



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 January 2019 – 31 March 2019

EU HOME AFFAIRS SUB-COMMITTEE

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NOW

REGULATION (EU) 2018/1726 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 14 NOVEMBER 2018 ON THE EUROPEAN UNION AGENCY FOR THE OPERATIONAL MANAGEMENT OF LARGE-SCALE IT SYSTEMS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE (EU-LISA), AND AMENDING REGULATION (EC) NO 1987/2006 AND COUNCIL DECISION 2007/533/JHA AND REPEALING REGULATION (EU) NO 1077/2011 ("REGULATION 2018/1726")

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

Thank you for your letter of 25 October 2018 in which you ask for an update on the progress of document 10820/17. I am writing now to notify you that Regulation 2018/1726 was agreed by Justice and Home Affairs Council on 9 November and adopted on 14 November. The UK abstained in the Council vote as the proposal remained under parliamentary scrutiny. I regret that the Home Office was unable to give the Committee time to consider the matter prior to adoption in this instance, however I want to reassure you that this did not undermine the UK's position.

15 January 2019

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

Thank you for your letters dated 15 January 2019 on the above files, which the EU Home Affairs Sub-Committee considered at its meeting on 6 February.

I note your update on the conclusion of negotiations and adoption of these files, and that a Council Decision on the UK's participation in the new eu-LISA Regulation was adopted in September 2018.

I was surprised to learn that this Council Decision was adopted in September, when your letter of 28 September 2018 informed the Committee that discussions on its terms were still ongoing. I was also disappointed to receive your letters a full two months after the euLISA Regulation was agreed, despite the Committee's request that you provide an update as soon as the proposal, and related Council Decision were agreed. As for your reassurance that the UK's position was not undermined by abstaining in the vote to agree the Regulation, I note that it is the Government's responsibility to seek scrutiny clearance in sufficient time to ensure the UK can participate fully in Council votes.

In addition, I understand that the Commons European Scrutiny Committee requested the deposit of the Council Decision for scrutiny. As you know, a request from either House that an item be deposited for scrutiny is sufficient to require the Government to do so. It is therefore concerning that the Decision was not deposited, and that no justification has been offered for the failure to do so.

As the eu-LISA Regulation has now been adopted, we clear the file from scrutiny. However, the Committee would be grateful for an update on the steps you are taking to avoid future failings in the scrutiny process, and reassurance that your Department will make every effort to respect the Committee's role in the EU legislative process by ensuring that we have sufficient time and information to consider the files we hold under scrutiny.

I expect your response within 10 working days.

6 February 2019

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

Thank you for your letter of 6 February on the above dossier. I have also written to the Chair of the European Scrutiny Committee (ESC) today.

As the Committee notes, the Council Decision was formally adopted in Council in September. It is particularly regrettable that my letter of 28 September informing the Committee that negotiations were ongoing was issued on the same day. This was a failure of internal process.

As I have sought to explain to the chair of the ESC, the report which specifically requested that the Council Decision be deposited for scrutiny did not come to the attention of the Home Office officials until after the Council Decision had been formally agreed with the Council Legal Service and put to a vote at COREPER on 26 September. However, it remains the case that all efforts should have been made to ensure that the Council Decision was deposited for scrutiny as a matter of procedure.

I would ask the Committee to note that the entire dossier – including the Regulation, the Council Decision and the Council Decisions regarding the Associate States' participation in EU Lisa – was concluded to an accelerated timetable that was not anticipated. However, clearly this does not obviate the Government's obligations to the scrutiny process.

I accept that mistakes have been made in this case and I apologise that the Committees did not have the opportunity to scrutinise the Council Decision as requested by the ESC in June 2018.

I can assure the Committee that the Government aims to discharge its scrutiny obligations promptly and accurately and aims to take every effort to ensure it do so properly. I have instructed officials to work with the Permanent UK Representation in Brussels to ensure that such errors are avoided in future

11 March 2019

PROPOSAL FOR A COUNCIL DECISION ON THE CONCLUSION OF THE ARRANGEMENT WITH THE KINGDOM OF NORWAY, THE REPUBLIC OF ICELAND, THE SWISS CONFEDERATION AND THE PRINCIPALITY OF LIECHTENSTEIN ON THE PARTICIPATION BY THOSE STATES IN THE EUROPEAN AGENCY FOR THE OPERATIONAL MANAGEMENT OF LARGE-SCALE IT SYSTEMS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE (11804/18)

PROPOSAL FOR A COUNCIL DECISION ON THE SIGNING, ON BEHALF OF THE EUROPEAN UNION, OF THE ARRANGEMENT WITH THE KINGDOM OF NORWAY, THE REPUBLIC OF ICELAND, THE SWISS CONFEDERATION AND THE PRINCIPALITY OF LIECHTENSTEIN ON THE PARTICIPATION BY THOSE STATES IN THE EUROPEAN AGENCY FOR THE OPERATIONAL MANAGEMENT OF LARGE-SCALE IT SYSTEMS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE (11805/18)

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

Thank you for your letter of 25 October 2018 in which you requested an update on the progress of the Council Decision. The Government was able to secure a Council Decision under Article 4 of the Schengen Protocol on the matter of the UK's participation in the new Regulation to the extent that it relates to the relevant operational management of the VIS, parts of SIS II, EEAS and ETIAS. The Council Decision, was adopted at COMPET in September and I attach the final text of the Council Decision for your consideration.

Your committee has also asked:

Has the government considered how this proposed Council Decision may affect the UK's negotiations with the EU about future participation in eu-LISA? Does the Government plan to seek a similar arrangement to the one proposed in this document?

The Government has been clear that we are seeking a coherent Security Partnership that includes mechanisms for rapid and secure data exchange as part of our future relationship. Given the role of eu-LISA in the management of large scale EU IT systems, including SIS II, the UK's future relationship with eu-LISA will be a matter for discussion.

15 January 2019

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

Thank you for your letters dated 15 January 2019 on the above files, which the EU Home Affairs Sub-Committee considered at its meeting on 6 February.

I note your update on the conclusion of negotiations and adoption of these files, and that a Council Decision on the UK's participation in the new eu-LISA Regulation was adopted in September 2018.

I was surprised to learn that this Council Decision was adopted in September, when your letter of 28 September 2018 informed the Committee that discussions on its terms were still ongoing. I was also disappointed to receive your letters a full two months after the euLISA Regulation was agreed, despite the Committee's request that you provide an update as soon as the proposal, and related Council Decision were agreed. As for your reassurance that the UK's position was not undermined by abstaining in the vote to agree the Regulation, I note that it is the Government's responsibility to seek scrutiny clearance in sufficient time to ensure the UK can participate fully in Council votes.

In addition, I understand that the Commons European Scrutiny Committee requested the deposit of the Council Decision for scrutiny. As you know, a request from either House that an item be deposited for scrutiny is sufficient to require the Government to do so. It is therefore concerning that the Decision was not deposited, and that no justification has been offered for the failure to do so.

As the eu-LISA Regulation has now been adopted, we clear the file from scrutiny. However, the Committee would be grateful for an update on the steps you are taking to avoid future failings in the scrutiny process, and reassurance that your Department will make every effort to respect the Committee's role in the EU legislative process by ensuring that we have sufficient time and information to consider the files we hold under scrutiny.

I expect your response within 10 working days.

6 February 2019

PROPOSAL FOR A DIRECTIVE ON COMMON STANDARDS AND PROCEDURES IN MEMBER STATES FOR RETURNING ILLEGALLY STAYING THIRD-COUNTRY NATIONALS (RECAST) - A CONTRIBUTION FROM THE EUROPEAN COMMISSION TO THE LEADERS' MEETING IN SALZBURG ON 19-20 SEPTEMBER 2018 (12099/18)

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

Thank you for your letter received on 11 December 2018 on the above proposal which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 16 January 2019.

I note that your letter re-stated the criteria the Government will take into account when making its opt-in decision. I would be grateful if you could now provide an assessment of how far the current draft text meets each of these criteria.

In the meantime, we have decided to retain the file under scrutiny. I look forward to receiving a response from you within ten working days.

16 January 2019

Letter from the Rt Hon Caroline Nokes MP, Minister of State for Immigration

Following your letter of 16 January 2019, I write to provide an assessment of how far the current draft text meets each of these criteria.

As I set out in my previous letter of 11 December 2018, JHA opt-in decisions should be taken in the national interest, and the United Kingdom should opt in only where it is considered that there will be operational, policy or legal benefits from opting into a measure. In this instance it is the UK Government's view that opting in to this recast Directive would impact the national sovereignty of our border policy and operations.

The Government has been clear that border management is a sovereign issue. It is important that the UK acts in the national interest to maximise the return of those with no legal right to be in the country. Whilst the approach led by the Commission may ensure consistency and strengthening of returns processes, it is both unclear and uncertain whether this recast will directly improve the efficiency of returns. UK return procedures have continued to be a success in comparison to other EU Member States, with strong relationships with third countries and new initiatives such as biometric returns. We remain focused on improving our returns procedures and do not rely on this Directive to enact returns of third country nationals.

Furthermore, noting both the UK's decision to leave the EU on the 29th March 2019 and the previous decision not to opt in to this Directive, the UK Government assessed there was limited value to the UK in participating in this Directive, especially given the cost of implementing the Directive as part of the UK's border operations. All these factors informed the decision taken not to opt in.

The UK remains committed to continued engagement and cooperation with the EU on refugee and migration issues, and supports efforts to strengthen EU borders, while maintaining the sovereignty of the UK's returns policy.

I hope this letter assists you in your further scrutiny.

31 January 2019

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration

Thank you for your letter dated 31 January 2019 on the above proposal, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 13 February 2019.

Thank you for your explanation of the factors which informed the Government's decision not to opt-in to this recast Directive. As discussions on this proposal continue, and in light of its relevance to the Home Affairs Sub-Committee's work on UK-EU asylum cooperation post-Brexit, we have decided to retain the file under scrutiny.

Please keep us informed of any developments to the draft text as negotiations progress.

13 February 2019

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE EUROPEAN CYBERSECURITY INDUSTRIAL, TECHNOLOGY AND RESEARCH COMPETENCE CENTRE AND THE NETWORK OF NATIONAL COORDINATION CENTRES (12104/18)

Letter from Margot James MP, Minister for Digital and the Creative Industries, Department for Digital, Culture, Media and Sport

Thank you very much for your letter dated 28th November on the Proposal for a Regulation of the European Parliament and of the Council establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres, document number 12104/COM(18)630. I am very grateful for the Committees' consideration of this.

You sought more detail on the government's views on the proposed regulation, including further information on subsidiarity, third country participation and stakeholder engagement; including a general progress update on the proposal.

On subsidiarity, we have since been provided with further explanations from the Commission on the value that the proposals would bring in bringing together what they consider to be an otherwise fragmented network of industry, research institutions and public bodies. We would agree with their assessment that creating greater harmonisation of these bodies across the EU would benefit the cyber security sector. However, we are continuing to seek further detail on the benefits that the Centre would bring in implementing the cyber pillars of the Digital Europe and Horizon Europe programme above existing structures for doing this. We will also continue to seek an assessment of the value of the estimated impact of the activities proposed and will keep you updated on this point.

You also sought to know whether we will seek amendments to the draft Regulation to allow for the possibility of third country participation. The proposal, as it currently stands, does not envisage a role for third countries and, given that the Centre will be established in 2021, we do not currently anticipate that the UK would have a role on the Governance board of the Centre, nor would it be part of the Competence Community or be required to set up a National Coordination Centre. However, the UK already has in place a number of relevant centres, programmes and networks similar to what is proposed by this legislation, including: the National Cyber Security Centre, the UK Cybersecurity Innovation centres, Digital Innovation Hubs (10 in total), centres of excellence in cyber security research and skills programmes (school age, university level and professional).

Whilst there is no explicit provision for third-party participation by non-EU European states in the proposal, I can provide reassurance that we will look to explore with the European Commission and like minded Member States how third countries can best participate in the work of the Centre. We will seek to continue to work with the EU in ways that promote the long-term economic development of Europe and pursue a free, open and secure cyberspace after the UK's withdrawal from the EU. The Political Declaration reaffirms UK and EU commitment to promote security and stability in cyberspace through increased international cooperation and we will seek to work closely with the EU Competence Centre as part of this.

We would also like to seek assurance that the future tasks of the Competence Centre should be carried out in line with wider international developments. This will help ensure that cyber security products and solutions within the EU can be used globally, which will improve the EU's competitiveness and avoid market fragmentation. Further, this will also help avoid additional regulatory burdens for businesses. We are therefore aiming to seek this clarification during negotiations, as well as further clarity on what is meant by 'organisations established in the EU' as part of the competence community.

You also sought further information regarding consulting UK stakeholders. We have engaged and continue to engage with industry through workshops and roundtables, but have no plans for a formal consultation. This is because it is anticipated that the UK would not have a role in the Centre or have a national coordination centre, due to the fact that the Competence Centre structure as proposed by this Regulation is not intended to be established until 1st January 2021. This date has been set as 2021 because one of the Centre's primary tasks is to implement the cyber security activities of the Digital Europe and Horizon Europe Programmes of the European Union's next multiannual financial framework (MFF), which runs from 2021-27.

The Romanian Presidency are trying to address a number of concerns that have been put forward by a number of Member States, notably a need for a clearer understanding of what exactly Member States can expect from the Competence Centre and which tasks it shall fulfill. Further concerns that have been voiced by Member States include the proposed governance structure, the Centre's role as an implementation body for EU financial resources to cyber security under the proposed programmes Digital Europe and Horizon Europe and the intended financing mechanisms.

Negotiations on the draft Regulation commenced on 28th September 2018 and are currently ongoing. The Presidency are aiming for a general approach on the file in Council by mid-end February 2019, with a view to reaching final agreement by Q2 2019. We will continue to update you as these discussions progress.

4 February 2019

Letter from the Chairman to Margot James MP, Minister for Digital and the Creative Industries

Thank you for your letter dated 4 February on the above file, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 27 February 2019.

I am grateful for your detailed and helpful response to the Committee's initial questions on subsidiarity, third country participation, and stakeholder engagement.

I note that the Government continues to seek further detail on several aspects of the proposal to inform your policy position, and that other Member States have concerns about the intended scope and function of the Competence Centre. What reassurances have the Commission offered in this regard? Have any amendments been made to the proposal to address these concerns?

Your letter indicated that the Presidency would seek a General Approach on this file by midend February, but I understand there has been insufficient progress for this to take place. As the file remains under scrutiny, I take this opportunity to note that any request for a scrutiny waiver or clearance should be accompanied by a comprehensive update on the progress of negotiations, the Government's policy position, and the factors which will determine whether the UK votes in favour of a General Approach.

I look forward to your response within ten working days.

27 February 2019

Letter from Margot James MP, Minister for Digital and the Creative Industries

Thank you very much for your letter dated 27th February on the Proposal for a Regulation of the European Parliament and of the Council establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres, document number 12104/COM(18)630.

In my last letter, I noted that the Romanian Presidency have been trying to address a number of concerns expressed by Member States, notably a need for a clearer understanding of what exactly Member States can expect from the Competence Centre, which tasks it shall fulfill, the proposed governance structure, the Centre's role as an implementation body for EU financial resources to cyber security under the proposed programmes Digital Europe and Horizon Europe and the intended financing mechanisms. You sought more detail on reassurances that the Commission might have offered to address these concerns and any amendments to address these concerns.

In your response, you requested a response within ten working days. As it became apparent the Presidency would seek a Permanent Representatives Committee (COREPER) mandate, my officials agreed with your officials that this update would come after we knew the results of that vote. On 13th March 2019, following a number of text revisions, the Council of the EU's Permanent Representatives Committee (COREPER) did indeed grant the Romanian Presidency a partial mandate to begin trilogue negotiations with the European Parliament.

I would like to now take this opportunity to provide you with an update on progress on negotiations, including amendments to address Member State concerns, and those factors which have determined our position.

The Centre: There has been additional clarification to ensure that the Centre's activities are more clearly expressed, resulting in a clearer structure that details the Centre's overarching objectives and actual tasks. We have also successfully sought common positions with like-minded Member States to ensure the activities and tasks of the Centres are not unnecessarily duplicated already carried out by existing institutions (eg. ENISA). Further, the Presidency have responded to Member State concerns by removing the term 'Competence' Centre to better describe its coordinating function. The UK supports the removal of the term 'Competence' Centre, since it underlines that the Centre will have more of a coordinating function with National Coordination Centres, rather than providing the necessary competence or expertise.

National Coordination Centres: The UK continues to support the intent of the proposed activities of the National Centres and we have looked to encourage the sharing of international best practices in technical discussions. We have also sought to ensure that the actions of the Centre and National

Coordination Centres are aligned with global activity in order to avoid market fragmentation. The tasks of the National Coordination Centres, as set out in the revised text, has been clarified to take into account Member State suggestions that the National Coordination Centres coordinate research and industry input from the Community.

The Community: As proposed in our negotiating mandate and in line with our position to ensure a role for UK industry, we have received assurances that an entity registered within the Union would be considered to be established for the purposes of participating in the proposal. An amendment suggested by the UK was also successfully tabled, which sets out that industry cyber security expertise shall be utilised not only for research, but also for product development, information security and cooperation with academia.

Financial Contributions: In technical discussions, the Government's position has been to remain neutral on this issue as the UK will not be a Member State in 2021 when the Centre is established and negotiations on budgets in the next Multi-Annual Financial Framework are a matter for Member States. We have supported Member States who have sought clarity on finance issues, in particular ensuring coherence with the EU funding programmes Digital Europe and Horizon Europe.

EU Exit implications: We continue to support these measures which aim to build cyber security capability in the EU and build the prosperity of the cyber security sector. The UK is committed to maintaining a close relationship with the EU on cyber security so we will continue to look to work closely with the EU Competence Centre following EU Exit, in order to share best practice, research and information where it is in the mutual interests of our cyber security sectors. We also continue to explore with the European Commission and like minded Member States how third countries can best participate in the work of the Centre.

We will continue to update you during trilogues and seek permission for scrutiny clearance in advance of any binding vote.

25 March 2019

AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE EUROPEAN UNION AGENCY FOR ASYLUM AND REPEALING REGULATION (EU) NO 439/2010 - A CONTRIBUTION FROM THE EUROPEAN COMMISSION TO THE LEADERS' MEETING IN SALZBURG ON 19-20 SEPTEMBER 2018 (12112/18)

Letter from the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

I am responding to the Committee's letter of 14 November on the above proposal to provide further information concerning the Government's approach. I am sorry for the delay in my response.

JHA opt-in decisions should be taken in the national interest, and we should opt into a measure only where we consider there will be operational, policy or legal benefits from doing so. The UK took the decision not to opt into the initial proposal for an EUAA Regulation to repeal the EASO Regulation, that was published in 2016, based on several problematic elements. The 2016 Regulation provided the EUAA with a significant amount of oversight over national asylum systems and, by virtue of opting in, the UK could become subject to evaluations and recommendations from the Agency, who would have powers to monitor Member States' asylum systems. The amended version of the Regulation gives the Agency further powers to intervene in Member States' asylum systems than the previous version, including monitoring and evaluation. The UK Government remains of the firm view that the functioning of asylum systems is a sovereign issue.

The UK Government intends on continuing its work with EASO throughout the Implementation Period, and until the EUAA Regulation is formally adopted and the new Agency comes into existence. However, we will not be opting into this amended proposal because as set out in the Explanatory Memorandum, it does not address any of the UK's concerns in relation to the text.

I trust this letter assists you in your further scrutiny.

6 February 2019

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration

Thank you for your letter dated 6 February 2019 on the above proposal, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 20 February 2019.

I note your confirmation that the UK will not be opting-in to this amended proposal for the EUAA, and your helpful explanation of the factors which informed this decision.

Your letter indicates that the UK will continue its work with the European Asylum Support Office (EASO) throughout the transition period, until the EUAA comes into existence. What is the expected timetable for the adoption of this proposal; is the Agency likely to become operational during the transition period?

We would be grateful for further updates in due course as negotiations progress. In the meantime, the file remains under scrutiny.

20 February 2019

Letter from the Rt Hon Caroline Nokes MP, Minister of State for Immigration

Thank you for your letter dated 20 February 2019 on the above Regulation. In response to your question regarding the expected timetable for the adoption of the EUAA proposal, based on current timelines we do not expect the Agency to become operational during the transition period.

The transition from the European Asylum Support Office (EASO) to the EUAA is part of the EU's wider reforms of the Common European Asylum System (CEAS). So far, the CEAS package has been difficult to move forward largely due to the recast Dublin IV Regulation, which includes mandatory burden sharing. The UK has always been clear that we cannot support the inclusion of mandatory burden sharing. As a result, while the EUAA Regulation is ready to be approved by the European Parliament, there is no consensus for the full CEAS package to move forward until all the individual measures are agreed.

Ahead of the European Parliament being dissolved for the European elections scheduled for 23rd May, there has been no agreement on the reforms in the CEAS package. Therefore with this delay, it is unlikely that this Regulation will be ratified and come into force before the end of the transition period in December 2020.

I trust this letter assists you in your further scrutiny.

14 March 2019

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration

Thank you for the Explanatory Memorandum (EM) dated 14 March 2019 on the above file, which the EU Home Affairs Sub-Committee considered at its meeting on 27 March 2019.

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

27 March 2019

PROPOSAL FOR A REGULATION ON THE EUROPEAN BORDER AND COAST GUARD AND REPEALING COUNCIL JOINT ACTION NO98/700/JHA, REGULATION (EU) NO1052/2013 AND REGULATIO (EU) NO 2016/1624 (12143/18)

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

Thank you for your letter of 20 December 2018 on the above file, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 16 January 2019.

I note that negotiations on this file are ongoing and would be grateful for a further update as discussions progress, including any clarity gained on future UK access to the FADO database.

In the meantime, we have decided to retain the file under scrutiny. I look forward to receiving your response to this letter in due course.

16 January 2019

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)

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)

Letter from the Chairman to Margot James MP, Minister for Digital and the Creative Industries, Department for Digital, Culture, Media and Sport

Thank you for your letter of 22 December 2018 on the above documents, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 16 January 2019.

We are content to clear these documents from scrutiny and do not require a response.

16 February 2019

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EU) NO 516/2014 OF THE EUROPEAN PARLIAMENT AND THE COUNCIL, AS REGARDS THE RE-COMMITMENT OF THE REMAINING AMOUNTS COMMITTED TO SUPPORT THE IMPLEMENTATION OF THE COUNCIL DECISIONS (EU) 2015/1523 AND (EU) 2015/1601 OR THE ALLOCATION THEREOF TO OTHER ACTIONS UNDER THE NATIONAL PROGRAMMES (13356/18)

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

Thank you for the Explanatory Memorandum (EM) of 7 November 2018 on the above file, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 9 January 2019.

I understand that this measure was adopted in a Council meeting in December 2018, and that the UK chose not to opt-in. As such, we are content to clear the file from scrutiny but would be grateful for an update on the following:

- the Government's reasons for deciding not to opt-in to this measure;
- whether this decision has any financial implications for the UK's 2014-2020 AMIF allocation.

I look forward to receiving your response to this letter within ten working days.

9 January 2019

Letter from the Rt Hon Caroline Nokes MP, Minister of State for Immigration

Thank you for your letter of 9 January 2019 regarding the Explanatory Memorandum in relation to the above file.

You asked for an update on the following questions, which I shall answer in turn:

1. The Government's reasons for deciding not to opt-in to this measure

The Commission presented a proposal to make technical amendments to Regulation (EU) No 516/2014 of the European Parliament and the Council. The Presidency discussed the proposal with the Budget Committee on 31 October 2018.

The proposal detailed how AMIF money, committed for EU relocation programmes, had not been spent in this Multiannual Financial Framework (MFF). According to the de-commitment rule, payments should have been made before the end of 2018, or the money would be returned to the EU. The proposal therefore sought to reallocate remaining funds for wider AMIF activity within the current MFF 2014 – 2020.

The UK did not opt-in to the original relocation measures (Council Decision from 2015 setting up the EU relocation programme). Therefore, funding was not committed to the UK under the relocation decisions of 2015. The amending regulation applies only to the unspent amounts committed under the 2015 Council Decision. As the proposed recommitment only applied to money already committed to Member States' national programmes, we understood from the Commission that there would be no money to be recommitted to the UK. This means no new money available to the UK to be used for migration related activities because there is no money for the UK to access.

2. Whether this decision has any financial implications for the UK's 2014-2020 AMIF allocation.

We confirmed with the Commission that there would be no impact on current UK access to (non-relocation related) AMIF funding if the UK chose not to opt-in to this proposal.

24 January 2019

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING COUNCIL REGULATION (EC) NO 539/2001 LISTING THE THIRD COUNTRIES WHOSE NATIONALS MUST BE IN POSSESSION OF VISAS WHEN CROSSING THE EXTERNAL BORDERS AND THOSE WHOSE NATIONALS ARE EXEMPT FROM THAT REQUIREMENT, AS REGARDS THE WITHDRAWAL OF THE UNITED KINGDOM FROM THE UNION (14329/18)

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

Thank you for the Explanatory Memorandum (EM) of 30 November 2018 on the above file, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 16 January 2019.

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

16 January 2019

PROPOSAL FOR A COUNCIL DECISION ON THE SIGNING, ON BEHALF OF THE EUROPEAN UNION, OF A PROTOCOL BETWEEN THE EUROPEAN UNION, THE REPUBLIC OF ICELAND AND THE KINGDOM OF NORWAY TO THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE REPUBLIC OF ICELAND AND THE KINGDOM OF NORWAY CONCERNING THE CRITERIA AND MECHANISMS FOR ESTABLISHING THE STATE RESPONSIBLE FOR EXAMINING A REQUEST FOR ASYLUM LODGED IN A MEMBER STATE OR IN ICELAND OR NORWAY REGARDING THE ACCESS TO EURODAC FOR LAW ENFORCEMENT PURPOSES (15658/18)

PROPOSAL FOR A COUNCIL DECISION ON THE CONCLUSION OF A PROTOCOL BETWEEN THE EUROPEAN UNION, THE REPUBLIC OF ICELAND AND THE KINGDOM OF NORWAY TO THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE REPUBLIC OF ICELAND AND THE KINGDOM OF NORWAY CONCERNING THE CRITERIA AND MECHANISMS FOR ESTABLISHING THE STATE RESPONSIBLE FOR EXAMINING A REQUEST FOR ASYLUM LODGED IN A MEMBER

STATE OR IN ICELAND OR NORWAY REGARDING THE ACCESS TO EURODAC FOR
LAW ENFORCEMENT PURPOSES (15653/18)

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

I write to you regarding our explanatory memorandum on all law enforcement in Iceland, Norway, Switzerland, Denmark and Liechtenstein to access the Eurodac databases, which has come to you with some delay.

A shift in responsibilities across policy teams and the interrelated nature of the explanatory memorandum resulted in delay in determining which officials within the Department were best placed to lead on the drafting.

Unfortunately, despite our best efforts to meet our extended parliamentary deadline; we were unable to do so. I would like to thank the Committee for its patience and apologise for any inconvenience caused.

29 January 2019

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

Thank you for the Explanatory Memorandum (EM) of 29 January 2019 on the above file, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 27 February 2019.

The EM says that the UK is supportive of extending the law enforcement access to Eurodac to Iceland, Norway, Switzerland and Liechtenstein. Does the Government also support the extension of such access to Denmark?

I also note that a timetable for negotiations on the Decisions has not been published and that the EM does not indicate whether the UK will opt-in to this measure.

I look forward to an update on the negotiations in due course and in the meantime these files will be retained under scrutiny.

27 February 2019

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

Thank you for your letter of 27 February 2019 in relation to the above file.

In response to your question, I can confirm that the UK supports the extension of law enforcement access to Eurodac to Denmark, Iceland, Norway, Switzerland and Liechtenstein.

In terms of the timetable for negotiations on the Decisions and whether the UK will opt-in to this measure, I can now provide further information. The current EU Presidency is keen to seek quick adoption of these Decisions. This means that the Decisions on signature were adopted at the Justice and Home Affairs (JHA) Council on 7-8 March 2019. Due to the Presidency's approach, the Government did not have time to complete its internal opt-in procedures, and did not opt into these Decisions on signature. The UK therefore did not vote on the adoption of the Council Decisions on signature of these agreements.

In relation to the Decisions on conclusion of these agreements, the JHA opt-in deadline was 18 March. The Government decided to opt in to these Council Decisions on 15 March. These Decisions will allow Denmark, Iceland, Norway, Switzerland and Liechtenstein to have law enforcement access to Eurodac, as EU Member States do. These states already have access to Eurodac for asylum purposes. The Government considers that whilst there are no substantive impacts on the UK, we support wider data sharing for law enforcement purposes. In addition, giving access to EU databases to third countries is potentially useful to the UK in relation to our future security relationship negotiations, and not opting in would potentially leave a lack of legal clarity about the UK's relationship to these states in the context of exchanging data through Eurodac.

The Decisions will now go to the European Parliament for their consent, which we expect to be given during the final EP plenary during April 2019, and adopted by Council shortly thereafter.

27 March 2019

PROPOSAL FOR A REGULATION ESTABLISHING THE CONDITIONS FOR ACCESSING THE OTHER EU INFORMATION SYSTEMS AND AMENDING REGULATION (EU) 2018/1862 AND REGULATION (EU) YYYY/XXX [ECRIS-TCN] (5071/19)

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE CONDITIONS FOR ACCESSING OTHER EU INFORMATION SYSTEMS FOR ETIAS PURPOSES AND AMENDING REGULATION (EU) 2018/1240, REGULATION (EC) NO 767/2008, REGULATION (EU) 2017/2226 AND REGULATION (EU) 2018/1861 (5072/19)

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

Thank you for your Explanatory Memorandum (EM) dated 29 January 2019 on the above proposals relating to ETIAS, which the EU Home Affairs Sub-Committee considered at its meeting on 6 March.

Your EM confirms that the UK will not take part in the adoption of, or be bound by, Regulation 5072/19 as this proposal builds on parts of the Schengen acquis the UK does not participate in. We have therefore decided to clear this file from scrutiny.

Regulation 5071/19, on the other hand, engages both the UK's JHA (Title V) opt-in and Schengen opt-out Protocols. Your EM notes that the Government will undertake a full analysis of the advantages and disadvantages of this Regulation to the UK in making its optout / opt-in decision. I would be grateful if you could share the results of this analysis, and, in particular, what the operational benefits of participating in this Regulation would be, given the UK's non-participation in ETIAS. Has the deadline for the UK to notify the Council of its decision been confirmed?

I look forward to your response within 10 working days. In the meantime, file 5071/19 remains under scrutiny.

6 March 2019

Letter from the Rt Hon Caroline Nokes MP, Minister of State for Immigration

I write further to the Committee's letter of 6 March 2019. Your letter asks for the Government's analysis of the advantages and disadvantages of an opt-in / opt-out decision, and the operational benefits of participating in this Regulation, given the UK's non-participation in ETIAS (European Travel Information and Authorization System).

In looking at the benefits of participating in this Regulation, I have considered the operational implications of doing so by examining the interaction of ETIAS with the European Criminal Records Information System – Third Country National database (ECRIS-TCN) and the Second Information Schengen System (SIS II) separately. In terms of the ECRIS-TCN provisions, should the UK agree to participate, a search by ETIAS could result in a hit on the data of the UK ECRIS-TCN. Under this Regulation, the UK would be required to add a 'flag' to data loaded into ECRIS-TCN to confirm that conviction data of Third Country Nationals (TCNs) of interest to ETIAS is on UK systems. The ETIAS National Unit would facilitate the verification of the information in the ETIAS application. However, as the UK is not part of ETIAS and does not have an ETIAS National Unit, this could introduce some financial and resource obligations for the UK, should it be required that a technical solution is needed to resolve the verification issue. Whilst it is clear there are advantages to the EU from ETIAS having access to UK's criminal data on Third Country Nationals, given that both ETIAS and ECRIS-TCN measures will not come into operation until at least 2021, it is too early to properly estimate the potential benefits to the UK. Significantly, it is also not possible to quantify the resource implications without which we cannot conduct a cost-benefit analysis.

If an ETIAS search against SIS II resulted in a hit, the ETIAS Central Unit based in the European Border and Coast Guard Agency (EBCGA), would contact the UK SIS II (SIRENE) Bureau to verify the information on the ETIAS application. The result would be communicated to the ETIAS National Unit in the Member State to whom the ETIAS application was made. The absence of an established ETIAS National Unit may lead to additional obligations on the UK's SIRENE Bureau, which at present have not yet been quantified. Again, whilst there are advantages to those EU Member States who operate ETIAS from accessing UK SIS II data, the potential benefits to the functioning of SIS II and to the UK more widely from participating in the Regulation, remain unclear.

However, it is important to consider how the UK's participation in the Regulation could contribute to the EU's strategy on border control and security. Participation in this proposal would highlight the UK's commitment to the wider security of the Schengen zone at a time when we would seek a close relationship with the EU on security and law enforcement once the UK leaves the EU.

In terms of the deadline for the UK to make a decision on the Schengen opt-out (SIS II) and JHA opt-in (ECRIS-TCN) decision, the Council Secretariat have now confirmed that the date of the last language version was 14 January 2019, so the deadline by which the UK must communicate its decision is 13 April. The Government will confirm its position in due course.

25 March 2019

PROPOSAL FOR A REGULATION LAYING DOWN PROVISIONS FOR THE CONTINUATION OF ONGOING LEARNING MOBILITY ACTIVITIES UNDER THE ERASMUS+ PROGRAMME IN THE CONTEXT OF THE WITHDRAWAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ("UNITED KINGDOM") FROM THE EUROPEAN UNION (5892/19)

Letter from the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation, Department for Education and Department for Business, Energy and Industrial Strategy

Thank you for your EM dated 26 February 2019 on the above proposal, which the House of Lords EU Home Affairs Sub-Committee considered at its meeting on 13 March 2019.

I note that negotiations on this file are continuing and that the Government is seeking clarity on whether this proposal will cover mobility projects under the European Solidarity Corps. As this proposal is scheduled for rapid agreement, we have decided to clear the file from scrutiny. As you will be aware, however, the EU Home Affairs Sub-Committee has a particular interest in this area and is awaiting your response to its recent report on *Brexit: the Erasmus and Horizon programmes*.

I would be grateful for an update on the progress of negotiations on this file, including any clarity provided by the Commission on the scope of the proposal, and its financial implications for the UK. I look forward to hearing from you in due course.

13 March 2019

Letter from Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Thank you for your letter dated 13 March 2019, confirming that the House of Lords EU Home Affairs Sub-Committee had cleared from scrutiny the EU's Erasmus+ contingency regulation.

You asked for an update on the progress of negotiations on this proposal. I can confirm that the Erasmus+ contingency regulation was adopted by Council on 19 March. The UK abstained from voting at this stage. The UK also previously made a minute statement to Coreper asking the Council to note our position that all such relevant contingency measures should apply in relation to Gibraltar, where Gibraltar has previously been covered by the relevant area of EU law. The UK has consistently set out its position on Gibraltar across the span of EU contingency measures.

You asked that I update on any clarity provided by the Commission on the scope of the proposal and its financial implications for the UK. The Commission has not so far provided any further advice, either

to Erasmus+ participants about how they will be affected, or to national agencies about how it would be administered.

However, we understand from statements the Commission has made that the regulation applies only to ongoing learning mobility activities under the Erasmus+ programme which have started at the point that the EU treaties cease to apply to the UK if the UK withdraws from the EU without a deal. It will cover mobilities that are ongoing at the point of exit up to a maximum of 12 months. The provisions do not apply to the European Solidarity Corps. It is the Government's understanding that the regulation is not conditional upon any additional UK financial contribution – i.e. that the regulation will take effect without the UK being required to make any additional payment for defined participants to continue their exchanges.

We still have a number of points of clarification, and will want to ensure Erasmus+ participants receive clear advice about the implications for them, so we are continuing through all available channels to seek further details from the Commission. We will continue provide information and further guidance to beneficiaries as we receive more clarity.

You noted the EU Home Affairs Sub-committee's interest in this area, and that this committee awaits my response to its recent report on Brexit: the Erasmus and Horizon programmes. I thank the Committee for this report, and I will be responding to that in due course.

24 March 2019

**RECOMMENDATION FOR A COUNCIL DECISION AUTHORISING THE
PARTICIPATION IN NEGOTIATIONS ON A SECOND ADDITIONAL PROTOCOL TO
THE COUNCIL OF EUROPE CONVENTION ON CYBERCRIME (CETS NO. 185)
(6110/19)**

**Letter from the Chairman to the Rt Hon Ben Wallace MP, Minister for Security and
Economic Crime, Home Office**

Thank you for your EM dated 20 February 2019 on the above Recommendation, which the EU Home Affairs Sub-Committee considered at its meeting on 6 March.

We have decided to retain this file under scrutiny, and have several questions:

- Following your assumption that a JHA legal base will be added to this Recommendation, thereby engaging the UK's opt-in protocol, what progress has been made in this regard?
- Is the potential addition of a JHA legal base likely to be confirmed before 29 March, after which time the UK's opt-in would not apply?
- What has been the outcome of your EU "competence analysis" on the anticipated subject matter of the Second Additional Protocol to the Budapest Convention?
- What would be the advantages and disadvantages of the UK taking part in negotiations on the Second Additional Protocol in its own right?

I look forward to your response within 10 working days.

6 March 2019

Letter from the Rt Hon Ben Wallace MP, Minister for Security and Economic Crime

Thank you for your letter of 6 March 2019 in which you raise a number of questions relating to documents 6110/19 and 6110/19 ADD relating to the Second Additional Protocol to the Budapest Convention. I am pleased to reply to the questions as follows:

- **Following your assumption that a JHA legal base will be added to this Recommendation, thereby engaging the UK's opt-in protocol, what progress has been made in this regard? Is the potential addition of a JHA legal base likely to be confirmed before 29 March, after which time the UK's opt-in would not apply?**

The Council recently confirmed on 1 March a substantive JHA legal base is necessary. This clarifies that the JHA opt-in for the UK (and Ireland) is triggered in line with Protocol 21 to the EU Treaties. Recitals will need to be added to the Decision by the Council to record the application of the Protocol. As you note, the UK would not be able to opt in to the measure during the proposed Implementation Period, as it is not a measure amending, replacing or building upon existing legislation that the UK is bound by, and so the UK will only be able to opt in if we communicate such a decision to the EU on or before 29 March. The Government is currently considering its position.

- **What has been the outcome of your EU “competence analysis” on the anticipated subject matter of the Second Additional Protocol to the Budapest Convention?**

Based upon the competence analysis carried out by this Department, I do not agree with the EU Commission’s assertion that the EU has exclusive competence in regards the Second Additional Protocol but rather that it is shared. I consider that where competence is shared, in line with the principle of subsidiarity, competence should be exercised at the lowest level, namely by EU Member States including the UK.

The Commission asserts there is significant overlap with EU law. The strength of their arguments, however, vary for each element of the proposal and the subject matter in question, and depend on its degree of association with EU law. The strongest argument for exclusive EU competence relates to the Second Additional Protocol’s proposals on e-evidence, specifically as these relate to the proposed EU e-evidence Regulation which has not yet been adopted but which envisages creating a regime of European production orders and preservation orders.

As the UK has not opted in to the e-evidence Regulation and given that e-evidence related matters comprise a large part of the subject matter under discussion for the Second Additional Protocol, I would not accept that the UK is bound by any exclusive external EU competence in this area. Furthermore, some measures under discussion for inclusion in the Second Additional Protocol such as those relating to jurisdiction and trans-border direct access to data (i.e. not involving co-operation between competent authorities) I consider fall outside the scope of EU competence altogether.

It is difficult to point to a conflict or even potential for conflict between the proposed commitments in the Second Additional Protocol (where these have been developed) and internal EU rules relating to the same subject matter. *The Government’s position is that where there is no conflict with internal EU rules, competence should remain shared and Member States should be able to exercise that competence.* We are mindful, however, that the EU Court of Justice’s case-law on the test for implied exclusive external competence could be characterised as somewhat divergent, and that there is the risk of the Court finding that such competence arises merely because of the “significant overlap” in terms of the subject matter, without the need for a forensic assessment of the relevant provisions.

- **What would be the advantages and disadvantages of the UK taking part in negotiations on the Second Additional Protocol in its own right?**

Informed in part by the Department’s position on competence in regards the Second Additional Protocol, highlighted above, the key advantage of the UK negotiating in our own right is ensuring maximum control and approach over our position and interests. No substantial disadvantages have been identified.

Mindful that the UK will be bound by a duty of sincere cooperation (during the Implementation Period in line with Article 129 of the Withdrawal Agreement), if the Government decided not to opt in, my department would seek to work closely with the UK mission to the Council of Europe to understand and, where appropriate, align our positions with those of the EU, and continue to work closely with wider international partners.

I hope this provides sufficient information for the Committee to consider its scrutiny position.

25 March 2019

PROPOSALS FOR COUNCIL DECISIONS ON THE SIGNING AND CONCLUSION OF AGREEMENTS ON THE ACCESS OF THE SWISS CONFEDERATION AND THE PRINCIPALITY OF LIECHTENSTEIN TO PRÜM (6251/19)

PROPOSAL FOR A COUNCIL DECISION ON THE SIGNING, ON BEHALF OF THE EUROPEAN UNION, AND ON THE PROVISIONAL APPLICATION OF CERTAIN PROVISIONS OF THE AGREEMENT BETWEEN THE EUROPEAN UNION AND THE PRINCIPALITY OF LIECHTENSTEIN ON THE APPLICATION OF CERTAIN PROVISIONS OF COUNCIL DECISION 2008/615/JHA ON THE STEPPING UP OF CROSS-BORDER COOPERATION, PARTICULARLY IN COMBATING TERRORISM AND CROSS-BORDER CRIME, OF COUNCIL DECISION 2008/616/JHA ON THE IMPLEMENTATION OF DECISION 2008/615/JHA ON THE STEPPING UP OF CROSS-BORDER COOPERATION, PARTICULARLY IN COMBATING TERRORISM AND CROSS-BORDER CRIME, AND THE ANNEX THERETO, AND OF COUNCIL FRAMEWORK DECISION 2009/905/JHA ON ACCREDITATION OF FORENSIC SERVICE PROVIDERS CARRYING OUT LABORATORY ACTIVITIES (6253/19)

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

Thank you for the Explanatory Memorandum (EM) of 21 February 2019 on the above files, which the EU Home Affairs Sub-Committee considered at its meeting on 27 March 2019.

We have decided to retain these files under scrutiny. Please confirm your JHA opt-in decision and, if the UK does opt-in, whether you intend to support these proposals in Council.

I look forward to your response within 10 working days.

27 March 2019

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE IMPLEMENTATION AND FUNCTIONING OF THE .EU TOP LEVEL DOMAIN NAME AND REPEALING REGULATION (EC) NO 733/2002 AND COMMISSION REGULATION (EC) NO 874/2004 (8468/18)

Letter from Margot James MP, Minister for Digital and the Creative Industries, Department for Digital, Culture, Media and Sport

I am writing to provide your Committee with a final update on the proposed Regulation for the **implementation and functioning of the .eu Top Level Domain (TLD)** following my letter of 19 October, which updated you on the negotiation of this file.

Since then the negotiation has moved rapidly, with the Austrian Presidency securing an informal agreement between the European Parliament (EP) and the Council before the end of its Presidency in December, which is expected to be formally ratified shortly.

Background

The Austrian Presidency secured an informal mandate at COREPER on 24 October, to enter into informal trilogues with the EP.

The EP agreed its position soon after on 29 November. The EP text diverged from the Council's text in a few areas. Principally, the EP, alongside the European Commission, were content to see the removal of the 'not for profit' status of the Registry. The EP were also keen to see a greater operational role for the Multi-Stakeholder Council - now renamed the Multi-stakeholder Advisory Group.

The compromise text preserves the UK interests I set out in my previous correspondence, with the 'not for profit' status of the .eu TLD registry retained, as well as as language reflecting the Multi-stakeholder Advisory Group's strategic purpose. This informal deal will be ratified formally shortly by

both the EP and Council. At present, we consider it is unlikely that this Regulation will come into force before the UK leaves the EU, although we will update the Committee if this does become likely.

16 January 2019

PROPOSAL FOR A REGULATION ON THE CREATION OF A EUROPEAN NETWORK OF IMMIGRATION LIAISON OFFICERS (RECAST) (9036/18)

PROPOSAL FOR A COUNCIL DECISION CONCERNING THE NOTIFICATION OF THE UK OF ITS WISH NO LONGER TO TAKE PART IN SOME OF THE PROVISIONS OF THE SCHENGEN ACQUIS ON THE CREATION OF AN IMMIGRATION LIAISON OFFICERS NETWORK (5939/19)

Letter from the Chairman to the Rt Hon Caroline Nokes MP, Minister of State for Immigration, Home Office

Thank you for EM dated 11 February 2019 on the proposal for a Council Decision concerning UK participation in the EU Immigration Liaison Officers (ILO) network, which the EU Home Affairs Sub-Committee considered at its meeting on 6 March 2019.

Your EM confirms that the UK informed the EU of its decision not to opt-in to the proposed recast ILO Regulation (EM 9036/18) on 1 October 2018. The consequential Council Decision (EM 5939/19) is to be welcomed insofar as it confirms that the UK's decision to stop participating in the ILO network will not affect its continued participation in other Schengen measures.

You may recall, however, that the Committee last wrote to you on the recast ILO Regulation in September 2018, asking that you keep us updated on the UK's opt-out decision on this proposal. I was therefore disappointed to learn the outcome of the UK's opt-out decision in the EM on the proposed Council Decision, and that this had taken place several months ago.

As both files were due to be adopted towards the end of February, we have decided to clear them from scrutiny. Nonetheless, I take this opportunity to register my concern that, as is now all too often the case, the scrutiny process was not respected, and the Committee was not kept informed about a UK opt-out decision.

I would be grateful if you could confirm whether, and when, both files were adopted.

6 March 2019

Letter from the Rt Hon Caroline Nokes MP, Minister of State for Immigration

I am writing in response to your letter of 6th September 2018 and to update you on this measure following my letter to you on 20 July 2018, which replied to your questions regarding the Commission's proposals set out in EM9036/18. I must apologise for the delay in replying to your letter. Due to an administrative error, it was not made clear to officials that a response was required. I have also received your correspondence of 7th March and this reply is updating you on the adoption of the regulation by the European Union.

In my correspondence in July I indicated that we had not yet finalised our decision whether to participate in this measure. You asked to be informed of the opt out decision. I can confirm that we took the decision to not participate in this measure and informed the EU of this decision on 1 October 2018. This decision reflected the UK decision to leave the EU, that we were not participating in associated financial measures and that non-participation would not impact on our ability to work with other Immigration Liaison Officer networks as we do currently.

This decision resulted in a production by the Commission of a Council Decision on 1 February 2019 on the implications of the UK's opt out decision on the UK's Schengen participation, which was submitted to you in EM 5939/19 on 19 February 2019.

The Regulation was adopted on 27 February 2019 and the Council Decision was adopted on 18th February 2019. The UK did not vote on the Regulation as we opted out and abstained on the adoption

of the Council Decision. The regulation is expected to be voted on by the European Parliament in the last plenary in April

20 March 2019

UK'S JHA OPT-IN PROTOCOL

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

Thank you for your letter of 28 November.

Your letter noted that the Withdrawal Agreement allows the transition period to be extended to 31 December 2022 and asks whether, in light of the possibility that the transition period could be extended, and my statement that it takes “on average around 2 years” to negotiate and implement new EU legislation, I would still maintain that it is “highly unlikely” that legislation establishing new JHA tools will take effect during the Implementation Period, although we will continue to monitor this.

If the provision (Article 132 of the Withdrawal Agreement) enabling the extension of the Implementation Period was activated, it would make it more likely that legislation establishing new JHA tools would take effect during the Implementation Period. If we considered such tools or measures to be useful additions to the current EU JHA toolbox, we would engage in a discussion with EU partners about the benefits of UK participation in those tools until the end of the Implementation Period. The final paragraph of Article 127(5) of the Withdrawal Agreement allows for the EU to invite the UK to cooperate in relation to new JHA measures under the conditions set out for cooperation with third countries in the relevant measures.

In terms of an assessment of the risk to the UK from not being able to exercise its JHA opt-in to JHA tools during an extended transition period, I consider the risk to be limited. To our knowledge, and reflecting the European Commission's 2019 annual work programme, there are no plans for the EU to propose entirely new JHA tools / measures where the UK has not already been involved in negotiations, and where appropriate opted in. At this stage, it is unclear what priorities the next European Commission will have – and we are unlikely to get any further understanding of priorities until after the May 2019 European Parliament elections and subsequent election of the next Commission.

In relation to the application of the JHA opt-in to JHA content in measures that do not cite a JHA legal base, your letter asks:

Since 2011, on how many occasions has the Government unilaterally asserted in the Council that the UK's opt-in arrangements apply to EU measures that do not include a Title V legal basis?

Officials have undertaken a review of information available, including public reporting, and consider that the UK has asserted the opt-in on 59 occasions in relation to JHA obligations in measures where the original proposal did not cite a JHA (Title V) legal base.

How many times has the Government indicated that it is not participating in such measures? How many of these measures will apply to the UK on 29 March 2019?

In relation to 10 measures, the UK Government considers that it did not opt in to JHA obligations and does not consider itself bound by those obligations. For the remainder of opt-in decisions relating to measures not citing a JHA legal base, the UK either opted-in (43 measures), or subsequent rulings by the CJEU have meant the UK now considers itself bound (6 cases). Those 10 measures where the UK did not opt in to JHA obligations within the measures are:

1. Proposal for a Council Decision on the signature and conclusion of a Partnership and Co-operation Agreement between the EU and Singapore
2. Proposal for a Council Decision on signature and conclusion by the EU of the Stabilisation and Association Agreement with Kosovo
3. Proposal for a Regulation laying down common rules on securitisation and creating a European framework for simple, and transparent and standardised securitisation and amending

Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No. 1060/2009 and (EU) No. 648/2012

4. Proposal for a Regulation of the European Parliament and of the Council on the protection of the individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
5. Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 768/2005 establishing a Community Fisheries Control Agency
6. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency
7. Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading
8. Proposal for a Directive amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
9. Proposal for a Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part
10. Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral

How does the Government plan to deal with the uncertainty that may arise as a result of these past actions? Do the provisions of the European Union (Withdrawal Act) 2018 offer a solution to the uncertainty created by the Government's unilateral assertion of the UK's opt-in arrangements? If so, which provisions?

As your letter notes, the Government's Explanatory Notes to the European Union (Withdrawal) Bill state that the purpose of the legislation was to "convert EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserve laws made in the UK to implement EU obligations".

There are no specific provisions in the European Union (Withdrawal) Act 2018 clarifying which JHA obligations the Government does not consider itself bound by. However, the Act does not retain in domestic law exempt EU instruments as defined by Schedule 6 of the Act, which includes instruments or provisions of instruments insofar as they are not applicable as a result of the UK's JHA opt-in Protocol.

The information provided in the Annual Reports to Parliament on the application of the JHA opt-in indicates where the UK Government has applied the opt-in and whether or not the Government has opted in. Where the UK has not opted into JHA obligations and does not consider itself bound, the UK will not be bound by such obligations during the Implementation Period. The Government considers that there is little if any, practical risk of uncertainty arising because of the nature of the JHA obligations in the 10 measures – either the obligations are on the EU or EU agencies, or the obligations are JHA in nature but do not substantively impact existing UK policy or practical co-operation.

15 January 2019

Letter from Lord Jay of Ewelme to the Rt Hon Nick Hurd MP, Minister of State for Policing and the Fire Service

Thank you for your letter dated 15 January 2019 regarding the UK's Justice and Home Affairs Opt-in Protocol. The EU Home Affairs Sub-Committee considered your letter at its meeting on 6 February 2019.

We note that you consider the risk of the UK not being able to opt-in to new JHA measures during the transition period "to be limited". We consider the risk to be at best unknown, in light of the possibility that the transition period could be extended, and of uncertainty around the priorities of the next Commission.

Thank you for the further information on the number of measures that do not include a Title V legal basis where the UK unilaterally asserted that opt-in arrangements apply. We note that the UK unilaterally decided not to opt-into Article 43a of the General Data Protection Regulation. Have you assessed what impact this decision may have on the UK's ability to achieve an adequacy decision on data protection from the EU?

Please respond to this letter within 10 working days.

6 February 2019