the text. We will continue to argue for the UK position – notably ensuring there is are unwelcome administrative burdens on legitimate trade and penalties remain within the legal competence of the UK Government. We will ensure that your Committee is kept up to date of progress.

We are continuing to liaise with our colleagues in DExEU regarding the Brexit implications of this legislation.

On the basis of securing a text that meets the objectives of the UK, we ask for scrutiny clearance to be granted.

30 October 2017

Letter from the Chairman to the Rt Hon Mel Stride MP, Financial Secretary to the Treasury

Thank you for your letter of 30 October about proposed changes to the EU Regulation on controls of cash entering or leaving the European Union (Document 15819/16), which the Home Affairs Sub-Committee considered at their meeting on 29 November.

We are content to clear this document from scrutiny and do not require a response.

19 December 2017

AND AGENCIES AND ON THE FREE MOVEMENT OF SUCH DATA, AND REPEALING REGULATION (EC) NO 45/2001 AND DECISION NO 1247/2002/EC (5034/17)

Letter from the Chairman the Rt Hon Matthew Hancock MP, Minister of State for Digital, Department for Culture, Media and Sport

Thank you for your letter received on 4 July 2017 regarding the proposed Regulation on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies and agencies (EU Institutions Regulation), which the Home Affairs Sub- Committee of the Select Committee on the European Union considered at a meeting on 6 September.

I note the agreement of the General Approach and the positive progress that has been made in addressing some of the inconsistences between the proposed Regulation and the GDPR. Can you confirm that the ability for EU institutions to make "ad hoc" restrictions in the absence of Union law or an internal rule has been removed from the draft?

I also note that other issues of concern have yet to be addressed including the presumption of rejection after three months of complaints made to the European Data Protection Supervisor and discrepancies in the sanctions regime. I look forward to receiving further updates on the progress of the negotiations, and on these issues in particular.

In the meantime we will continue to hold this document under scrutiny.

6 September 2017

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON A MORE EFFECTIVE RETURN POLICY IN THE EUROPEAN UNION - A RENEWED ACTION PLAN (6943/17)

Letter from the Chairman to the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International), Home Office

Thank you for your letter received on 25 September 2017 about the Communication for a more effective return policy in the EU – A Renewed Action Plan (Document 6943/17), which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 11 October.

Your last reply did not contain any more detail than your previous letter about the Government's plans for the UK's future cooperation with the EU on returns or future participation in European Readmission Agreements. We note your offer to update us with more information in due course and look forward to receiving those updates sooner rather than later.

We have cleared this document from scrutiny. I look forward to hearing from you in due course.

11 October 2017

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL THE PROTECTION OF CHILDREN IN MIGRATION (8297/17)

Letter from the Chairman to the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International), Home Office

Thank you for your letter received on 27 September about the protection of children in migration, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 11 October.

We welcome the information that you provided on age assessments, although this remains an area of concern. In our 2016 report, Children in Crisis: Unaccompanied migrant children in the EU, we noted a reluctance on the part of assessors to believe unaccompanied migrant children and noted the significant consequences that age disputes can have on children. It is fundamental that the children's best interests be the primary consideration in any decision that concerns them.

In our previous letter we asked whether the Government had introduced measures to improve data collection, training and exchanges of best practice at the EU and UK level. While noting your assurance that the Government adheres to robust safeguarding laws, we would invite you to explain further what data is collected, how it is disaggregated and how the UK works with the EU and other Member States to exchange best practice on data collection.

We note your clarification about the UK's plans not to participate in the European Guardianship Network and appreciate the update on your visit to Greece and Italy.

We have cleared this document from scrutiny. In the meantime I look forward to hearing from you within 10 working days.

11 October 2017

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A EUROPEAN TRAVEL INFORMATION AND AUTHORISATION SYSTEM (ETIAS) AND AMENDING REGULATIONS (EU) NO 515/2014, (EU) 2016/399, (EU) 2016/794 AND (EU) 2016/1624 - GENERAL APPROACH (9763/17)

Letter from the Chairman to the Rt Hon Brandon Lewis MP, Minister of State (Immigration and International), Home Office

Thank you for your letter dated 24 October about the Opt-in Decision on the Proposal for a Regulation amending Regulation (EU) 2016/794 for the purpose of establishing a European Travel Information and Authorisation System (ETIAS) watchlist.

We were broadly content with the answers that you gave to our questions of 14 September 2017, and can now clear this document from scrutiny. However, we would welcome more detailed information about how the Government takes decisions on whether or not to opt-in to such proposals. Our concern is that there is little obvious consistency between such decisions, which might perhaps cause confusion for the European institutions and our partners in other EU Member States

23 November 2017

Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service

I am writing to respond to the questions raised by your Committee on the Government's EM to Parliament on the Amending Europol Regulation to establish a European Travel Information and Authorisation System watchlist.

You asked how the Government takes decisions on whether or not to opt-in to proposals. All opt-in decisions are taken on a collective cross-Government basis. The Government is committed to taking all opt-in decisions on a case-by-case basis, putting the national interest at the heart of the decision-making process. The Government will consider the operational, policy and legal benefits of a measure when deciding whether or not to opt-in, for example, whether the measure brings benefits for UK operational activity in the JHA field and whether a measure supports UK policy aims.

In relation to measures that amend measures that the UK participates in, the Government will consider both the benefits of the amending measure for the UK, and the risks of making the application of the measure being amended inoperable for the Member States and the Union, and subsequent risk of the UK's ejection from a measure we wish to continue to participate in. If there are no risks of inoperability, the Government will consider whether to opt in purely on the basis of the national interest.

21 December 2017

COMMISSION IMPLEMENTING REGULATION (EU) OF XXX ON TECHNICAL STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF A TRACEABILITY SYSTEM FOR TOBACCO PRODUCTS (UNNUMBERED)

COMMISSION DELEGATED (EU) REGULATION OF XXX ON KEY ELEMENTS OF DATA STORAGE CONTRACTS TO BE CONCLUDED AS PART OF A TRACEABILITY SYSTEM FOR TOBACCO PRODUCTS

COMMISSION IMPLEMENTING DECISION (EU) OF XXX ON TECHNICAL STANDARDS FOR SECURITY FEATURES APPLIED TO TOBACCO PRODUCTS

Letter from the Chairman to Andrew Jones MP, Exchequer Secretary to the Treasury, HM Treasury

Thank you for your EM received on 10 October 2017 about the traceability system for tobacco products, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 1 November.

Although the content of these documents is mostly technical we agree with the Government that the traceability system should be proportionate, efficient and effective. You note in your EM that the costs to Government of this system will be limited to enforcement, and that this will be incorporated into the existing tobacco anti-fraud strategy. Do you have estimates on how much it will cost the Government to enforce the traceability system as it is currently proposed? We would also welcome more detail on what the enforcement of this regime would look like in practice.

In addition, we would like further information on the potential cost to British importers of tobacco products and the implications of the traceability system for retail outlets that stock tobacco products. We would be particularly interested to know whether obtaining a facility identification code, as required under Article 16, will involve any costs.

We look forward to hearing from you within 10 working days. In the meantime we will hold all three documents under scrutiny.

2 November 2017

Letter from Andrew Jones MP, Exchequer Secretary to the Treasury

Thank you for your letter of 2 November 2017 about the traceability system for tobacco products. I am pleased to hear the Committee agrees that the system adopted should be proportionate, efficient and effective. This letter sets out the further information you have requested.

The regulations require the generation of Unique Identifiers by a third party 'ID issuer', who is independent from the tobacco industry. The ID issuer would also be responsible for verifying the printing of Unique Identifiers onto packets through anti-tampering devices installed within production premises. The costs of ID issuers would be met by the tobacco industry through a small unit cost for each Unique Identifier they request. Manufacturers and importers would also be required to appoint independent auditors to monitor their track and trace data repositories. These auditors would produce annual reports to verify that the actions taken are in line with the regulations.

The Commission envisages that enforcement by Member States will be minimal, in the form of recurring audits guided by the independent auditors' reports. Given that a majority of tobacco products consumed in the UK are manufactured overseas by just four companies, we estimate that this work would require approximately one full-time member of staff, based on the Commission's enforcement cost estimate. HM Revenue & Customs plan that these additional checks would be integrated into existing compliance activity to verify duty payments.

The traceability system itself requires no operating cost from government. It would provide additional tools for officers to determine whether tobacco products are genuine or not. Where genuine products are discovered being smuggled or sold without the payment of duty, the system can identify the point at which they were diverted from the legitimate supply chain. Member States would have

the ability to tell their appointed ID issuer to remove rogue businesses from their system, thereby removing access to legitimate product.

On the costs to business, the Commission's assessment of track and trace solutions estimated the total investment needed by manufacturers and importers, and used this to produce an additional per pack cost of €0.0028. It has not been possible at this stage to produce cost estimates for UK manufacturers or importers due to the continuing changes to the proposed regulations.

The proposals should have little impact on retailers of tobacco products. Each retailer and site would require an identification code so products can be identified as going from the wholesaler or manufacturer to that particular retailer. This code can be obtained on behalf of the retailer by one of their suppliers. There is currently no provision in the implementing regulations for a fee for obtaining a facility identification code.

I hope that this clarifies the position.

16 November 2017

Letter from the Chairman to Andrew Jones MP, Exchequer Secretary to the Treasury

Thank you for your letter received on 15 November 2017 about the traceability system for tobacco products, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 29 November.

I understand that the Delegated Regulation on the key elements of data storage contracts has been agreed in the Council thereby incurring a scrutiny override. This was unfortunate, but given that the Delegated Regulation is technical in nature we will not labour the point. We note also that the Implementing Decision on technical standards for security features applied to tobacco products has also been agreed. Whilst we retain under scrutiny the Implementing Regulation on technical standards for the establishment and operation of a traceability system for tobacco products we note that the formal scrutiny reserve resolution does not apply. I would welcome an update on how the Government voted on these proposals and whether you are content that the system will be proportionate, efficient and effective.

On the Implementing Regulation, I have noted concerns raised by some UK and EU health charities that the draft proposal leaves some scope for the tobacco industry to play a role in the traceability system. Are you satisfied that the proposals as drafted ensure that the system will be truly independent of the tobacco industry?

I would also like to raise some questions about the UK's involvement in this system post- Brexit. The track and trace system for cigarettes and hand-rolling tobacco is expected to enter into force from May 2019, and tracking of other tobacco products from May 2024. How will the UK's participation in the traceability system be affected by the UK's withdrawal from the EU? And on a related note, are you able to clarify when the UK intends to sign and ratify the Protocol to Eliminate Illicit Trade in Tobacco Products under the Framework Convention on Tobacco Control?

We look forward to hearing from you within 10 working days. In the meantime we will hold all three documents under scrutiny

1 December 2017

Letter from Andrew Jones MP, Exchequer Secretary to the Treasury

Thank you for your letter of 1 December about the traceability system for tobacco products.

The Delegated Regulation on data storage contracts has not been agreed in Council and there was, therefore, no scrutiny override. This Regulation is made under Article 27(5) of the Tobacco Products Directive. This means that the Commission adopts the regulation and the Council and the European Parliament then have 2 months to raise an objection. If no such objection is raised, the delegated regulation takes effect. The Commission advise that adoption is likely to take place in mid-December.

The Implementing Decision and Implementing Regulation have now been agreed by a written committee vote, and the UK voted in favour of these. These will be formally adopted alongside the Delegated Regulation later this month.

In adopting the Directive, the UK recognised that track and trace would impose some additional burdens on businesses that choose to deal in tobacco products. HMRC has worked with the Commission on the implementing regulations to limit those burdens and ensure the system delivered is as effective, efficient and proportionate as possible. We recognise the Commission has made changes to address some of the concerns raised by industry, particularly small and medium sized companies. In the context of these changes and of the UK's wider support for international tobacco control objectives the regulations were considered acceptable.

In respect of the concern you highlight over the involvement of the tobacco industry in the traceability system, this has been addressed through the drafting of technical specifications which prevent the use of technologies that offered tobacco manufacturers influence over the generation of tracking codes. Independence of the system is further assured through the use of different independent service providers to supply the identification codes for product packs, to operate the data storage repositories and produce at least one element of the packet security marker. The criteria to assess independence are strictly defined and include a measure of the revenues that potential providers derive from the tobacco industry and restrictions on the associations that company directors and key staff members may have with the industry. I am satisfied the combination of measures will maintain the necessary and important independence from the industry.

A key aspect of a successful track and trace system is the ability to share data between countries to identify the origins of genuine product on which duty is being evaded.

Although the Government triggered Article 50 on 29 March 2017 there is no immediate change to our relationship with the EU until we have left. We remain a member of the EU with all the rights and obligations that membership entails and continue to be bound by the requirements of its legislation and Directives, including the Tobacco Products Directive.

However, regardless of membership of the EU, the UK is also bound to implement a track and trace system, including data sharing between parties, under the World Health Organisation Framework Convention on Tobacco Control Illicit Trade Protocol. The UK and EU are signatories to the Protocol and the Tobacco Products Directive track and trace system is designed to meet its requirements. The UK plans to ratify the Protocol early in 2018 once all the necessary legislation to implement its provisions has been approved by Parliament.

I hope that this clarifies the position.

13 December 2017

COMMISSION IMPLEMENTING REGULATION (EU) …/... OF XXX LAYING DOWN RULES FOR APPLICATION OF DIRECTIVE (EU) 2016/1148 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AS REGARDS FURTHER SPECIFICATION OF THE ELEMENTS TO BE TAKEN INTO ACCOUNT BY DIGITAL SERVICE PROVIDERS FOR MANAGING THE RISKS POSED TO THE SECURITY OF NETWORK AND INFORMATION SYSTEMS AND OF THE PARAMETERS FOR DETERMINING WHETHER AN INCIDENT HAS A SUBSTANTIAL IMPACT (UNNUMBERED)

Letter from the Chairman to the Rt Hon Matthew Hancock MP, Minister of State for Digital, Department for Culture, Media and Sport

Thank you for your EM received on 28 September 2017 about the Draft Commission Implementing Act laying down rules for application of Directive (EU) 2016/1148 of the European Parliament and of the Council as regards further specification of the elements to be taken into account by digital service providers for managing the risks posed to the security of network and information systems and of the parameters for determining whether an incident has substantial impact, which the Home Affairs Sub-Committee of the Select Committee on the European Union considered at a meeting on 1 November 2017.

We are grateful that your EM outlined the Government's plans to seek more clarity about certain provisions of this Implementing Act. We agree that further information is required about the thresholds for determining whether a cybersecurity incident is substantial, which would oblige digital service providers to report the incident to the relevant authority. We would ask the Government to share this information with us when they receive it.

The EM states that the Government was due to be asked to approve the proposals on or just after 23 October; discussions with DCMS suggest that approval is now likely to be requested at least two weeks after that date. We would welcome an update on the progress of negotiations once the Government has approved the proposals.

While we acknowledge that the scrutiny reserve does not apply to Implementing Acts, it would be helpful if you could continue to correspond with us about this legislation.

2 November 2017

Letter from the Rt Hon Matthew Hancock MP, Minister of State for Digital

I submitted an unnumbered Explanatory Memorandum (EM) to you on 28 September covering the Commission's draft Implementing Regulation laying down rules for application of Directive (EU) 2016/1148 of the European Parliament and of the Council as regards further specification of the elements to be taken into account by digital service providers for managing the risks posed to the security of network and information systems and of the parameters for determining whether an incident has a substantial impact.

Since that EM, the Commission have hosted two meetings of the NIS Committee of Member States (on 23 October and 4 December) to discuss the draft Implementing Regulation. The draft Implementing Act was provisionally agreed by Member States in the meeting on 4 December, and is now subject to a formal written procedure. It is expected to be formally agreed in January and will come into effect on 10 May 2018. I attach a copy for your information.

During these meetings, the UK was successful in persuading the Commission and other Member States to amend the draft regulations to:

- remove the geographical spread parameter that made any event that impacted on two or more Member States a reportable incident. This would have placed significant burdens on industry and was UK stakeholders' number one concern with the draft.
- clarify that all the incident parameters would be based only on information that DSPs currently held, which addresses a number of concerns UK stakeholders had that they may be required to report incidents where they had no control over the information;
- highlight that the security requirements for hazards would use a risk based approach; and
- ensure that the documentation requirements were limited to that needed to support future investigations by the Competent Authority, to reduce the administrative burden that could have arisen.

Overall the UK Government continues to regard the draft Implementing Act as a positive and necessary step by the Commission, one that represents a genuine attempt to codify issues that affect a very broad range of businesses, operating environment and services.

However, the Government remains concerned that the Implementing Act is overly prescriptive and goes further than the UK would have wished in setting out the security requirements for DSPs. Although improved, the parameters for reporting an incident are not sufficiently flexible and could lead to under or over reporting, depending on the size of DSP involved. As such, it is the Government's intention formally to abstain from approving the Implementing Act. This will signal our broad concern over the Implementing Act without disrupting the process and putting overall implementation of the Directive at risk, which we assess would be counterproductive.

Domestically, we will incorporate the Implementing Act into our draft NIS regulations, which will be submitted to Parliament in the New Year.

22 December 2017

OPT-IN DECISION: PROPOSAL FOR A REGULATION AMENDING REGULATION (EU) 2016/794 FOR THE PURPOSE OF ESTABLISHING A EUROPEAN TRAVEL INFORMATION AND AUTHORISATION SYSTEM (ETIAS) WATCHLIST

Letter from Nick Hurd MP, Minister of State for Policing and the Fire Service, Home Office

I am writing to inform of you of the Government's decision not to opt in to the proposal for a Regulation amending Regulation (EU) 2016/794 for the purpose of establishing a European Travel Information and Authorisation System (ETIAS) watchlist. I apologise that the Committee was not updated when the European Scrutiny Committee was informed as I had promised it would be. I will endeavour to make sure this isn't repeated in future.

As the UK does not participate in ETIAS itself, we do not expect to have direct access to the watchlist through this process. The Government also notes that there are a number of issues still to be resolved with regard to how the watchlist will be hosted by Europol and how it will function. As such, it is not clear whether opting-in could place any additional obligations on the UK. For these reasons, the Government has decided not to opt-in to the amending Regulation at this time. Not opting in will not affect the operability of the Europol Regulation for the UK.

The Committee asks whether the Government will consider how the proposal plans to ensure that the rights of UK citizens who feature on the watchlist are upheld. The watchlist will be used as part of the process for deciding whether to grant authority to travel in the EU, to third country nationals who are exempt from the requirement to be in possession of a visa when crossing external borders. This will therefore not apply to UK nationals, whilst we remain an EU Member State. The Committee should also note that as the watchlist will be hosted by Europol, it will be subject to the strict data protection controls that it has in place, as set out in the Europol Regulation

24 October 2017