



House of Commons
European Scrutiny Committee

**Twenty-first Report of
Session 2008–09**

**Documents considered by the Committee on 10 June 2009,
including the following recommendation for debate:**

Prevention and Settlement of Conflicts of Jurisdiction in
Criminal Proceedings

Report, together with formal minutes

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Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

EC	(in " <i>Legal base</i> ") Treaty establishing the European Community
EM	Explanatory Memorandum (submitted by the Government to the Committee)
EP	European Parliament
EU	(in " <i>Legal base</i> ") Treaty on European Union
GAERC	General Affairs and External Relations Council
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
RIA	Regulatory Impact Assessment
SEM	Supplementary Explanatory Memorandum

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is in the House of Commons Vote Bundle on Mondays and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

Letters sent by Ministers to the Committee about documents are available for the public to inspect; anyone wishing to do so should contact the staff of the Committee ("Contacts" below).

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1 Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings

(a) (30410) 5208/09 —	Draft Council Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings.
(b) (30502) — —	Draft Council Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings
(c) (30687) 8338/09 —	Draft Council Framework Decision on Prevention and Settlement of Conflicts of exercise of Jurisdiction in Criminal Proceedings — General Approach

<i>Legal base</i>	Articles 31(1)(c) and 34(2)(b) EU; unanimity, consultation
<i>Department</i>	Justice
<i>Basis of consideration</i>	Minister's letters of 30 March, 30 April and 14 May 2009
<i>Previous Committee Report</i>	(a) HC 19-x (2008-09), chapter 2 (11 March 2009); (a) and (b) HC 19-xii (2008-09), chapter 7 (25 March 2009); (c) None
<i>To be discussed in Council</i>	June
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	(a) and (b) Cleared; (c) For debate in European Committee B

Previous Consideration

1.1 We last considered this draft Framework Decision at our meeting on 25 March 2009. We noted that the proposal for a Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings had been substantially revised and met many of the Committee's concerns. We had a few outstanding reservations: namely that the reference to the principle of *ne bis in idem* (double jeopardy) in Article 1(2)(a) be better defined and the recitals on Member State discretion not to surrender or exercise jurisdiction and on defendants' rights under national law be repeated in the operative part of the text. For this reason, we continued to hold the proposal under scrutiny. We did, however, agree to the Minister voting in favour of a General Approach on the text at the JHA Council on 6 April, in accordance with paragraph (3)(b) of the Scrutiny Resolution.

The Minister's letters of 30 March and 30 April 2009

1.2 On 30 March the Parliamentary Under-Secretary of State at the Ministry of Justice (Lord Bach) wrote to thank the Committee for agreeing to the adoption of a General Approach on the text. He also agreed that the wording we had proposed for the definition of *ne bis in idem* in Article 1 would add clarity and that his officials would endeavour to have it incorporated into the text before the General Approach was adopted.

1.3 With regards to recital 7, which clarifies that Member States are not obliged to surrender jurisdiction, the Minister commented as follows. “The operative text concerns the taking of measures (direct consultations) with a view to reaching consensus. Except in so far as it directs Member States to Eurojust where it is competent to act, the operative text of the instrument is otherwise silent as to what should happen in the event consensus is not reached. The recital simply clarifies within that context that the measure is not to oblige a Member State to surrender or exercise jurisdiction. In addition, this Framework Decision is not meant to deal with surrender of jurisdiction; it is about cooperation between competent authorities. For this reason too our view is that a provision on such an obligation (even a negative one) is better placed in a recital.”

1.4 With regards to the recital on defendants' rights (in draft form and unnumbered at that stage) the Minister commented that “the principal difficulty is that this is not a Framework Decision regarding the rights of defendants and so it does not sit well to include wording on this in the operative part of the text. We therefore believe that it would be better to focus on refining the wording of the recital further, so that it is focussed on defining better the parameters of the operative text”.

1.5 On 30 April the Minister wrote again to inform us that a General Approach to the text (document (c)) had been agreed in the JHA Council on 6 April, enclosing a copy. He commented that “the text has not changed much since the last draft you saw”. He did not elucidate any changes, although there were some.

1.6 We responded by letter dated 29 April to the Minister's reluctance to repeat two – in our view key – recitals in the operative part of the text. We stated that the principles contained in both recitals contain important safeguards. They are directly relevant to a Member State's right not to surrender or exercise jurisdiction or an individual's right to make representations about where he or she will be tried before national courts. As such, they are germane to the operation of the procedures set out in the Framework Decision and may well be relied upon by a Member State or individual. We commented further that it was our understanding that for a right within an EC/EU legal instrument to be actionable it should be reflected in an operative paragraph of the text, and not in the recital alone. Bearing in mind the jurisdiction of the ECJ to “give preliminary rulings on the validity and interpretation” of Framework Decisions under Article 35 of the EU Treaty, we asked the Minister to confirm his agreement with our understanding, which would make the repetition of these two recitals in the operative text necessary should a Member State or individual wish to rely on them. We also told the Minister that his views on this would be useful for future scrutiny of EU documents being handled by his Department.

The Minister's letter of 14 May 2009

1.7 The Minister replied to our letter on 14 May in the following terms:

“The first point to make is that, with respect, we think the better interpretation is that the recitals in this instrument do not create a right or rights. As we have previously explained, we are of the view that recitals are there only to provide context and as an aid to interpretation. We therefore prefer the view that the two recitals you refer to are not capable of constituting ‘important safeguards’. Where the normative provisions of the instrument are silent, national law applies, including any relevant safeguards it provides.

“To take the example of the recital explaining the position regarding individual's rights, this measure is aimed at facilitating co-operation between competent authorities and simply does not afford, create or take away any existing procedural rights for individuals. This is clear from the operative text. In that respect we do not in fact consider that the instrument needs to say anything about the question of individual rights to argue they should be prosecuted in their own or another jurisdiction. The instrument would not be interpreted otherwise. But recitals, in explaining the purpose behind an instrument, can still be a useful tool and whilst strictly legally unnecessary in this instance, we agreed that it was better for a recital to include some explanation than for the measure to stay silent.

“Similar points apply to the recital on Member State rights. The operative part of the text concerns direct consultations with a view to reaching consensus and (except in relation to Eurojust where it is competent to act) is silent on what happens if no consensus is reached. Again the context of the instrument is important — this is about seeking to achieve consensus only. It is not about forcing options on Member States and it is proper in that context for a recital to clarify that is not the purpose of the instrument, when it might otherwise have dealt with such matters. The operative text again is clear.

“You ask the department to confirm the Committee's understanding that for a right to be actionable it should be reflected in an operational paragraph of the text and not the recital alone. As a matter of general EU law it is certainly correct that a recital cannot give rise to an actionable right. In Case 215/88 Casa Fleischhandels ([1989] ECR 2789), for example, considering the interpretation of various Regulations, the Court of Justice said, at paragraph 31, ‘Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot itself constitute such a rule.’ Also, for the purposes of direct effect, an individual must be able to point to a provision of Community law that is sufficiently clear, precise and unconditional. Recitals will generally explain the reasons for and context of the instrument and may also be used to help interpretation (and see e.g. Case C-173/99 BECTU [2001] ECR I-4881).

“That said, when discussing questions of rights and direct effect it is necessary to distinguish between first and third pillar measure. As you will know, the UK has not accepted the jurisdiction of the ECJ under the third pillar. The position on this would, of course, change after five years were the Lisbon Treaty to come into force.

Our assessment

1.8 Document (c), the draft of the Framework Decision as agreed by General Approach (“the General Approach text”), discloses that the Minister’s officials had been successful in inserting into Article 1 the definition of *ne bis in idem* as we had proposed. We are grateful for their efforts; this, in our view, was an important clarification.

1.9 We also note that the “Criteria for reaching consensus” on jurisdiction listed in Article 15 of the text we scrutinised on 25 March 2009 (document (b)) have been removed. New Article 11 is now entitled “Procedure of reaching consensus” and states simply that when the authorities of the Member States enter into direct consultations, they “shall consider the facts and merits of the case and all the factors which they consider to be relevant”. Reference to fewer criteria is now found in Recital 9. We welcome the increased flexibility in the General Approach text on how jurisdiction should be determined.

1.10 We also note a new Recital 10 now refers to the role of Eurojust, reminding Member States that the obligation for competent authorities to enter into direct consultations “does not exclude that such direct consultations be conducted with the assistance of Eurojust”. We welcome the greater prominence in the General Approach text given to the role of Eurojust in resolving conflicts of criminal jurisdiction – we had reported on 11 March¹ that we thought that Eurojust might have been able to resolve parallel proceedings without the need for this Framework Directive. We also note that referral of an unresolved dispute over jurisdiction to Eurojust is discretionary in the revised text: Article 12 (2) reads: “where it has not been possible to reach consensus in accordance with Article 10, the matter shall, *where appropriate*, be referred to Eurojust...”. In document (b), pursuant to Article 16(2), an unresolved dispute had to be referred to Eurojust (“the matter shall be referred to Eurojust...”). The discretion in the General Approach text is now consistent with Recital 11 which clarifies that “No Member State should be obliged to waive or to exercise jurisdiction unless it wishes to do so”.

1.11 We are grateful to the Minister for his letters of 30 March and 14 May explaining why, in his view, there was no need for the recitals on defendants’ rights and Member State obligations to surrender jurisdiction to be repeated on the operative part of the text. We are also grateful for his exposition of the purpose of recitals in EC/EU legal instruments, which we would summarise as being consistent with our own view, namely that they are no more than an aid to interpreting the operational paragraphs and do not create rights.

1.12 Having reviewed the General Approach text, we agree with the Minister that there is no need for the recital on Member States not to surrender jurisdiction to be repeated in an Article. The operational part of the text does not place a legal burden on a Member State to do so, recourse to Eurojust is no longer obligatory, and so the recital alone suffices as a guide to interpreting the extent of the legal obligations of the Framework Decision.

1.13 On defence rights, however, we do not agree with the Minister’s contention in his letter of 14 May, echoing comments in his letter of 30 March, that the Framework Decision is “aimed at facilitating co-operation between competent authorities and simply does not afford, create or take away any existing procedural rights for individuals”. To us it seems

1 See headnote above.

plain that the obligation to consult between Member States conducting parallel proceedings against the same defendant *is with a view to* one Member State surrendering or exercising jurisdiction over a defendant to avoid a parallel prosecution. This may well affect the procedural rights of that defendant, and so we have difficulty in drawing the distinction the Minister makes between the obligation to cooperate and the intended result of that cooperation. In our view, the Framework Decision could lead to a defendant being tried in a different Member State to his home State and would therefore greatly benefit from a reference to defence rights in the operative part of the text as well as in Recital 17.

Conclusion

1.14 The Minister responded to our last Report of 25 March by letter dated 30 March, in which he accepted our concerns over the definition of *ne bis in idem* in Article 1 and explained why he did not agree that the two recitals over which we had additional concerns should be incorporated in the operative part of the text. We replied on 29 April stating again why we thought the two recitals should be incorporated, and asking for further clarification of the Minister's reasons. On 30 April the Minister wrote to tell us that a General Approach to the text had been agreed in the JHA Council on 6 April and enclosed a copy of the text. On 14 May he wrote again, in response to our letter of 29 April, explaining in greater detail why in his view neither of the recitals should be incorporated into the operative text. We thank the Minister for his letters.

1.15 The General Approach text discloses that the Minister's officials had been successful in inserting into Article 1 the definition of *ne bis in idem* that we had proposed in our last Report. We are grateful for their efforts; this, in our view, was an important clarification.

1.16 We agree with the Minister that it is now no longer necessary for the recital on Member State obligations (Recital 11) to be incorporated in the operative text of the Framework Decision. But we disagree with him (for the reasons set out in paragraph 13 above) that it is not necessary for the recital on defence rights (Recital 17) to be incorporated. In our view, the procedures set out in the Framework Decision could lead to a defendant being tried in a different Member State to his home State. The Framework Decision would therefore greatly benefit from a reference in the operative part of the text to the need for the defendant's rights to be safeguarded.

1.17 We consider that the omission of a reference to defence rights in the context of this Framework Decision is of sufficient importance to warrant a debate in European Committee B on document (c), the General Approach text, and we call upon the Government not to give its agreement to the final adoption of this text before the debate. In so concluding, we clear documents (a) and (b) from scrutiny.

2 Hazardous substances in electrical and electronic equipment

(30284) 17333/08 + ADDS 1–2 COM(08) 809	Draft Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast)
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<i>Legal base</i>	Article 95EC; co-decision; QMV
<i>Document originated</i>	3 December 2008
<i>Deposited in Parliament</i>	22 December 2008
<i>Department</i>	Business, Enterprise and Regulatory Reform
<i>Basis of consideration</i>	EM of 6 January 2009 and SEM of 27 May 2009
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	Second half of 2009
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Not cleared; further information requested

Background

2.1 Waste from electrical and electronic equipment (WEEE) was identified in the Community's Fifth Environmental Action Programme² as one of the target areas for prevention, recovery and safe disposal because such equipment presents a number of problems. In particular, its components tend to include various hazardous materials;³ a large proportion is landfilled, incinerated or recovered without any pre-treatment; and the decreasing life-span of much of the equipment has led to a rapid growth of WEEE, compared with municipal waste in general. This led the Community to adopt in 2002, after considerable discussion (dealt with at some length by our predecessors), two separate, but related measures. One (Directive 2002/95/EC)⁴ sought to restrict the use of certain of these hazardous substances in electrical and electronic equipment whilst the other (Directive 2002/96/EC)⁵ established procedures to reduce the amount of resultant waste and to increase the level of recycling and recovery.

2.2 The Commission has now brought forward two further proposals, which would recast each of these measures. We will be reporting separately on the proposal relating to Directive 2002/96/EC, the current document being concerned with the level of hazardous substances in electrical and electronic equipment.

2 OJ No. C 138, 17.5.93.

3 Such as heavy metals; halogenated substances (CFCs); polychlorinated biphenyls (PCBs); polyvinyl chloride (PVC); brominated flame retardants; and asbestos and arsenic.

4 OJ No. L 37, 13.02.03, p.19.

5 OJ No. L 37, 13.02.03, p.24.

The current document

2.3 Directive 2002/95/EC harmonises the rules on the restriction of the use of hazardous substances in such equipment by:

- requiring the use of substitutes for mercury, lead, cadmium, hexavalent chromium, and polybrominated diphenyls (PPB) and polybrominated diphenyl ethers (PBDE) flame retardants from 1 January 2008;
- providing exemptions to this requirement where the use of these substances is unavoidable, or where their substitutes would have greater negative impacts on health or the environment; and
- setting up a Community procedure to amend these exemptions in the light of advances in scientific knowledge or technical progress, and to establish maximum levels at which the presence of the substances would be tolerated in specific materials and components.

2.4 Because the current proposal is seeking essentially to recast the Directive, it retains many of the existing provisions. However, it would make a number of changes, as follows:

- The Directive would be aligned with Decision No 768/2008/EC on a common framework for the marketing of products (which was adopted earlier this year as part of the “Goods Package” with a view to introducing greater legislative consistency among EC harmonising measures), and in particular among the increasing number of members of the “New Approach” family of legislation setting harmonised requirements for a range of products. This would involve the introduction of common definitions, and specify the obligations of economic operators at different stages in the supply chain (manufacturers, importers, distributors) in relation to the placing on the market of electrical and electronic equipment. It would also provide for manufacturers to self-certify the conformity of their products with the requirements of the Directive, to prepare an “EC declaration of conformity”, and to affix the “CE marking”. In addition, reference is made to Regulation No 765/2008, setting out the requirements for accreditation and market surveillance relating to the marketing of products.
- The scope of the measure would now be defined more completely in this Directive itself, rather than in the Directive 2002/96/EC, and would include, for the first time, medical devices and monitoring and control equipment. However, the application to these two categories would be phased in over a period up to 2017, and a new annex of exemptions has been proposed specifically for them, with derogations being made additionally for military equipment (for which explicit provision is not made in the current legislation).
- Although there would be no change to the list of restricted substances, four substances would be reviewed by the comitology procedure to establish whether they should be added to the restricted list.
- The criteria for determining whether the use of restricted substances should be permitted in particular applications would be changed, and would now allow for

socio-economic aspects to be taken into account, thus providing an explicit basis for a cost-benefit analysis when such decisions are reached.

The Government's view

2.5 In his Explanatory Memorandum of 6 January 2009, the Economic and Business Minister at the Department for Business, Enterprise and Regulatory Reform (Mr Ian Pearson) says that the proposal aims to align the RoHS Directive with similar Directives concerned with products meeting essential requirements before they are placed on the market. He comments that there has been an effort to better define scope in the Directive and align basic definitions and the conformity assessment procedures with Decision No 768/2008/EC, and that this should give all economic operators more confidence that they are meeting the requirements of the Directive, and also make it easier for market surveillance authorities to ensure a more even playing field in terms of enforcement. He also believes that the reference to Regulation No 765/2008 should ensure that the relevant authorities are aware of their obligations.

2.6 Overall, the Minister says that the UK broadly supports this re-cast, and in particular the changes outlined above which provide greater commonality with other similar Directives and confidence for economic operators as well as more even EU market surveillance, noting also that the UK strongly supported the introduction of the “Goods Package” for these reasons, as well as the introduction of a defined scope into the proposed Directive in terms of simpler legislation.

2.7 As regards the inclusion of medical devices and monitoring and control instruments, the Minister observes that these were originally excluded as being safety-critical (and not to be exposed prematurely to substitute substances replacing the restricted substances, in case equipment failure resulted). It was therefore considered prudent to see if the substitute substances used in non safety-critical areas caused any problems, and he notes that the Commission has decided to introduce these areas into the Directive in a phased way over several years, with many exemptions for specific applications. He says that initial contact with the industry sectors concerned in the UK suggests that, since this will provide additional environmental benefit, the Commission has chosen a reasonable way forward, but he adds that this will be considered further as part of the UK consultation.

2.8 The Minister said that a UK Impact Assessment would be prepared as soon as possible, but, in the meantime, he pointed out that the Commission's impact assessment had suggested a net benefit in European terms, and in particular had said that, although the initial implementation of the revised conformity assessment provisions could create some cost for producers and Member States, the harmonised provisions would eventually reduce administrative burdens and create more certainty for producers. The Commission did, however, believe that there would be increased costs for producers in relation to the two new categories of electrical and electronic equipment to be covered, particularly for bespoke equipment, but had sought to alleviate this by phasing these two categories into scope over the period to 2017. In addition, the list of specific use exemptions would help to counterbalance the proposed inclusion.

Supplementary Explanatory Memorandum of 27 May 2009

2.9 We have now received from the Minister a supplementary Explanatory Memorandum of 27 May 2009, enclosing the promised Impact Assessment. This suggests that the inclusion of medical devices and monitoring and control instruments could give rise to annual costs within the UK of between £45 and 92 million, equivalent to 1–2% of turnover, due principally to expenditure on the research needed to bring about the product re-design and development needed to substitute the restricted substances. On the other hand, the assessment not only says that it has not proved possible to quantify the benefits, it goes on to suggest that majority of the equipment in question is unlikely at present to result in significant harm to the environment, and that there will be a minimal reduction in the toxicity experienced by the public in normal everyday activities. It therefore suggests that, although there are benefits, “it is not clear that the proposal can be justified based on the current estimates of the size of the potential benefits and costs involved”. Furthermore, it observes that this conclusion appears to be in line with the Commission’s own research, which included the comment that the impacts of RoHS in this equipment are extremely small, and that they are “at the limits regarding costs and benefits”.

2.10 Despite this, the Minister simply says in his supplementary Explanatory Memorandum that “there is a need for the proposal to be cleared from scrutiny as soon as possible”, adding that the incoming Swedish Presidency has announced that it will give this proposal high priority, holding working group meetings at a high frequency from the beginning of July.

Conclusion

2.11 Although the Minister has asked for the proposal to be cleared, he does not appear to have indicated whether or not the UK proposes to support it in the Council, or what the prospects are for its early adoption. Consequently, before we are able to consider it further, we would like information on these points, and in particular on the approach which the UK proposes to adopt, given the doubts voiced in the Government’s Impact Assessment — and, it would seem, in the Commission’s own research — about the justification for the proposal in the light of its relative costs and benefits.

3 Industrial emissions

(a) (29313) 5223/08 COM(07) 843	Commission Communication: <i>Towards an improved policy on industrial emissions</i>
(b) (29348) 5088/08 + ADDs 1–2 COM(07) 844	Draft Directive on industrial emissions (integrated pollution prevention and control) (Recast)

<i>Legal base</i>	(a) — (b) Article 175EC; co-decision; QMV
<i>Department</i>	Environment, Food and Rural Affairs
<i>Basis of consideration</i>	SEM of 2 May 2009 and Minister's letter of 5 June 2009
<i>Previous Committee Report</i>	HC 16–x (2007–08), chapter 1 (30 January 2008)
<i>To be discussed in Council</i>	25 June 2009
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Not cleared (but see para 3.13–15 below)

Background

3.1 According to the Commission, the largest industrial installations account for a considerable share of total emissions of key atmospheric pollutants, and have other important environmental impacts. Emissions from such installations have therefore been subject to Community-wide legislation for some time. In particular, Directive 96//61/EC⁶ concerning integrated pollution, prevention and control (IPPC) governs the issuing of permits to large installations with a thermal input greater than 50 MW, covering all environmental impacts, and linked to the application in the main industrial sectors⁷ of best available techniques⁸ (BAT). These were set out in a series of BAT reference documents (BREFs), which are non-binding, but in practice Member States have only limited discretion to allow less stringent permit conditions. This measure is complemented by so-called sectoral Directives, which lay down specific provisions, including minimum emission limit values for certain industrial activities (notably large combustion plants, waste incineration, activities using organic solvents, and titanium dioxide production). These need not be as strict as those in the IPPC Directive, but are frequently applied instead of BAT, especially in the case of large combustion plants.

6 OJ No. L 257, 10.10.96, p.26.

7 Energy, metal production and processing, minerals and chemical production, and waste management, plus a range of "other" activities (such as slaughterhouses and installations for the intensive rearing of pigs and poultry).

8 These are established techniques which are the most effective in achieving a high level of environmental protection under economically and technically viable conditions, taking into account the costs and benefits.

3.2 However, the Commission also says that, notwithstanding these measures, all the installations involved need to be better geared to the implementation of BAT. It therefore put forward in December 2007 two documents. The Communication at document (a) noted that not all Member States had fully implemented the Directive, and that, there were a number of areas of concern. The Commission therefore suggested that the seven existing pieces of legislation⁹ in this area should be re-cast into a single measure, with the concept of BAT being improved and clarified, together with a tightening of current minimum emission limit values in some sectors, and the introduction of minimum provisions relating to inspections, permit conditions, and the reporting of compliance. It also said that the scope of the IPPC Directive should be extended, and its application to certain sectors clarified, and that the comitology procedure should be used to amend non-essential elements of the re-cast Directive.

3.3 The Communication also provided an estimate of the likely impact of the measures proposed. It suggested that there would be net environmental benefits of €7–28 billion a year for the large combustion sector alone, which it says would greatly outweigh (by a factor of between 3 and 14) the economic impacts, with further positive, but less quantifiable, impacts in other areas (such as on soil, water and waste), and a likely reduction in administrative burdens by between €105–255 million a year. It also said that no significant long term impact on competitiveness, detrimental social impacts or negative effects on economic growth have been identified as a result of a higher uptake of BAT, and that this would instead help to create a more level playing field and reduce distortions of competition within the Community, as well as helping to promote the development and deployment of innovative technology.

3.4 This Communication was accompanied by a draft Directive (document (b)) intended to give legislative effect to its recommendations. This would:

- extend the scope of the IPPC Directive to include additional activities, such as combustion installations between 20 and 50MW, the preservation of wood and wood products, and the production of wood panels, and it would lower the threshold at which the measure would apply to intensive poultry installations;
- require that BREFs should be the basis on which conditions are set for permits issued, and that this should be reflected in permitted the emission limits;
- specify that any national derogations regarding emission limit values should be based on well defined and publicly justified criteria, and not exceed the emission limit values specified in the Directive;
- introduce a new requirement for the periodic monitoring of adjacent soil and groundwater to protect them from contamination by dangerous substances.

3.5 It would also require operators to report regularly on compliance with permit conditions, and measures to be taken in a case of non-compliance; require permit conditions to be reconsidered after a new or updated BREF is adopted; and require

⁹ The IPPC Directive, Directive 1999/13/EC on solvents emissions, Directive 2000/76/EC on waste incineration, Directive 2001/80/EC on large combustion plants, and Directives 78/176/EEC, 82/883/EEC and 92/112/EEC relating to the titanium dioxide industry.

Member States to provide for a system of environmental inspections. In addition, it would also set more stringent emission limit values, aligned with BAT, for certain categories of combustion plants and pollutants, and for installations producing titanium dioxide: and, in order to reduce unnecessary administrative costs, it would enable competent authorities to introduce derogations to the current minimum monitoring requirements for certain emissions generated by waste incineration and co-incineration plants.

3.6 As we noted in our Report of 30 January 2009, the Government supports in principle the aim of strengthening and clarifying the use of BAT, and says that this concept has consistently been promoted and supported by the UK, its key feature being the need to be both technically and economically viable in the sector concerned. As regards individual aspects of the proposal, we noted:

- that, although the information exchanges used to establish BAT-associated emission levels are not of a sufficient uniformly high standard to justify their being imposed in all but the most unusual circumstances, the UK may be able to support the proposal, subject to securing a commitment that the quality of BREFs will be improved, and that the circumstances in which they would not be applied would be clarified sufficiently;
- that, although the UK has pointed out that, if the IPPC Directive were to be properly applied, there would be no need to strengthen existing minimum requirements for large combustion plants, the co-incineration of waste and titanium dioxide production, it may reluctantly have to accept the proposal, given the shortcomings in the way the Directive has been applied by Member States;
- that the minimum requirements for large combustion plants could have “troubling” consequences for the future development of replacement power plants, and is therefore probably the most controversial aspect of the whole proposal, which will need to be considered in depth in the context of energy policy, climate change and air quality objectives;
- that the Government intended to study in detail the justification for extending the IPPC Directive to other activities, and to carry out an UK impact assessment before reaching a final view;
- that it wished to adopt a similar approach to any amendment of the threshold for including intensive poultry installations, and to the proposal regarding soil monitoring and remediation;
- that it was minded to support the proposals for inspection, reporting on compliance, and reviewing of permits, whilst seeking the development of clear Community guidance to ensure that the burden on regulators and operators would be proportionate.

Subject to examination of the detail, the Government also supported the proposals to simplify the issue of permits and reduce reporting by operators; the introduction of Action Programmes to support Member States in reducing unnecessary administrative costs and streamlining their reporting; and the merging of seven current Directives into a single measure.

3.7 Whilst noting the conclusions of the Community-wide impact assessment carried out by the Commission, the Government said that it would be carrying out an initial assessment for the UK, which it aimed to submit in May 2008, but that it did not expect the proposals to reach the Council before December 2008. In view of this, we said that we would reserve judgement until we had seen that assessment, but that, in the meantime, we were drawing the two documents to the attention of the House as being potentially important, if only for the scale of the activities affected, and the health, environmental and cost implications of the changes being proposed.

Supplementary Explanatory Memorandum of 2 May 2009

3.8 We received recently from the Minister for Sustainable Development, Climate Change Adaptation and Air Quality at the Department for Environment, Food and Rural Affairs (Lord Hunt) a supplementary Explanatory Memorandum of 2 May 2009. This noted that the original Explanatory Memorandum of 17 January 2008 had identified the requirements for large combustion plants as probably the most controversial element in the proposal because of the consequences for the development over the next decade of replacement power plants consistent with carbon reduction objectives, and said that the UK had been on the forefront of Member States calling for greater flexibilities for existing plants up to the early 2020s. He added that significant progress had been made in the negotiations, and that the Government would continue to press for further amendments. He also noted that, insofar as the proposal would impose BAT-associated emission levels in all but the most unusual circumstances, this had caused difficulty for some Member States, but that the UK had supported this, provided the circumstances in which BAT levels would not be applied were clear.

3.9 These points apart, the Minister reported that he expected that any eventual agreement in the Council would maintain the threshold for the inclusion of combustion plants at 50MWth (compared with the 20 MWth proposed by the Commission), and that the UK was continuing to argue that the threshold for the inclusion of intensive poultry installations should be kept at the level in the current IPPC Directive.

3.10 We were, however, surprised and concerned to learn that the UK Impact Assessments of various components of the proposal — covering (i) combustion plants, (ii) intensive livestock installations, and (iii) a range of other activities¹⁰ — had been published on his Department's website as long ago as May 2008, but were only now being drawn to our attention, nearly a year later. Our concerns were all the greater, since the Minister had also gone on to say, not only that the Presidency would be seeking to achieve political agreement at the Environment Council on 25 June, and that, in view of the considerable progress made at working level, the prospects of this were good, but that (subject to its outstanding concerns being addressed), the Government would wish to encourage this. Furthermore, the Assessments which had been prepared were extremely detailed, and had, in certain respects, been subject to subsequent revision. We therefore made clear to the Minister our displeasure over the way in which this information had been provided, and

10 These activities are: non-ferrous metal foundries; biological processing for chemical production; production of chemicals for use as fuels or lubricants; specified treatments of non-hazardous waste; wood-based panel production; mixed animal and food production; preservation of wood and wood products; and off-site treatment of waste water.

the need for us to have a clear and up-to date statement of the costs and benefits arising from the proposals, if we were consider — let alone clear — the document.

Minister's letter of 5 June 2009

3.11 We have now received from the Minister a letter of 5 June 2009, apologising for his Department's oversight in not advising us earlier of the publication of its impact assessments in May 2008, and enclosing a note which provides a helpful summary of the current position. This indicates that, for a number of areas (non-ferrous metal foundries, biological processing for chemical production, the production of chemicals for use in fuels or lubricants, and wood-based panel production), there would be no additional costs because these are in practice already subject to the IPPC Directive in the UK; that the existing measures in place within the UK under industry codes of practice for the preservation of wood and wood products are comparable to those likely to be required were the proposal to be adopted, with no additional costs (or, for that matter, benefits) arising; that, likewise, the inclusion of off-site treatment of waste water from an installation where an IPPC activity is carried out would in effect regularise UK practice; and that the impact of the proposal to extend IPPC to food products of mixed animal and vegetable origin is likely to be minimal.

3.12 As regards those elements in the proposal where costs would arise, the note says:

- that the initial Impact Assessment put the annualised cost of the original more stringent requirements for *large combustion plants* at between £170 million and £331 million and the corresponding benefits as being in the range £119 million to £171 million:¹¹ however, although the Government had concluded that outright opposition to the proposal was not an option — not least because the Thematic Strategy on Air Pollution calls for a significant reduction in emission levels — it had been instrumental in the Council in pressing for the restoration of certain existing flexibilities for plants in operation prior to November 2003, and that it currently seemed likely that this would result in a reduction in annual costs to £214 million and annualised benefits between £127 million and £178 million (though the UK was continuing to press for further flexibilities);
- that, since the Commission's original proposal to extend the Directive to *smaller combustion plants* between 20 and 50 MWth had given no firm indication of the emission limits values which would apply in such an event, the Government had drawn up assessments according to three scenarios, with annual costs ranging from £16.4–16.8 million for the least stringent to £66.8–67.2 million for the most, and corresponding benefits ranging from £7.8–11.2 million to £16.6–23.9 million: however, as a result of pressure from the UK and others, it now seemed likely that the Council will restore the *status quo*, coupled with a new provision requiring the Commission to review the issue (and, if necessary, to make a separate proposal by 2013);

¹¹ According to the note provided by the Minister, the methodology used by the Commission in its Impact Assessment indicated UK benefits in the range £402million-£1121 million.

- that the inclusion within IPPC of *intensive poultry rearing installations* falling below the current threshold would have resulted in annualised costs of £3.0–3.2 million, and benefits of £1.6–2.3 million, but that, following opposition from the UK and several other Member States, the Council is again likely to restore the *status quo*, whilst requiring the Commission to review the application of IPPC to this sector and make any further proposals by 2013: a similar approach also seems likely in relation to a proposal to require BAT to be applied to the land spreading of manure from establishments intensively rearing pigs and poultry (which would otherwise have given rise to annualised costs of £2.3–7.6 million, and benefits of £5.5–17.9 million);
- that, as drafted, the proposal would extend of IPPC measures which currently apply to the *disposal of non-hazardous waste* by physico-chemical or biological treatment to include the *recovery* of such waste by these means: although this would give rise to annual costs of between £14.6 million and £532 million, it had not been possible to quantify or monetarise the potential benefits, but the scope of the proposal had now been narrowed considerably, reducing the annual cost to between £1.8 and 9.8 million (though here too the UK was continuing to seek further amendments which would reduce these numbers still further).

Thus, assuming the Council proceeds in the way now expected, the overall cost of the proposal would be reduced from some £944 million to about £224 million, of which some £214 million would relate to the requirements for large combustion plants (which would in turn lead to annual benefits of around £178 million).

Conclusion

3.13 As we observed in our Report of 30 January 2008, this is evidently an extremely complex proposal, dealing with a range of activities with significant health, environmental and cost implications, and which seeks to cover in a single instrument a number of existing measures. It has thus proved difficult for us to obtain a clear view of its implications, particularly in view of the Government’s failure until very recently to draw to our attention the Impact Assessments it carried out over a year ago.

3.14 Having said that, we note that many of the detailed aspects of the proposal will not give rise to increased costs in the UK, and that, as a result of the discussions which have taken place in Brussels, the Government is hopeful that, in certain of those areas which might have done so, notably smaller combustion plants and intensive livestock rearing, the Council will agree to amendments which will in effect maintain the current position for the time being. In that event, by far the most significant costs remaining would be in relation to large combustion plants, where the Government currently estimates that the original figure of up to £331 million a year would be reduced to some £214 million, but would be accompanied by annual benefits of some £178 million. (We also note that the methodology used by the Commission to estimate the benefits arising from the proposal produces figures between 3 and 10 times those calculated by the UK, and hence leads it to conclude that there would be a net benefit, whereas the UK figures suggest the opposite.)

3.15 Given that the Council has yet to confirm the changes which the Government foresees on small combustion plants and intensive livestock rearing, and that the Government is still pressing for further flexibilities on large combustion plants and on the treatment of non-hazardous waste, we do not feel able at this stage to clear the document. However, we recognise that the Government may well be anxious to sign up to a political agreement at the Environment Council on 25 June, in order to consolidate the gains it has secured in the negotiations to date (or indeed any further improvements it manages to secure in the two areas referred to above). Consequently, if such a deal were to be on offer, we would be willing in this instance to exercise our discretion under paragraph 3(b) of the Scrutiny reservation to enable the UK to agree to it, notwithstanding the absence of scrutiny clearance. This is of course on the understanding that, if it does so, we will expect to consider the matter further on the basis of a report from Minister on the outcome.

4 Sustainable Energy Sources in Developing Countries

(30564) 8857/09 SEC(09) 534	Commission Staff Working Paper: <i>Access to Sustainable Energy Sources at the Local Level in Developing Countries</i>
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<i>Legal base</i>	—
<i>Document originated</i>	17 April 2009
<i>Deposited in Parliament</i>	29 April 2009
<i>Department</i>	International Development
<i>Basis of consideration</i>	EM of 28 May 2009
<i>Previous Committee Report</i>	None; but see (26101) 14040/04: HC 38–iii (2004–05), chapter 14 (12 January 2005)
<i>To be discussed in Council</i>	To be determined
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Not cleared; further information requested

Background

4.1 In 2005 we considered Commission Communication 14040/04, on the future development of the EU Energy Initiative and the modalities for the establishment of an Energy Facility for African, Caribbean and Pacific (ACP) countries. It noted that energy is essential for a wide range of services, such as lighting, heating, cooking, transport, agriculture, industrial production and modem communications. Lack of access to reliable and affordable energy in developing countries is a barrier to the economic and social development of the poor, affecting most development objectives. The EU Energy Initiative for Poverty Eradication and Sustainable Development (EUEI) was launched at the 2002

World Summit on Sustainable Development (WSSD),¹² to provide energy services for the benefit of the poor, and contribute to the achievement of the UN Millennium Development Goals.¹³ Africa was seen as an urgent priority due to very low access rates, while small-island countries were particularly sensitive to energy import costs.

4.2 The EUEI hosted a conference in Nairobi, Kenya in November 2003 attended by government representatives from some 40 countries from sub-Saharan Africa. In his helpful Explanatory Memorandum of 20 November 2004, the then Secretary of State for International Development (Mr Hilary Benn) said that:

“the conference recommended that priorities for the EUEI should include rural energy, electrification, improving access to energy for households and national and regional sector strategies and policies. The Conclusions of the April 2004 General Affairs Council (8568/04) confirmed a need for adequate financing for the Initiative and recognised that the Commission and Member States need to be more involved in responding to the priorities expressed at the Conference. The Council requested the Commission take the lead in the follow-up to the Conference.”

4.3 He summarised the Communication as follows:

“The Communication provides information on the objectives of the proposed Energy Facility, how it will operate, the activities it would support, and the intended management and funding arrangements. The main focus of the Facility will be to increase access to modern energy services in rural areas in Africa, although the distribution of funds between ACP regions will follow the principles of the Cotonou Agreement. Three main types of activity are envisaged:

“Delivery of Energy Services: Joint financing of investment projects, leveraging funds from other sources, including Member States, other donors, International Financial Institutions (IFIs) and the private sector.

“Creating an Enabling Environment: Assistance to countries to: develop or implement national energy policies and strategies for the implementation and management of energy programmes; and to improve monitoring and evaluation capacity. This could include the institutional, legal and regulatory framework for the energy sector.

“Facilitating Future Large-Scale Investment Programmes: Finance for preparatory activities for investment into cross-border interconnections, grid extensions and rural distribution. This will prepare ACP countries for financing by IFIs, World Bank and the private sector, and will reflect African Union and New Partnership and

12 The World Summit on Sustainable Development, held in Johannesburg on 26 August-4 September 2002, which resulted in a wide range of commitments by the US, the EU and other members of the international community on Water and Sanitation, Energy, Health, Agriculture, Biodiversity and Ecosystem Management and Trade and Economic Issues.

13 UN millennium development goals to be achieved by 2015 — the eradication of extreme poverty and hunger, achievement of universal primary education, promotion of gender equality and female empowerment, reduction of child mortality, improvement of maternal health, combat of HIV/Aids, malaria and other diseases, environmental sustainability and a global partnership for development.

African Development (NEPAD)¹⁴ priorities. This will be aimed at leveraging significant additional capital investment in energy infrastructure from other sources.

“The Delivery of Energy Services is expected to take the largest share of the Facility, with no more than 20% being devoted to the other two main activities.

“The Commission will manage the Energy Facility, using external specialists where necessary. Existing decision-making processes between the EU and the ACP institutions will be applied.”

4.4 The then Secretary of State went on to say that the UK had made a commitment to improving access to energy through the EUEI, which was reflected in the then DTI's Energy White Paper (February 2003) and in the FCO's Energy Strategy (October 2004); improving access to energy would need adequate resources to effectively follow up on the outcome of the 2003 Nairobi conference and 2002 WSSD commitments. The proposed source of funding was to be the remaining funds from the conditional €1 billion (£700 million) of the 9th European Development Fund (EDF). The EU Council had decided in March 2004 to establish the ACP-EU Water Facility, with an initial allocation of €250 million (£173.9 million) drawn from the conditional funds. The EU Council would then decide by March 2005, in the light of the mid-term reviews of Country Strategies and on the basis of a performance review of the 9th EDF, whether to allocate a further €250 million (£173.9 million) to the Water Facility and use the remaining €500 million (£338 million) for purposes to be agreed. The EU Energy Facility was likely to be just one of several competing demands for the remaining conditional funds. The UK, together with other Member States, did not want to pre-judge the outcome of the performance review of the 9th EDF. Should the Council decide to release some or all of the remaining conditional funds, then the then Secretary of State would consider this proposal. He did not expect there to be any substantive debate of the Energy Facility before this process was concluded. The ACP States would need to be consulted and agree on the proposed use of the funds.

4.5 At that same meeting, the then Committee considered a separate Commission Communication, on decisions and expenditure in 2004 under the Ninth European Development Fund, which was examined in chapter 18 of that Report, looking ahead to the performance review to which the Secretary of State refers. The then Committee looked forward to hearing from him on the outcome and on any consequential proposals. Like him, it had no wish to prejudice the outcome. That said, the then Committee noted that there was clearly a certain momentum in this particular proposal. Given the widespread interest in development issues and the role that Africa was set to have during the upcoming UK Chairmanship of the Group of Eight and, in the second half of the year, Presidency of the EU, they considered it appropriate not only appropriate to clear the Communication but also to draw it to the attention of the House.¹⁵

14 The New Partnership for Africa's Development (NEPAD) arises from a mandate given to the five initiating Heads of State (Algeria, Egypt, Nigeria, Senegal, South Africa) by the Organisation of African Unity (OAU) in July 2001 to develop an integrated socio-economic development framework for Africa, spearheaded by African leaders and supported by the G8 economies, that will address the current challenges facing the continent.

15 See headnote: (26101) 14040/04: HC 38–iii (2004–05), chapter 14 (12 January 2005).

The Commission Staff Working Document

4.6 The Commission Staff Working Document rehearses much of the same analysis as in the previous Communication. It sees the current global energy challenges as essentially three-fold:

- ensuring energy security;
- reducing greenhouse gas emissions to avoid dangerous climate change;
- increasing access to energy in developing countries to promote economic growth and improve livelihoods.

4.7 With regard to access to modern energy services in developing countries, the Commission notes that 1.6 billion people in the LDCs still lack access to electricity and 2.5 billion world-wide use traditional biomass for cooking. The particular focus is on Africa, as the continent lagging most behind and providing the greatest challenges. The paper illustrates the link with some of the MDGs thus:

Energy Services and the MDGs

MDG 1 Extreme poverty and hunger

Energy inputs such as electricity and fuels are essential to generate jobs, industrial activities, transportation, commerce, micro-enterprises and agriculture outputs. Most staple foods must be processed, conserved and cooked, requiring heat from various fuels.

MDG 2 Primary education

To attract teachers to rural areas electricity is needed for homes and schools. After dusk study requires illumination. Many children, especially girls, do not attend primary schools in order to carry wood and water to meet family subsistence needs.

MDG 3 Gender equality

Lack of access to modern fuels and electricity contributes to gender inequality. Women are responsible for most household cooking and water boiling activities. This takes time away from other productive activities as well as from educational and social participation. Access to modern fuels eases women's domestic burden and allows them to pursue educational, economic and other opportunities.

MDG 4 Child mortality

Diseases caused by unboiled water, and respiratory illness caused by the effects of indoor air pollution from traditional fuels and stoves, directly contribute to infant and child disease and mortality.

MDG 5 Maternal health

Women are disproportionately affected by indoor air pollution and water- and food-borne illnesses. Lack of electricity in health clinics, illumination for night time deliveries, and the daily drudgery and physical burden of fuel collection and transport all contribute to poor maternal health conditions, especially in rural areas.

MDG 6 Combat HIV/AIDS

Electricity for communication such as radio and television can spread important public health information to combat deadly diseases. Health care facilities, doctors and nurses, all require electricity and the services that it provides (illumination, refrigeration, sterilization, etc) to deliver effective health services.

4.8 The Commission sets out a general approach in which access to sustainable and affordable energy services, and not only the provision of energy technologies or

infrastructure, should be “in the focus of development cooperation”, and where improving energy efficiency “should be given proper attention as a cost-efficient way of providing additional energy services within given resource constraints and without negative environmental impact.” The different characteristics of rural, urban and peri-urban areas in terms of population density, energy demand and distance “are factors that must be considered on a case by case basis in the design of energy access programmes.” A main problem, in many developing countries, is the unsustainable use of traditional cooking practises (mainly charcoal, but also fuel wood, used in urban areas) Expanding national electricity networks is the basic model for increased access in national programmes; but decentralised off-grid and mini grid solutions are vital, both to ensure equity and to help extend the grid.

4.9 Against this background and analysis, the Commission calls for concerted effort within the EU to step up action on energy access and development issues, with focused EU attention on:

- supporting local solutions and engaging local actors, which “must be given an increasing role in EU development cooperation”;
- promoting decentralised solutions based on renewable energies, which “must be a key component in EU development cooperation”;
- improving energy efficiency, which “should be mainstreamed in all EU energy development cooperation work”; and
- setting up the appropriate frameworks and financing models, where EU development cooperation should “focus more on engaging with local authorities and other local bodies in energy development” and must “strive to attract international, national and local capital and engage the private sector”.

4.10 Current work at EU level is reviewed, beginning with the EU Energy Initiative (EUEI). This currently includes:

- COOPENER: the first EUEI instrument, which focussed on policy support and capacity building on sustainable energy services for poverty reduction;
- the Africa-EU Partnership on Energy: launched at the EU-Africa Summit in 2007 as a forum for high-level dialogue, and currently producing a road map, which will identify action to integrate energy markets, create the conditions to attract investments, increase cooperation in renewable energy, mobilise increased financing, capacity development, technical assistance and technology transfer.
- National Indicative Programmes under the 10th EDF;
- the Infrastructure Trust Fund for Africa providing support for regional projects on interconnection, power generation and power trade; and
- the ACP-EU Energy Facility: targeting increased access to energy services in rural and peri-urban areas; the first Energy Facility, launched in 2006 and operated mainly through call for proposals, has supported 74 projects across Africa reaching out to 6.7

million beneficiaries. The new ACP-EU energy facility, “with a focus on renewable energy, will be the key instrument to address the challenge of access to energy”.

The Government’s view

4.11 In his Explanatory Memorandum of 28 May 2009, the Minister of State at the Department for International Development (Mr Gareth Thomas) says that:

- the Commission will provide additional resources under the 10th EDF Intra ACP indicative programme to launch this second Energy Facility and to replenish the Infrastructure Trust Fund,
- also provide coordination and support for the Africa-EU Partnership on Energy and launch a number of targeted initiatives on climate change; and that
- coordination within the framework of the EU Energy Initiative will be continued.

He notes that this proposed second Energy Facility, with €200 million/£179 million, will:

“support innovative projects that aim to increase access to modern energy services in rural, isolated and peri-urban areas in ACP countries. The facility will focus on renewable energy, work with decentralised actors and the local private sector, and concentrate on local financing gaps and capacity constraints. It will be anchored in national and regional strategic frameworks and within clearly defined strategies and priorities set by the ACP partner countries.”

and says that “all work is prepared in close cooperation with EU Member States, and facilities are open for co-financing by Member States.”

4.12 The Minister continues as follows:

“DFID does not have a bilateral energy access programme. Instead we provide core funding for a number of energy initiatives, including the Global Village Energy Partnership (GVEP) and the Energy Sector Management Assistance Program (ESMAP), which is an internal World Bank think-tank and capacity building programme. We are also providing €800 million (£715 million) of capital funding to the multilateral Climate Investment Funds (CIFs), which will be administered by the World Bank, and will help fund low carbon energy programmes and projects in a range of middle and low income countries, alongside investments in forestry and adaptation.

“As a result, the paper does not have any direct implications for DFID policy. DFID officials have provided input on the policy content, and we are content that it reflects DFID’s emphasis on low carbon and climate resilient development. It also aligns with our view on the need for renewable energy projects and technologies to facilitate the productive use of energy to better support sustainable livelihoods and local economic development.

“EU programmes on energy in developing countries represent a significant percentage of overall energy sector activity, so it will be important for DFID to remain engaged to ensure that EU activity supports our multilateral efforts.

“The amount of increased funding is an estimate and is subject to revision under the ACP Working Group. It is currently being proposed that funding to the EU-Africa Infrastructure Trust Fund will increase to at least €200 million (£179 million) out of the intra ACP envelope (one of the funding streams within the EDF) and this is likely to be presented at the EDF Committee immediately after summer. Indeed, the Commission is aiming to increase this amount for the TF further and this additional amount will have to come from Member States.

“DFID is considering making an additional bilateral contribution to the TF, in addition to the €10 million (£8.9 million) already committed. This has yet to be finalised.”

4.13 Finally, the Minister notes that Conclusions on this topic were adopted by Development Ministers at the General Affairs and External Relations Council on 18 May 2009, and that it is proposed to launch the Energy Facility under the Czech EU Presidency.

4.14 The Council says that its Conclusions¹⁶ are “aimed at addressing a key energy challenge: helping developing countries to have access to modern energy services in order to ensure basic human needs, accelerate economic growth and improve the livelihoods of their people” and note that “Access to sustainable energy is also closely linked to two other energy challenges, i.e. energy security for all and mitigating climate change.”

Conclusion

4.15 **Although the document raises no questions, we are drawing it to the attention of the House because of the widespread interest in the issues that it seeks to address.**

4.16 **For the same reason, we are also drawing it to the attention of the International Development Committee.**

4.17 **We are surprised that the Minister makes no mention of the previous Communication on this topic, since it would have provided an opportunity to provide the House with an assessment of what has been achieved so far, beyond a reference to the first Energy Facility having supported 76 projects and reached 6.7 million people. The then Secretary of State referred to the goal of improving monitoring and evaluation capacity; but there is no indication that this has happened. It would have been helpful to have had an indication of what sort of projects and in what ways people had been “reached”; comparing the present document with the predecessor Communication, the implication is that programmes have failed to make much of an impact on rural areas. Ditto “leveraging significant additional capital investment in energy infrastructure from other sources”, which is important, given that the Commission says the EU must “strive to attract international, national and local capital**

¹⁶ Which are set out in a separate document, available at <http://register.consilium.europa.eu/pdf/en/09/st09/st090909.en09.pdf>.

and engage the private sector”. Does the Minister agree that improving energy efficiency “should be mainstreamed in all EU energy development cooperation work”?

4.18 We are also confused over the proposed level of funding. The Minister says that the new €200 million Energy Facility is to be launched before the end of June, but suggests that it will be funded from the €200 million Infrastructure Trust Fund, which presumably will have other calls on its resources and whose precise funding level will not be settled before the end of the Presidency under which the new Energy Facility is to be launched.

4.19 We are left with the impression that, beyond wanting “DFID to remain engaged to ensure that EU activity supports our multilateral efforts”, the Minister does not see a great deal in the Commission’s proposals. We should be grateful for the Minister’s comments, and in the meantime shall retain the document under scrutiny.

5 Labour standards in the fishing sector

(29724) 10176/08 COM(08) 320	Draft Council Decision authorising Member States to ratify, in the interests of the European Community, the Work in Fishing Convention, 2007, of the International Labour Organisation (Convention 188)
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<i>Legal base</i>	Article 42 EC; consultation; unanimity
<i>Department</i>	Transport
<i>Basis of consideration</i>	Minister’s letter of 14 May 2009
<i>Previous Committee Report</i>	HC 16–xxvii (2007–08), chapter 6 (16 July 2008)
<i>To be discussed in Council</i>	Not known
<i>Committee’s assessment</i>	Legally and politically important
<i>Committee’s decision</i>	Not cleared; further information requested

Background

5.1 In June 2007 a new convention on labour standards for the fishing sector was adopted at the International Labour Organisation (ILO). The new convention, the Working in Fishing Convention, revises and updates four existing fishing sector conventions. Its adoption follows on from the consolidated Maritime Labour Convention (MLC) of 2006,¹⁷ which excludes the fishing sector from its scope of application.

5.2 The Working in Fishing Convention applies to all fishers and all fishing vessels engaged in commercial fishing operations (with some scope for exemptions and exception). It

¹⁷ (27630) 10901/06 (27623) 10900/06: see HC 34–xxxvi (2005–06), chapter 10 (19 July 2006) and HC 41–iii (2006–07), chapter 16 (6 December 2006).

updates and consolidates the existing conventions on hours of work, minimum age, medical examinations, work agreements and crew accommodation into a single document, and adds new issues such as health and safety, food and potable water, manning, repatriation, recruitment and placement and social security, as well as making provisions for compliance and enforcement.

5.3 This draft Council Decision would authorise Member States to ratify the Work in Fishing Convention, for those parts falling under Community competence, preferably before 31 December 2012. The Commission has actively supported the development of the new convention, although it had only observer status at the ILO negotiations.

5.4 When we considered the document, in July 2008, amongst the comments we heard from the Government were that:

- the draft Decision would increase the pressure on the UK to ratify and implement the convention by 31 December 2012;
- many of the convention's requirements are not within Community competence and Government policy is to ratify a convention only when it is satisfied that the UK's national law and practice is fully in line with all of the requirements of that convention — even though in many cases the UK might be providing a similar or higher level of protection than required under the convention;
- decisions on whether or not legislative changes are desirable and should be introduced in order to comply with a particular convention would depend on a number of factors, including their impact on other Government policies, the commitment of resources and whether ratification would lead to an improvement in the level of protection for the workers concerned;
- against this background, the Government fully supported the aim of the new convention, was in principle committed to working towards ratification and accepted that in this case — the updating of four existing fishing sector conventions — UK law and practice should be changed in order to achieve this;
- the UK fishing industry had a number of significant reservations about the new Convention, for example the requirement for those working on fishing vessels to hold a medical fitness certificate;
- consultation would continue on the most appropriate way of implementing the changes and as proposals for implementation were considered and developed;
- moreover, given the broad range of subjects covered in the convention, a significant number of UK legislative changes would be required to implement it. More work was needed to identify exactly what those changes should be, following which a timetable for ratification would be prepared; and
- it was not yet clear whether the Government would be able to meet the timetable proposed in the draft Decision.

5.5 We said that clearly the convention was important for the UK fishing industry. But we noted the Government's commendably careful approach to the ratification of such

conventions. Given that, and the timetable pressure implied in the draft Decision, we were not clear whether the Government intended to support that Commission proposal, as opposed to the convention itself, in the form it was drafted. And we asked for clarification of this point. We asked also whether it was the Government’s intention to challenge what seems to us as the inappropriate citation of “the first sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300 (3)” of the EC Treaty in the draft Decision. It seemed to us that a simple reference to Article 300 or a reference to the second sentence of the first subparagraph of Article 300(2) would be more apt. Meanwhile the document remained unclear.¹⁸

The Minister’s letter

5.6 In response to our question as to whether the Government intends to support the Commission’s draft Decision the Parliamentary Under-Secretary of State, Department for Transport (Jim Fitzpatrick) says that:

- the Government fully supports the aim of the convention and is committed to ratification, including any consequential changes to UK law and practice necessary in order to achieve this;
- more work is needed to identify exactly what those changes should be, but it is estimated that approximately 19 sets of existing merchant shipping regulations would need to be amended;
- the timetable for ratification can only be established after the work on identification of these changes is complete;
- the Commission’s position is that it will “enable and encourage Member States to take all the steps necessary for ratification without further delay”;
- the Government interprets this as exhorting Member States to ratify before 31 December 2012, as indicated in the draft Decision, but not an explicit requirement to do so; and
- on this basis the Government feels that it can accept the proposal, as it does not consider it to be in conflict with the aims of the convention.

5.7 Turning to the Article 300 EC citation the Minister says that:

- the Government agrees with our view that the reference to the first sentence of the first subparagraph of Article 300(2) in the draft Decision is incorrect;
- in its view, the correct reference would be enlarged to “the first subparagraph of Article 300(2)”;
- this is in preference, for the avoidance of doubt, to our suggestion of “a simple reference to Article 300 or a reference to the second sentence of the first subparagraph of Article 300(2)”;

18 See headnote.

- the Government sought clarification from the Commission on this point in the first substantive Council Working Group discussion of the proposal, on 11 March 2009 and the Commission undertook to consider the matter further before the next meeting; and
- the Government is reasonably confident that its view on the citation will prevail.

5.8 The Minister also tells us that:

- at the same Working Group meeting another Member State questioned the assertion that there are aspects of the convention within the exclusive competence of the Community and this will also be discussed at the next meeting of the Working Group;
- he had hoped to be able to tell us the outcome of further Working Group discussion, which was provisionally scheduled for April 2009 — however, this did not take place and a date for the meeting was not yet set; and
- there have been indications that the Czech Presidency would like to move the draft Decision forward for adoption at the Employment and Social Affairs Council on 8–9 June 2009, but this was not yet confirmed.

Conclusion

5.9 We are grateful to the Minister for this explanation of the Government’s view of the draft Decision and his account of developments on it. We understand that in the event there was not sufficient progress on the matter to encourage the Presidency to take it to the June 2009 Employment and Social Affairs Council.

5.10 We should like to hear in due course about further developments, in particular in relation to the Article 300 EC citation and to the question raised about exclusive Community competence. Meanwhile the document remains under scrutiny.

6 Intelligent transport systems

(a) (30312) 17563/08 + ADDs 1–2 COM(08) 886	Commission Communication: <i>Action plan for the deployment of intelligent transport systems in Europe</i>
(b) (30313) 17564/08 + ADDs 1–2 COM(08) 887	Draft Directive laying down the framework for the deployment of intelligent transport systems in the field of road transport and for interfaces with other transport modes

<i>Legal base</i>	(a) — (b) Article 71(1) EC; co-decision; QMV
<i>Department</i>	Transport
<i>Basis of consideration</i>	Minister's letter of 3 June 2009
<i>Previous Committee Report</i>	HC 19–vii (2008–09), chapter 4 (11 February 2009) and HC 19–xi (2008–09), chapter 6 (18 March 2009)
<i>To be discussed in Council</i>	11 June 2009
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	(a) Cleared, but relevant to possible debate on document (b) (Decision reported on 11 February 2009) (b) Not cleared; further information requested

Background

6.1 Intelligent transport systems are information and communications technologies used to manage traffic and inform travellers. There has been a gradual increase in the use of this technology in recent years in areas such as road safety, traffic management and tackling climate change. In this Communication of December 2008, document (a) the Commission called for a coordinated approach to intelligent transport systems across the Community and set out a 24 point action plan aimed at delivering faster deployment of technology-based systems for road transport (including interfaces with other modes of transport) throughout the Community. The plan covered actions designed to address a wide range of policy areas within three categories:

- cleaner transport;
- improving transport efficiency; and

- improving road safety and security.¹⁹

6.2 At the same time the Commission presented this draft Directive, document (b) intended to establish a framework for the coordinated deployment and use of intelligent transport systems for road transport (including interfaces with other modes of transport) and to develop the necessary specifications. In the context of its concern that recent technological developments had been too fragmented and not coordinated across Member States, the Commission considered the use of a framework Directive to be the most appropriate way to address this issue. The Commission based its proposal on an impact assessment annexed to both documents. This examined three policy options to support the action plan:

- Option A — no additional new action;
- Option B — overcoming problems by concentrating on coordination and synergy measures; and
- Option B+ — Option B extended with a Directive and comitology procedure.²⁰

6.3 The Commission, believing that the self-regulatory approach pursued so far by industry was not sufficient and that this approach would have the greatest impact, selected Option B+. The resultant draft Directive would:

- require Member States to take measures necessary to ensure the coordinated deployment and use of interoperable intelligent transport systems applications and services within the Community;
- provide for type approval of road infrastructure related intelligent transport systems equipment and software;
- establish a comitology committee to assist the Commission in defining procedures and specifications;
- establish a “European ITS Advisory Group” to which representatives of relevant intelligent transport systems stakeholders would be invited to advise the Commission on business and technical aspects; and
- require Member States to ensure that processing of personal data be carried out in accordance with Community rules and that these data and records be protected against misuse, alteration or loss.

6.4 We first considered these documents in February 2009. Whilst noting the Government’s view that the breadth of the policy areas covered by the Commission Communication was an ineffective approach and that it was urging the Commission to

19 (30312) 17563/08 + ADDs 1–2: see HC 19–vii (2008–09), chapter 4 (11 February 2009) and HC 19–xi (2008–09), chapter 6 (18 March 2009).

20 Comitology is the system of committees which oversees the exercise by the Commission of powers delegated to it by the Council and the European Parliament. Comitology committees are made up of representatives of the Member States and chaired by the Commission. There are three types of procedure (advisory, management and regulatory), an important difference between which is the degree of involvement and power of Member States’ representatives. So-called “Regulatory with Scrutiny”, introduced in July 2006, gives a scrutiny role to the European Parliament in most applications of comitology.

prioritise its proposals for 24 actions in relation to intelligent transport systems, we cleared the document. But we said that it would be relevant to a debate we might be recommending on the draft Directive. As for the draft Directive we were unsure as to what the Government's approach to the proposal would be. On the one hand we had been told why, for subsidiarity and practical reasons, the Government found the proposal for legislation inappropriate. On the other hand we had comments about the details of the proposal that implied that the Government accepted that there would be legislation based on negotiated revisions of the draft Directive. Additionally, while we understood why it was not possible yet to sensibly undertake an impact assessment of the draft Directive, we were surprised that the Government did not seem to intend a consultation on the proposal. So we kept it under scrutiny and asked for clarification as to how the Government intended to handle the draft Directive and on its intentions in regard to consultation.

6.5 We considered the matter again in March 2009 when we heard that there had been no discussion of the draft Directive but that the Transport Council of 30 March 2009 was expected to adopt Conclusions on the action plan set out in the Communication. We were also told, *inter alia*, that:

- whilst the Government supported the objectives of the Communication, it thought that, as currently set out, it underplayed the range of intelligent transport systems initiatives that were already being taken forward in a number of Community for a;
- the work of a number of existing groups was developing a clearer understanding of how intelligent transport systems applications could help to provide traveller information, improve road safety, or reduce congestion and carbon emissions;
- in the light of this work, the Government was not clear that additional legislative action was needed at this stage;
- the action plan was wide ranging and the Government did not feel the Commission had yet made a convincing case for taking all these work items forward through legislation, particularly through a framework Directive with extensive use of comitology;
- rather, the Government supported an approach using coordination and cooperation;
- early indications were that some other Member States shared the Government's concerns about moving to a regulatory framework, particularly without understanding the potential impacts for Member States;
- the Commission had yet to carry out a full impact assessment on its proposals — when questioned on the potential implications for Member States it was not able to provide any information; and
- the Commission had consulted with stakeholders through meetings and on-line during the preparation of the action plan and the Government intended to begin consultation with stakeholders in the coming weeks.

6.6 We said that before considering the draft Directive for a third time we wished to hear about the outcome of the consultation the Government was now undertaking and that our further consideration would also take account of the Council Conclusions the Minister had foreshadowed. Meanwhile the document remained under scrutiny.²¹

The Minister's letter

6.7 The Parliamentary Under-Secretary of State, Department for Transport (Paul Clark), first tells us that the Government remains supportive of the objectives of the action plan, but is concerned that the legislative approach proposed by the Commission is an inappropriate mechanism for deploying intelligent transport systems across Member States.

6.8 The Minister then tells us about the Government's consultations on these matters, saying that:

- it has worked with ITS (UK), the industry association, to consult UK stakeholders and ITS (UK) has conducted two consultation meetings to canvass industry views on the action plan and draft Directive;
- the external stakeholders consulted broadly support the objectives of increasing intelligent transport systems deployment and would prioritise among these objectives the implementation of safety-related intelligent transport systems;
- there is concern, however, that a pan-Community approach to intelligent transport systems fails to appreciate region-specific safety issues, for example, the impact, severity and regularity of snow on the roads;
- stakeholders share the Government view that the actions in the action plan are wide-ranging, complex and highly ambitious, particularly as the time frames suggested for implementation do not seem realistic; and
- they commented, moreover, that the recommendations ignore extant intelligent transport systems services in Member States, including in the UK, and therefore disregard existing legacy schemes and operating practices, in particular where delivery involves the private sector.

The Minister comments that the Government will continue to use stakeholder recommendations to inform negotiations in the Council Working Group, will continue to work with ITS (UK) and will consider how best to implement its recommendation to extend the consultation to include freight and automotive sector representative bodies, as well as local authorities.

6.9 Turning to the matter of Council Conclusions and subsequent developments the Minister says that:

²¹ See headnote.

- as predicted, Council Conclusions on the action plan were agreed at the March 2009 Transport Council;²²
- the action plan and draft Directive were then discussed at the informal Transport Council in the Czech Republic on 29 April 2009;
- the Government reiterated the UK position and presented examples of intelligent transport systems in action in the UK, to indicate where cooperation and the sharing of best practice might achieve tangible results, without the disruption of new legislation or the introduction of additional standards; and
- this position has been maintained in the Council Working Group, at which amendments have been made to the draft Directive.

He continues that Member States have expressed particular concerns about:

- appropriate levels of implementation for each priority area, that is whether it should be at Community or Member State level;
- scope of the comitology procedure and obligations resulting from it;
- priorities for the different actions envisioned;
- impact of the draft Directive on existing intelligent transport systems and national policies; and
- financial and administrative implications for Member States.

6.10 The Minister also tells us that:

- the majority of Member States, including the UK, have asked for a thorough cost-benefit analysis on the impact of intelligent transport systems deployment;
- the Commission has indicated that it will carry out an impact assessment on the specific measures to which the comitology procedure would apply;
- subsequently, in the Working Group meeting of 14 May 2009, the Commission placed a general scrutiny reserve on the draft Directive as it believes that, as amended, it no longer represents its intentions or those of the Council Conclusions
- there will be no further Working Group meetings on the draft Directive during the Czech Presidency, although it will present a progress report at the 11 June 2009 Transport Council; and
- the Government anticipates that the change in Presidency may bring about a change in approach.

6.11 Finally the Minister says the European Parliament held its first reading of the proposal on 22 April 2009 — MEPs:

²² See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/107025.pdf, pages 9–17.

- voted in favour of both the action plan and the draft Directive;
- are keen to maintain the scope of the proposed measures on road transport and its interfaces with other transport modes; and
- have, however and like Members States, requested more detail on the targets and deadlines along with an impact assessment prior to their adoption.

Conclusion

6.12 We are grateful to the Minister for this account of where matters stand in relation to policy on intelligent transport systems. We are now clear that it would be appropriate to recommend the draft Directive for debate in European Committee. But we will not take a final decision on that until after the Minister is able to report back to us on how the Commission intends to respond to the amended text of the draft Directive and the Swedish Presidency intends to carry the proposal forward.

7 Customs

(30454) 17483/08 + COR 1 —	Initiative of the French Republic with a view to adopting a Council Decision concerning the convention on the use of information technology for customs purposes
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<i>Legal base</i>	Articles 30 (1) (a) and 34 (2) (c) EU; consultation; unanimity
<i>Department</i>	Revenue and Customs
<i>Basis of consideration</i>	Minister's letter of 28 May 2009
<i>Previous Committee Report</i>	HC 19–xii (2008–09), chapter 4 (25 March 2009)
<i>To be discussed in Council</i>	Not known
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Not cleared; further information awaited

Background

7.1 The Customs Information System (CIS) Convention was signed by Member States in 1995 to strengthen and improve customs cooperation in the third pillar through the exchange of information for the purpose of sighting and reporting discreet surveillance or specific checks. An equivalent CIS for first pillar customs cooperation was established by Council Regulation (EC) No. 515/97. In 2003 the Council adopted a Protocol to extend the scope of the Convention to create a customs files identification database, FIDE. FIDE enables Member States' competent authorities to enter and search for current and completed investigations on individuals or businesses to aid their own investigations.

7.2 In October 2008 it was agreed at official level that the third pillar CIS should be amended to increase usage by Member States (only a minority of Member States currently input data with any regularity, reducing the benefits of the system) and to ensure consistency with the first pillar CIS, which had recently been amended by Regulation (EC) No 766/2008.²³

7.3 This document is an Article 34 (2) EU French initiative presenting a draft Council Decision, in place of the Convention, to achieve greater usage of the third pillar CIS, to align it with the revised first pillar CIS and, additionally, to give Europol and Eurojust access to the third pillar CIS, with Europol having also the right to input data. A Decision is suggested as being speedier to implement than an amended Convention, which would need to be ratified by Member States.

7.4 When we considered this document, in March 2009, we learnt that the Government broadly supported the French initiative, including granting access to Europol (which was in the original draft of the CIS Convention, but which was later dropped). However we learnt also of some reservations:

- the legal base cited in the draft Decision covered operational cooperation between Member States' competent authorities but not the collection, storage and analysis of information;
- there were incorrect references in the draft Decision — to Articles 36 and 223 EC rather than Articles 30 and 296 EC;
- the draft Decision alluded to Council of Europe provisions on data protection, but took no account of the 2008 Data Protection Framework Decision (to be implemented by November 2010);²⁴
- there was no reference in the draft Decision to the data protection rules governing Europol and Eurojust;
- apparently the current Europol Decision does not allow for the inputting of data by Europol and could not easily be amended to do so, thus rendering that part of the present proposal untenable; and
- under the Convention and the Protocol establishing the FIDE database, both of which the UK ratified, the input of data into FIDE is mandatory — this is out of alignment with the first pillar version and in principle obliges Member States to enter sensitive data on ongoing investigations.

7.5 We said that we understood the wish to increase usage of the third pillar Customs Information System and to align it with the revised first pillar system and we noted that the Government broadly supported the French initiative. However, we noted also the Government's reservations and asked, before considering the draft Decision further, to

23 (28210) 5048/07: see HC 41–viii (2006–07), chapter 3 (30 January 2007), HC 41–xxxiii (2006–07), chapter 6 (2 October 2007) and HC 16–vii (2007–08), chapter 16 (9 January 2008).

24 (29381) 16069/07: see HC 16–xiii (2007–08), chapter 17 (27 February 2008) and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:01:EN:HTML>.

hear about progress on addressing these reservations in negotiations. Meanwhile the document remained under scrutiny.

The Minister's letter

7.6 The Financial Secretary to the Treasury (Mr Stephen Timms) writes now about developments during negotiations, saying that:

- in relation to the legal base covering operational cooperation between Member States' competent authorities but not the collection, storage and analysis of information, the Government asked it to be extended to include Article 30(1) (b) EU and the point has been referred to the Council Legal Service;
- the incorrect reference to Articles 36 and 223 EC has been updated to Articles 30 and 296 EC of the consolidated TEC;
- the data protection issues are still being negotiated;
- following an opinion of the Council Legal Service, changes have been made so that the Data Protection Framework Decision is fully reflected in the draft text,;
- the Joint Supervisory Authority and the European Data Protection Supervisor have also provided opinions and a number of suggestions have been made which will be discussed in the near future;
- the Government is satisfied that the Decision has been reflected in the draft text and welcomes the comments from the Authority and Supervisor, though at the last negotiations a few Member States questioned the need for the reference to the Decision, as it is only due to be implemented by 27 November 2010;
- the Government believes that such a reference is necessary as many Member States may implement the Decision before that date;
- omission of a reference to the data protection rules governing Europol and Eurojust has been rectified;
- Europol is not seeking inputting rights to the CIS and both Europol and Eurojust will have read-only access;
- in relation to the draft text making the input of data into the third pillar FIDE database mandatory, which is out of alignment with the first pillar version and in principle obliges Member States to enter sensitive data on ongoing investigations, the Government has suggested that the mandatory element should be changed to align with the first pillar;
- it has gained the support of most Member States on this issue, but due to the unanimity decision-making arrangements that exist in the third pillar, it is felt that a compromise text that satisfies all Member States concerns is the only practical way forward; and

- the Government is participating in a drafting group to produce a compromise text and is hopeful that its concerns will be addressed and the matter will be agreed soon.

7.7 The Minister also tells us that, in accordance with legislative arrangements in the third pillar, the European Parliament has been consulted and provided its opinion on the original French initiative. The opinion:

- recommended the initiative be rejected, and called on the French Government to withdraw it;
- said the initiative was being rushed through by the Council before entry into force of the Lisbon Treaty, thereby limiting the European Parliament's legislative influence; and
- said the European Parliament was not satisfied that there were adequate data protection safeguards on the data collected and stored on the system and believed that the European Data Protection Supervisor should have been consulted at an earlier date by Council.

The Minister continues that the Czech Presidency has since met with the European Parliament Rapporteur who produced the Opinion, assured him that measures have been taken to address the data protection issues and explained that, far from being a totally new initiative, the draft Decision actually amends and replaces an existing Convention. As a result, the European Parliament will be consulted on the revised text and will provide a modified opinion in Autumn 2009.

7.8 Finally the Minister says that the Government is confident that its concerns will be addressed, though negotiations are likely to continue for the next few months.

Conclusion

7.9 We are grateful to the Minister for informing us of where matters stand on this draft Decision and look forward to hearing of further progress in due course. Meanwhile the document remains under scrutiny.

8 Trade in seal products

(29938) Draft Regulation concerning trade in seal products
 12604/08
 + ADDs 1–2
 COM(08) 469

<i>Legal base</i>	Article 95EC; co-decision; QMV
<i>Department</i>	Environment, Food and Rural Affairs
<i>Basis of consideration</i>	SEM of 9 March 2009 and Minister's letter of 3 June 2009
<i>Previous Committee Report</i>	HC 16–xxxii (2007–08), chapter 3 (15 October 2008)
<i>To be discussed in Council</i>	25 June 2009
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Cleared

Background

8.1 Although the Community currently prohibits the imports of certain seal skins (and products derived from them), this is in the main related to their conservation, and does not therefore address the extent to which the way in which seals are killed and skinned may cause avoidable pain, distress and other forms of suffering. The Commission has observed that this is now a major public concern, and that two Member States have introduced national measures restricting trade in seal products; that another is considering doing so; and that other Member States may well follow suit.

8.2 Since it considers that this could lead increasingly to a fragmentation of the internal market, it forward in July 2008 this proposal, which would ban the placing of seal products on the Community market, and their import into, transit through, and export from the Community (though imports for the personal use of travellers would still be permitted). Trade in seal products would also still be possible where it can be demonstrated that humane killing conditions have been met and effectively enforced, and where products are derived from hunts traditionally conducted by Inuit communities and which contribute to their subsistence. These derogations would be accompanied by appropriate certification and labelling or marking provisions to demonstrate compliance with the necessary conditions.

8.3 The Commission noted that the Treaty does not provide a specific legal basis for addressing these kind of ethical issues, but that a reliance on ethical provisions does not prevent it from adopting measures in areas where it has the power to legislate. In particular, it noted that the case law of the European Court of Justice has established that, where different national laws adopted may directly affect the functioning of the internal market, Community measures are justified, and that the Court has recognised that the protection of animal welfare is a legitimate public interest. It also pointed out that, insofar as the measures proposed would apply to intra-Community trade as well, they would be

non-discriminatory, and hence compatible with the General Agreement on Trade and Tariffs (GATT).

8.4 As we noted in our Report of 15 October 2008, the Government had said that there is no commercial or recreational hunting of seals in the UK, although the UK does import and export seal products, and may also have some involvement in the preparation of processed products incorporating ingredients derived from seals. However, it had been lobbied heavily in recent years to extend the current Community prohibition, and its current policy is to pursue an extension of the existing Community ban to include commercial imports of seal skin products from all harp and hooded seals, irrespective of age. It suggested that the current proposal went beyond this, in it applies to all seal products, not just skins, and to exports and goods in transit and for sale as well as imports.

8.5 Despite this, the Government welcomed the proposal in principle, and would like to see a workable ban implemented as soon as possible, though it also noted that some Member States had challenged the proposed legal base, and had also suggested that the proposal could be vulnerable to challenge in either the World Trade Organisation, the European Court of Justice, or the national courts, points which were being considered further by the Council Legal Services. In addition, there was a risk of challenge — albeit a low one — under the European Convention on Human Rights.

8.6 In commenting that the proposal raised a number of important political issues on which we expected to receive further information in the Government's promised Impact Assessment, we observed that it also gave rise to two legal points — the use of Articles 95 and 133 of the Treaty to address a matter which involves essentially ethical considerations, and the extent to which what is proposed is compatible with the European Convention on Human Rights. Consequently, whilst we were drawing the document to the attention of the House, we intended to hold it under scrutiny, pending further information, including the Impact Assessment which the Government had said it would produce following its formal consultation with trade and other interests.

Supplementary Explanatory Memorandum of 9 March 2009

8.7 We subsequently received a Supplementary Explanatory Memorandum of 9 March 2009 from the then Minister of State (Farming and the Environment) at the Department for Environment, Food and Rural Affairs (Jane Kennedy), enclosing an Impact Assessment which said that, although it had not been possible to quantify the costs and benefits of the proposal, a Community-wide ban with no derogations would be the simplest approach to implement, and would meet the UK's objectives at the lowest cost. The Assessment also said that the proposal would have a fairly limited impact on consumers and business in the UK, since imports of seal products in 2007 were only some €250,000 (though it added that, if a checking regime was needed to establish that imported products came from seals killed in a humane fashion, this could give rise to administrative costs for HM Revenue and Customs, the level of which would depend upon the degree of enforcement chosen).

8.8 However, the Minister added that a ban with no derogations could be vulnerable to challenge in the WTO, and would not provide incentives to improve the welfare standards associated with the seal hunt. The UK was therefore prepared to consider a limited exemption for products from Inuit subsistence hunting, even though this could be more

expensive to regulate and difficult to enforce. However, since she did not refer to the more general exemption proposed where humane killing conditions had been met, our Chairman wrote to her on 18 March asking for clarification on this point.

Minister's letter of 3 June 2009

8.9 We have now received from the Minister a letter of 3 June 2009, in which she says that, following trilogue discussions between the Commission, Council and European Parliament, a compromise proposal was adopted by the Parliament on 8 May, and is expected to go to the Council on 25 June for formal agreement. This would specify that the placing on the market (defined essentially as import and intra-Community trade) of seal products would only be allowed where the products:

- result from traditional hunts conducted by Inuit and other indigenous communities;
- are for personal use;
- result from hunts regulated under national law with the sole purpose of the sustainable management of marine resources and where the products are marketed on a non-profit basis.

Export and transit trade would however still be permitted on the basis that this should help to reduce the chance of a successful WTO challenge.

8.10 The Minister also refers to the use of Articles 95 and 133 of the Treaty to address a matter which involves ethical considerations. She says that the Commission is now basing the proposal solely on Article 95, having decided not to rely jointly on Article 133. She adds that Article 95 can only be used if it can be shown that the ban contributes to the functioning of the internal market, and that, whilst ECJ case law suggests that the Commission does not need a great deal of evidence that a measure is suitable to improve the functioning of the internal market, it does need to be presented with a plausible case. Consequently, the Commission has strengthened the justification for the measure in the preamble to the draft Regulation, although she comments that there will still be a risk of a successful challenge within the domestic courts or the ECJ, if there is a lack of evidence to support the assertions made.

8.11 She says that there is also a risk of challenge within the WTO on the basis that the ban poses a restriction on trade, but she suggests that the removal of the export and transit bans in the current version reduces the grounds for such a challenge, adding that, if it cannot be successfully argued that the measure does not pose a trade restriction contrary to WTO rules, the Commission will have to argue that the measure is necessary to protect public morals. However, she comments that public morality arguments have been little tested before the WTO, making it difficult to predict its approach to this exception.

8.12 Finally, the Minister refers to the compatibility of the proposal with the European Convention on Human Rights. She says that the UK does not consider the trade ban will affect the human rights of those involved in seal hunting activities in the UK as the products involved are not used for commercial purposes. So far as secondary processing is concerned, she suggested that the proposed ban might be challenged on the grounds that it

could affect the right to the peaceful enjoyment of one's possessions, but that an act which limits the use to which possessions can be put (rather than depriving someone of them) is only a breach of human rights if it is for a manifestly unreasonable purpose or is disproportionate to the objective. She says that the UK believes that the ban can be justified in the public or general interest.

8.13 The Minister concludes by saying that there is clear and strong public support for measures to curb seal hunting, and that on balance, despite the risk of a possible challenge, the Government sees merit in supporting the revised text. She adds that a failure to reach agreement now will postpone the adoption of new measures until 2010 at the earliest, and that the latest proposal will make a meaningful contribution to the welfare of seals. The Government therefore sees no reason to delay its formal endorsement of these measures.

Conclusion

8.14 **Although the Minister has told us that it has not been possible to quantify the costs and benefits of the proposal, we note that the impact within the UK is expected to be limited, given the relatively low volume of imported seal products. We also recognise the strong public support for measures to curb seal hunting, and that the proposal no longer contains the potentially troublesome derogation for products where it can be demonstrated that humane killing conditions can be effectively enforced. In view of this, and bearing in mind also the Government wish not to delay the formal endorsement of the proposal at the Council on 25 June, we are now content to clear it.**

9 Fair Trade and other Non-governmental Trade-related Sustainability Assurance Schemes

(30635) 9682/09 COM(09) 215	Commission Communication: <i>Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes</i>
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<i>Legal base</i>	—
<i>Document originated</i>	5 May 2009
<i>Deposited in Parliament</i>	12 May 2009
<i>Department</i>	International Development
<i>Basis of consideration</i>	EM of 3 June 2009
<i>Previous Committee Report</i>	None; but see (23829) 12301/02: HC 63–vii (2002–03), chapter 10 (15 January 2003) and (28544) 8390/07: HC16–viii (2007–08) chapter 14 (16 January 2008)
<i>To be discussed in Council</i>	To be determined
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

9.1 In 2002, at the request of the then Presidency of the European Union, the Commission produce Communication 12301/02, which set out three specific areas in which the Commission intended to take action, with the objective of the EU fulfilling its commitments in support of the efforts of developing countries to benefit from trade and investment. Three major conferences had taken place over the preceding year at which there had been increasing recognition of the importance of the relationship between development, trade and the integration of the developing countries into the world economy; effort was now needed to transform into action the commitments made at these conferences:

- a new and more direct approach to trade, centred on development and supported by capacity building, was launched in November 2001 with the Doha Development Agenda; a footnote in the Communication described the two Ministerial Declarations and a Ministerial Decision associated with this programme;
- world leaders at the UN Conference in Monterrey in March 2002 had stressed the importance for development of support to remove supply side constraints to trade; and
- the Johannesburg World Summit on Sustainable Development later in 2002 emphasised the need for further efforts in support of sustainable trade, beyond those made in Doha and Monterrey, stressing the need for mutually supportive trade, development and environment policies.

9.2 Some of the difficulties encountered by the least developed countries (LDCs) were spelt out, including the challenge they faced in implementing World Trade Organisation (WTO) agreements. The Commission spelt out at some length what the EU was already doing to try to assist the LDCs and placed importance on providing further assistance in this area in its proposals for action, which revolved around *Intensifying the dialogue with partner countries, Enhancing the effectiveness of the EU's support and Contributing to international effectiveness*.

9.3 The then Committee cleared this Communication with a Report to the House on 6 November 2002, and then reported further information from the then Secretary of State for International Development (Clare Short) on 15 January 2003.²⁵

9.4 More recently, the Committee considered Commission Communication 8390/07 on Aid for Trade, i.e., “funding or advice provided to support the trade capacity building efforts of developing countries”. The objective of TRA, or Aid for Trade, is to support all developing countries, in particular the LDCs, in their efforts to reform and to adjust to the world trading system. Aid for Trade recognises that, for countries to benefit from trade liberalisation, they need to improve their capacity to trade. Aid for Trade includes support for capacity to plan and implement trade-related policies and build up competitive capacity in productive sectors, enhance the investment and business climate and develop markets. Projects can target assistance with the World Trade Organisation (WTO) negotiations,

25 See headnote: (23829) 12301/02: HC 63–vii (2002–03), chapter 10 (15 January 2003).

customs reforms, transport, communications, and energy infrastructure improvements, product safety schemes, clearer rules and support to private companies in export markets.

9.5 The WTO General Council adopted Aid for Trade recommendations in October 2006. The Communication, which we considered (and cleared) on 25 April 2007 and upon which we finally reported on 16 January 2008, is the Commission’s contribution to further expanding EU support for Aid for Trade, with a view to adoption of a joint Commission and Member State strategy by the Council in the second half of 2007, as agreed by the Council in October 2006. The EU Aid for Trade strategy aims to set out a road map for implementing them and fulfilling specific Commission and Member State commitments, made in 2005, that they would strive to increase their “trade related assistance” to €2 billion (£1.36 billion) per annum by 2010 — €1 billion (£0.68 billion) annually from the Commission, and €1 billion annually from the Member States.²⁶

The Commission Communication

9.6 Against this wider background, this Communication provides an up-date on developments arising since the 1999 Commission Communication on fair trade and suggests preliminary considerations on the role of public authorities and stakeholders in the field of Fair Trade and other private sustainability assurance schemes.

9.7 The Commission says that the term “Fair Trade” is used “in conformity with standards established by the international standard setting and conformity assessment organisations, that are members of the ISEAL,²⁷ and as applied by the Fair Trade organisations”, and that the term “other private sustainability assurance schemes” is used “to describe other labelling schemes that aim to inform consumers about the sustainability of the production of the product.”

9.8 The 1999 Communication pointed out three key issues; (i) the development of Fair Trade and “ethical trade” need to be dealt with in a coherent manner; (ii) Fair Trade should contribute to sustainable development through voluntary participation, and EC involvement should take WTO obligations into account; and (iii) schemes must satisfy the needs of producers from developing countries and allow consumers to make properly informed choices. The Commission notes that these issues have been addressed in different instances — in particular, at European level, the 2006 report of the European Parliament (the “Schmidt Report”) and the 2005 exploratory opinion of the European Economic and Social Committee. The European Parliament report pointed out “the need for raising awareness among consumers, and the risk of abuse by companies that enter the Fair Trade market without complying with certification criteria”, and “additionally... recognises that Fair Trade is an essentially voluntary, private sector phenomenon, and that too heavy regulatory embrace could prove damaging rather than beneficial.”; while the key findings of the EESC opinion were “to identify the need for authoritative quality assessment of consumer assurance schemes and to fix central definitions.”

26 See headnote: (23829) 12301/02: HC 63–vii (2002–03), chapter 10 (15 January 2003)

27 International Social And Environment Accreditations and Labelling.

9.9 The Commission further notes that in June 2006 the European Council adopted its renewed sustainable development strategy and included fair trade in the call to Member States to promote sustainable products,²⁸ and that “issues of relevance to sustainability labelling” have also been referred to in many EC policy documents; the Communication on Agricultural Commodity chains, poverty and dependence; the EU Policy for Africa; the Action Plan on Cotton; the Aid for Trade Strategy adopted by the council in October 2007 and the Commission’s October 2008 Green Paper on agriculture product quality.

9.10 The Commission says that the most striking developments since 1999 have taken place in national markets where certified Fair Trade products were already present. Answering the 1999 Communication’s call for a single label and the need for independent verification and control, the “Fairtrade Certification Mark” has been successfully implemented. Consumer recognition of the Fair Trade mark in the UK was above 70% in 2008 (compared to 12% in 2000) and in France 74% in 2005 (compared to 9% in 2000). Worldwide sales of certified Fair Trade goods exceeded €2.3 billion by the end of 2007, and EU consumers each year purchase Fair Trade certified products for approximately €1.5 billion, which is 70 times more than in 1999: but were “still an order of magnitude behind organic food sales and still less than 1% of total trade”.

9.11 The Commission divides labelling markets between:

- Fair Trade proper;
- other “niche” certified products not participating formally in Fair Trade but targeting consumers aware of sustainability issues (Rainforest Alliance, Utz Certified);
- products covered by baseline standards that aspire to be “industry-wide” (e.g. Code for the Coffee Community (4C’s); Ethical Tea Partnership); and
- the rest (“no name” commodity supplies).

The Commission explains that a single producer may sell into all four of these categories, and says that “it can be tricky for the consumer to assess the significance of various sustainability schemes” and that “it is against this complex and evolving backdrop that political and institutional developments should be assessed.”

9.12 Turning to *Sustainability Criteria Applied*, the Commission further explains that private trade-related private sustainability schemes use a set of criteria to assess and/or guarantee the sustainability of the products; which criteria “often build on one or more of the three pillars of sustainable development; economic, environmental and social development, sometimes linking into international standards and agreements.” Some schemes “focus on a particular issue and objective (e.g. carbon footprint for climate change mitigation) whereas others rely on criteria in a wider sustainable development context.”²⁹ “Fair Trade” is in the first category; significant levels of consumer recognition in those markets where it is operating “goes with a good measure of understanding of the issues that Fair Trade promotes”, the criteria and standards applied by Fair Trade being “among the

28 See <http://register.consilium.europa.eu/pdf/en/06/st10/st10117.en06.pdf> for further information.

29 Annex III of the Communication elaborates on the additional private sustainability schemes referred to in the main body of the Communication.

most comprehensive and ambitious in terms of addressing a broad set of issues and conditions that impact the producers in developing countries, including in particular a minimum price for the producer and a premium paid to the community of the producer.³⁰

9.13 With regard to this latter consideration, the Commission notes that, in its 2007 Report on Fair Trade, the International Development Committee suggested a label to indicate the percentage of the price received by the producer.³¹

9.14 The Commission then examines *Policy Considerations*, under four headings, and elaborates several principles for maximising the impact of private trade-related private sustainability schemes:

— *Contributing to Sustainable Development:*

- Maintaining the non-governmental nature of private schemes throughout the EU.
- Exploring the scope for possible synergies between schemes and enhancing clarity for the consumer and producers.
- Achieving a common understanding of reasonable basic process requirements.
- Establishing objective facts on the relative impacts of different private trade-related sustainability assurance schemes.

— *Private trade-related private sustainability schemes and the WTO:*

- Ensuring transparent and non-discriminatory functioning of labelling schemes.

— *Public Procurement:*

- Secure that appropriate guidelines are available on how to implement sustainable public procurement

— *EU Support:*

- Identifying target areas under existing budget provisions such as studies clarifying the impacts of different schemes, supporting market transparency efforts and cost-benefit analyses of support given.

9.15 By way of supporting argumentation, the Commission notes that:

- public authorities spend 16% of EU GDP, and recalls the adoption of Commission Communication COM(08) 400 of 16 July 2008 on “Public procurement for a better environment”;
- the Commission has provided financial support for Fair Trade and other sustainable trade related activities essentially via its development cooperation instruments (budget chapter 19), through co-financing actions with NGO’s, with € 19.466 million allocated

30 A table from the Communication on the Fair Trade Criteria is at Annex 1 of this chapter of our Report.

31 Published as HC 356-I; available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmintdev/356/35602.htm>.

for various NGO implemented and co-financed actions between 2007 and 2008, the majority of which were in the field of awareness raising within the EU;

- for the budget years 2008 and 2009, additional credits of €1 million each year have been included specifically for actions related to Fair Trade in the credits for trade budget (chapter 20), which will be used to top up the financing under the development instruments.³²

9.16 The Commission concludes by saying that, given the potential contribution of Fair Trade and other trade-related sustainability assurance schemes to sustainable development, it “intends to stay engaged and further support such schemes”, and that “where appropriate, this Communication may be followed by additional initiatives in one or more policy fields.”

The Government’s view

9.17 In his Explanatory Memorandum of 3 June 2009, the Minister of State at the Department for International Development (Mr Gareth Thomas) says that the Government agrees with the Commission’s conclusions. In particular:

“We agree that there is no regulatory role for governments in the EU on Fair Trade and that consumers should have access to reliable information to enable informed choices. Further impact assessment, as well as dialogue between different labelling schemes to promote possible synergies, will provide greater clarity for the consumer. DFID is funding new impact assessments to add to previous studies. Our focus includes repeated surveys of affected producers and workers, looking at a variety of schemes in low income countries.

“We agree that clear guidance on Fair Trade in public procurement is essential to ensure maximum availability of Fair Trade products. DFID has worked with the Office of Government Commerce (OGC) on guidance for Fair Trade in Public Procurement (published in 2008) in line with EU procurement rules, and will continue to consider new EU guidance in this area with the OGC.³³

“We further concur with the conclusion that funding for Fair Trade and other sustainable trade activities should continue. DFID is providing financial support to Fairtrade labelling through the global apex body, the Fairtrade Labelling Organisations (FLO)”

9.18 Finally, the Minister says that

- there are no additional costs to the UK, as issues raised in this Communication are of a policy nature and UK support to Fair Trade is already considered within DFID’s overall support programme for this area;
- no date has been set for this Communication to go to a Council

32 Annex V of the Communication gives examples of current financing.

33 The guidelines are available at http://www.ogc.gov.uk/documents/Guidance_on_Fair_and_Ethical_Trading.pdf.

Conclusion

9.19 **Although no questions arise, and notwithstanding the Communication’s uncertain fate, we are reporting it to the House because of the interest in the issue that it covers.**

9.20 **Given its earlier report on the subject, we are also forwarding this chapter of our Report to the International Development Committee.**

Annex 1:

Fair Trade criteria

The criteria, as defined by the Fair Trade movement and recalled in the 2006 European Parliament report are;

- **a fair producer price**, guaranteeing a fair wage, covering the costs of sustainable production and living. This price needs to be at least as high as the Fair Trade minimum price and premium where they have been defined by the international Fair Trade associations;
- **part payments to be made in advance** if so requested by the producer;
- **long-term, stable relations** with producers and producers’ involvement in Fair Trade standard setting;
- **transparency and traceability** throughout the supply chain to guarantee appropriate consumer information;
- conditions of production **respecting** the eight International Labour Organization (ILO) **Core Conventions**;
- respect for the environment, protection of human rights and in particular women’s and children’s rights and **respect for traditional production** methods which promote economic and social development;
- **capacity building and empowerment** for producers, particularly small-scale and marginalised producers and workers in developing countries, their organisations as well as the respective communities, in order to ensure the sustainability of Fair Trade;
- support for production and **market access** for the producer organisations;
- **awareness-raising activities** about Fair Trade production and trading relationships, the mission and aims of Fair Trade and about the prevailing injustice of international trade rules;
- **monitoring and verification** of compliance with these criteria, in which southern organisations must play a greater role, leading to reduced costs and increased local participation in the certification process;
- regular **impact assessments** of the Fair Trade activities.

10 Freight transport

(30304) 17324/08 + ADD 6 COM(08) 852	Draft Regulation concerning a European rail network for competitive freight
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<i>Legal base</i>	Article 71(1) EC; co-decision; QMV
<i>Document originated</i>	11 December 2008
<i>Department</i>	Transport
<i>Basis of consideration</i>	SEM of 29 May 2009
<i>Previous Committee Report</i>	HC 19–vi (2008–09), chapter 1 (4 February 2009)
<i>To be discussed in Council</i>	11 June 2009
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared

Background

10.1 In October 2007 the Commission published a Communication *Towards a rail network giving priority to freight*, as part of a “freight package”. The package was debated in European Committee in February 2008.³⁴

10.2 This draft Regulation is concerned with the selection of trans-European routes to be designated as international rail freight corridors and their governance. It provides for:

- Member States to select routes for designation as such corridors;
- all Member States to participate in at least one, two or three international rail freight corridors (dependant on the volume of the Member State’s annual rail freight tonnage) at the latest three years after entry into force of the Regulation;
- criteria for the selection of such corridors, which includes that corridors should be part of the Trans-European Transport Network;
- infrastructure managers of Member States along corridors to form themselves into a governance body, with independent legal status, to have a steering role in relation to the implementation, investment planning and organisation of the corridor;
- the governance body to set up a “one-stop shop” to provide a single point at which applicants can request train paths along its freight corridor;
- the introduction of at least two categories of freight traffic for each corridor, one of which must be “priority freight” for goods requiring efficient transport time and guaranteed punctuality;

³⁴ (29039) 14277/07 + ADDs 1–2 (29017) 14165/07 + ADD 3 (29019) 14175/07 ADDs 1–2 (29035) 14266/07 + ADDs 1–2; see HC 16–iv (2007–08), chapters 4,5,6 and 7 (28 November 2007) and *Stg Co Deb*, European Committee, 4 February 2008, cols. 3–28.

- train paths allocated to priority freight not to be cancelled, reallocated or modified with less than three months notice without the consent of the path holder, except in cases of *force majeure*; and
- the Commission, assisted by a comitology³⁵ committee, to decide on Member States' applications for a derogation from the provisions of the Regulation.

10.3 When we considered the draft Regulation, in February 2009, we noted that, although enhancing freight transport by rail might be a laudable objective, the Government's preliminary comments showed that the proposal might need significant amendment. So before considering the matter further we awaited a promised fuller evaluation and impact assessment and the outcome of a proposed consultation with stakeholders. Meanwhile the document remained under scrutiny.³⁶

The Supplementary Explanatory Memorandum

10.4 The Minister of State, Department for Transport (Lord Adonis), now tells us about the Government's public consultation on the proposal, progress of negotiations in the Council Working Group, the outcome of the European Parliament's First Reading of the proposal and the Government's impact assessment. The Minister says that the public consultation was launched on 19 February 2009 and closed on 2 April 2009 — a reduced timescale was necessary to deliver responses which could be taken into account in the Working Group negotiations. A summary of the responses and the Government's views on them is attached to the Minister's Supplementary Explanatory Memorandum³⁷ and is published on the Department for Transport's website.³⁸ The Minister comments that:

- responses to the consultation were mixed;
- while the freight lobby on the whole welcomed the proposals, passenger representatives were concerned that the draft Regulation's concept of 'priority freight' as applied to capacity allocation and traffic management situations would be detrimental to the interests of passenger services in the UK;
- Network Rail expressed concerns that the absolute application of 'priority freight' would deprive it of the required operational flexibility to restore the entire network to normal operation in cases of disruption;
- the Office of Rail Regulation generally supported the Commission's aim to improve the quality of rail freight transport, ensure it has sufficient capacity and promote fair competition in the provision of all rail services; and

35 Comitology is the system of committees which oversees the exercise by the Commission of legislative powers delegated to it by the Council and the European Parliament. Comitology committees are made up of representatives of the Member States and chaired by the Commission. There are three types of procedure (*advisory, management and regulatory*), an important difference between which is the degree of involvement and power of Member States' representatives. So-called "Regulatory with Scrutiny", introduced in July 2006, gives a scrutiny role to the European Parliament in most applications of comitology.

36 See headnote.

37 Explanatory Memoranda can be seen on a Cabinet Office website: <http://europeanmemorandum.cabinetoffice.gov.uk/>.

38 See <http://www.dft.gov.uk/consultations/closed/competitivefreight/consultationresponse1.pdf>.

- it had, however, serious concerns about the lack of clarity in several areas of the proposed Regulation, including governance, ‘priority freight’, and traffic management.

10.5 Turning to the Council Working Group discussions the Minister tells us that these have progressed rapidly since his earlier Explanatory Memorandum (of 26 January 2009) with eleven meetings, during which considerable changes have been introduced. The main changes are, in relation to:

the scope of the proposal

- while the text does not specifically exclude domestic services, essential provisions, notably on capacity allocation for the use of freight corridors, are now on the whole limited to international freight services;

establishing freight corridors

- the original proposal has been replaced by a two-stage approach;
- a number of specific international corridors, listed in an Annex to the Regulation, would be established within three years after entry into force of the Regulation;
- these corridors would be based on the deployment plan for the European Rail Traffic Management System³⁹ or on currently existing corridors used by RailNetEurope, a voluntary combination of European infrastructure managers;⁴⁰
- a second wave of corridors would then be established by Member States submitting joint corridor proposals, at the latest two years after entry into force of the Regulation;
- the Commission would vet these applications against agreed criteria within nine months, after which the Member States concerned would have three years to make these corridors fully operational;
- the total time horizon for this second wave of corridor establishment is up to five years and nine months after entry into force of the Regulation.

governance

- the provision for establishing governance bodies for freight corridors has been removed;
- instead, each freight corridor would establish an executive board responsible for the general objectives of the corridor, made up of representatives of the Member States concerned, and a management board responsible for operating and developing the corridor, consisting of the infrastructure managers concerned;

39 See <http://www.ertms.com/>.

40 See <http://www.railneteurope.com/cont/index.aspx>.

- both bodies would take decisions on the basis of mutual consent, that is unanimity;
- essential decisions by the management board, such as the implementation plan and the investment plan for the corridor, would have to be approved by the executive board;

priority freight

- the provision for at least two categories of freight traffic for each corridor, one of which to be ‘priority freight’ for goods requiring efficient transport time and guaranteed punctuality, has been removed;

capacity allocation

- procedures dealing with capacity allocation for freight trains now have an express obligation to take into account the need for capacity of other types of transport on the corridor, in particular passenger transport; and

traffic management

- the provision for absolute priority for freight in the event of disturbance to traffic on the freight corridor has been removed and replaced with provisions which take both freight and passenger needs into account, by aiming to minimise the overall network recovery time in the event of disruption.

10.6 The Minister also tells us about completion of the European Parliament’s First Reading on 23 April 2009 and summarises the key changes to the original proposal:

establishing freight corridors

- simplification of the corridor creation process applicable to Member States with fewer than two direct rail links with other Member States;
- the number of required freight corridors, up to three in the Commission’s proposal, would no longer be subject to the Member State’s annual rail freight performance, but has been limited to one per Member State;

governance

- retention of the Commission’s approach to governance by infrastructure managers along the corridor in the form of a governance body;
- but addition of an option for Member States to create an executive board with Member State representatives authorising the governance body’s implementation plan and supervising its execution;

priority freight

- replacement of the concept of ‘priority freight’ with ‘facilitated freight’;

- while this new category of train path is characterised by an efficient transport time and guaranteed punctuality, the substitution clearly signals that freight trains on the corridor would not have an absolute priority over other types of traffic in the corridor;

capacity allocation

- introduction of a fee for paths that have been allocated but ultimately not used, to prevent scarce capacity being wasted; and

traffic management

- instead of a provision that allocated paths for ‘priority freight trains’ could only be cancelled with the holder’s consent, paths for ‘facilitated freight trains’ would need to be “respected as far as possible” in the event of disturbance.

10.7 The Minister then comments generally on the developments in the drafting of the proposed Regulation, saying that:

- the responses received to the public consultation helped determine the Government’s position in the negotiations and there have been significant changes to the proposal which deal satisfactorily with most of the expressed concerns;
- overall, the Government believes that the negotiated changes address all the UK’s key concerns with the Commission’s original proposal; and
- the Government will continue to work to ensure that the draft Regulation does deliver the expected improved quality of international rail freight services, in order for rail freight to become a more competitive alternative to other freight transport modes, in particular road.

10.8 The Minister continues with more detailed comment on various revisions to the text, saying that:

- the Government supports the Council Working Group’s introduction of a two-tier governance structure which is more transparent and clearer than the Commission’s original proposal — the relationship between management board (infrastructure managers) and executive board (Member States) is well defined;
- most importantly, because decision-making in both bodies is on the basis of unanimity, it allays the Government’s fears that executive powers over national infrastructure could otherwise have been vested in supranational bodies, an unacceptable concept;
- the Government considers that the negotiated changes strike a workable balance between the interests of freight and passenger services on the freight corridor — because the concept of ‘priority freight’ has been removed, the procedures dealing with allocation of planned and *ad hoc* capacity for freight trains must take into account the need for capacity of other types of transport on the corridor, in particular passenger transport, and the absolute priority for freight trains in the

case of traffic disturbance on the corridor, which would have resulted in the recovery time of the entire network being significantly increased, has been removed and substituted with traffic management provisions which aim at minimising the overall network recovery time;

- the Government was concerned that, if the scope of the Regulation were to cover domestic freight traffic using the designated corridor, this could lead to significant operational complexities and confusion by creating three different regimes, each with differing rules depending on whether the service concerned was an international freight service remaining on the freight corridor throughout its journey, a domestic freight service using the freight corridor only for part of its journey, or a domestic freight service not making use of the corridor;
- the negotiated changes do not specifically exclude domestic services from the scope of the draft Regulation — however, the Government is content that essential provisions of the draft Regulation, notably on capacity allocation for the use of freight corridors, are now on the whole limited to international freight services and therefore do not have the feared negative impact;
- the Government welcomes that the deadlines for establishing corridors are now more realistic and manageable — the UK is likely to participate in the second wave of corridor creation with such a corridor, the timescale for which would fit better with the next five-year planning and control period beginning in 2014; and
- the Government is content that the negotiated changes to the proposed Regulation are consistent with the Trans-European Transport Network.

10.9 The Minister also comments on the European Parliament’s amendments, saying that many of them are intended to achieve a similar effect to the changes introduced by the Council Working Group; that, however, they have not yet been discussed by the Council Working Group; and that if any of them were to be included in the Czech Presidency’s proposed political agreement at the Transport Council of 11 June 2009 the Government will seek to ensure that they are acceptable for the UK.

10.10 The Minister sends us the Government’s impact assessment, based on the negotiated changes to the draft Regulation.⁴¹ He comments that:

- the costs of the proposed legislation are difficult to quantify, but are likely to be relatively small;
- they will be comprised mainly of administration costs from setting up and running executive and management boards for the freight corridor(s) and creating and running a one-stop shop for applicants to request international freight train paths;
- the Commission’s impact assessment suggested annual costs of €0.5 million (£0.45 million) per corridor, but research carried out for the Government by ITS Leeds concluded that these would be likely to be less in the UK — some of what would be

41 See <http://www.dft.gov.uk/consultations/closed/competitivefreight/impactassessment.pdf>.

required by the proposed legislation already takes place in the UK, for example through Route Utilisation Strategies;

- some small costs would be involved in consulting with Community partners and stakeholders such as terminal operators or managers;
- increased cooperation between infrastructure managers and the creation of a one-stop shop to request international freight paths should make it easier for Freight Operating Companies to obtain good quality freight paths;
- such companies would also benefit from increased certainty — paths could not be cancelled without their consent less than one month ahead, except in the case of *force majeure* and as far as possible, in the event of disturbance in the corridor, paths could not be modified. This should result in improved reliability and reduced cost for rail freight and some modal shift for freight from road to rail (leading to general environmental, carbon reduction and road decongestion benefits);
- however, the institutional and operational arrangements in the UK are already similar to those proposed in the draft legislation — so the effect of this modal shift is likely to be limited to international rail freight and its magnitude, potentially of a material order, will be dependent on the resultant increase of international rail freight traffic, which is difficult to quantify at this stage;
- the proposed legislation has annual costs of less than £0.5 million and offers potential environmental and road decongestion benefits from potential modal shift of international freight from road to rail — however, with the available evidence the benefits cannot be quantified currently and therefore the value for money of the proposed legislation is uncertain; and
- the proposed legislation will not directly or indirectly limit the number of competitors in the rail freight market, nor will it reduce firms' incentives or ability to compete vigorously.

Conclusion

10.11 We are grateful for this full account of where matters stand on this draft Regulation and of the Government's view of the negotiated text. We note the improvements that have been secured and, having no further questions to ask, clear the document.

11 Trans-European Transport Network

(30421) 6135/09 COM(09) 44	Green Paper TEN-T: A policy review towards a better integrated Trans-European Transport Network at the service of the common Transport policy
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<i>Legal base</i>	—
<i>Department</i>	Transport
<i>Basis of consideration</i>	Minister's letter of 3 June 2009
<i>Previous Committee Report</i>	HC 19–viii (2009–09), chapter 5 (25 February 2009)
<i>To be discussed in Council</i>	11 June 2009
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

11.1 In 1996 the Community adopted Guidelines for the development of the Trans-European Transport Network (TEN-T) — defined as road, rail, inland waterways, motorways of the sea, seaports, inland waterway ports, airports and traffic management and navigation systems. The Guidelines provided that the TEN-T, should be a single multimodal network, with corridors of common interest and integration of land, sea and air transport infrastructure networks. They identified 14 priority axes deemed to be of European significance in supporting trans-national trade and cohesion. In 2004 the Guidelines were revised — changes made included:

- extension of the deadline for completing the TEN-T to 2020;
- extension of priority axes from 14 to 30 (the United Kingdom is involved in five of these); and
- the possibility of coordinators (termed European coordinators) to be appointed for cross-border priority axes.

11.2 Responsibility for implementing the network rests with Member States. TEN-T projects are mainly financed by them and to a lesser extent by private investors. The Community also provides support, primarily through instruments adopted under the Trans-European Networks Finance Regulation, as well as from the Cohesion and European Regional Development Funds, and other non-financial instruments, such as coordination initiatives.

11.3 Completion of the TEN-T network has been slow. Of the 30 priority corridors, only four⁴² have been completed to date. The lack of funding and the complexity of some TEN-T projects have been identified as the main reasons impeding timely implementation. The

42 Oresund Bridge, Malpensa airport, the Betuwe line, the high speed line PBKAL (Paris Brussels Cologne/Frankfurt Amsterdam London).

Guidelines require the Commission to report on their implementation every two years. The latest report was published in January 2009.⁴³

11.4 With this Green Paper the Commission sought to open a debate questioning not only whether the objectives of the 2004 Guidelines have been achieved, but whether or not those objectives are still sufficient to meet future TEN-T challenges. The Commission summarised developments on the TEN-T and took stock of three main issues:

- the design of the future TEN-T network;
- its objectives and priorities; and
- its financial needs.

The paper interspersed the discussion with twelve questions for stakeholders to consider and concluded with a set of three options for TEN-T development, for future network design, on which it asked for comment also. The options were:

- maintaining the *status quo* — that is keeping the TEN-T corridor approach, including the wider objectives and principles as set out in the current Guidelines, updating axes as necessary;
- maintaining the priority axes only — that is abandoning the wider objectives and priorities as set out in the current Guidelines given the difficulties in applying true Community level planning, but maintaining the priority axes approach (the approach used in the Trans-European Energy Network programme); or
- a priority or core network approach — that is adopt a flexible approach to the TEN-T, with geographical and conceptual pillars. The network would have to facilitate co-modality, by being fully integrated (including intelligent transport systems) and able to meet future transport and environment demands, for example contributing to emission reduction objectives.

The Commission invited responses by 30 April 2009.

11.5 When we considered the Green Paper we heard from the Government that:

- the Government was still formulating its position on the issues outlined by the Commission, but as a general principle it agreed that there was a need to revise the TEN-T programme;
- it would not wish, however, to see a revision that moved too far away from the principles and objectives agreed under the existing Guidelines;
- the Green Paper first option, and to a lesser extent the second, were continuations of the principles set out under the present Guidelines, whilst the third would provide a more radical review of the TEN-T programme, both in scope and in definition; and

43 (30376) 5620/09 + ADD 1: see HC 19–viii (2008–09) chapter 22 (25 February 2009).

- the Government expected that this review of TEN-T policy would, in due course, lead to a legislative proposal amending the 2004 TEN-T Guidelines.

We commented that clearly the consultation initiated by this Green Paper might lead to important changes to efforts to develop the TEN-T network. Before considering the document further we asked to see the outcome of the Government's planned informal consultation and its response to the Commission. Meanwhile the document remained under scrutiny.⁴⁴

The Minister's letter

11.6 The former Secretary of State for Transport (Geoff Hoon) first tells us that the Government's response to the Green Paper was submitted on the 30 April 2009 and he encloses a copy of the response. We annex the summary of this and the answer to the Commission's final question (on the options). The full text can be seen on a Commission website.⁴⁵ The response makes clear that the Government is looking for a fundamental review of the TEN-T programme and would prefer an approach based on the Commission's second option.

11.7 The Minister comments further that:

- in preparing the response, an informal consultation with interested stakeholders was conducted;
- given the nature of TEN-T, this was limited mainly to Government bodies, sponsored agencies and the Devolved Administrations;
- limited contributions were received — however the Government was aware that a considerable number of UK stakeholders, including the Welsh Assembly and the Scottish Executive, decided to respond directly to the Commission;⁴⁶
- the consultation exercise did not throw up any real surprises;
- there was a general agreement that the TEN-T programme should be reviewed;
- there was a general concern that the new design should not overlook the peripheral needs of the Community; and
- an issue which attracted significant comment was the Commission's initial options for the future design of the TEN-T network — most of the responses favoured the second option for its simplicity or the third for its potential wider-Community benefit.

11.8 The Minister continues that in considering those responses there were points of principle which the Government felt it was important to stress in its response to the Green Paper, such as the need for TEN-T to demonstrate value for money. On this, it specifically

44 See headnote.

45 See http://ec.europa.eu/transport/infrastructure/consultations/2009_04_30_ten_t_green_paper_en.htm.

46 Such responses can also be seen on http://ec.europa.eu/transport/infrastructure/consultations/2009_04_30_ten_t_green_paper_en.htm.

expressed its opposition to inclusion of new TEN-T corridors without a compelling case for Community value-added. He says that key points which were emphasised were:

- the objectives of the TEN-T programme need to be clarified and more focused on both scope and outcome;
- any TEN-T funding from the Community budget must be better focused on priority projects, and combined with a European Investment Bank loan and private finance as a general rule;
- the existing TEN-T maps would need to be reviewed — no further “priority corridors” should be set up without a compelling case for Community value-added;
- fundamentally, TEN-T needs to be better focused on projects that provide genuine Community value-added and value for money;
- only those transport corridors and transport components (such as major ports or airports) that are of strategic interest to a number of Member States should be part of the TEN-T network;
- in order to obtain a true network effect, the network needs to be fully integrated and multimodal and promote sustainable modes of transport;
- the peripheral needs of the Community should also be taken into account; and
- the review should address sound financial management, project scoping and TEN-T management which have each been inadequate in many cases — for instance, the Government would wish to see a clear definition of what defines the TEN-T network as complete.

11.9 Finally the Minister tells us that the Presidency hopes that at the 11 June 2009 Transport Council it will be possible to agree Council Conclusions, which the Government expects to invite the Commission to continue discussing the TEN-T review and to submit a proposal amending the TEN-T Guidelines before the end of 2010.

Conclusion

11.10 **We are grateful to the Minister for this information about the Government’s consultation on and response to the Commission’s Green Paper. We have no further questions to raise and clear the document.**

Annex: United Kingdom Government Response to the European Commission TEN-T Green Paper Review: Summary of Views

“The UK welcomes the opportunity to contribute to the EC Commission’s consultation on the Trans-European Network Green Paper — TEN-T review.

“The UK considers that the EU added value of the TEN-T programme in its current form is uneven — and generally lacking in the existing comprehensive network.

“Taking into account the urgent need to stimulate economic growth as well as the need to address the climate change challenges the United Kingdom calls for a fundamental review of the TEN-T programme and recommends that:

- The objectives of the TEN-T programme need to be clarified and more focused on both scope and outcome; any TEN-T funding from the EU budget must be better focused on priority projects, and combined with EIB loan and private finance as a general rule;
- The existing TEN-T maps would need to be reviewed. No further “priority corridors” should be set up without a compelling case for EU value-added;
- Fundamentally, TEN-T needs to be better focused on projects that provide genuine EU value added and value for money; Only those transport corridors and transport components (such as major ports or airports) that are of strategic interest to a number of Member States, should be part of the TEN-T network;
- In order to obtain a true network effect, the network needs to be fully integrated and multimodal and promote sustainable modes of transport; The peripheral needs of the Community should also be taken into account;
- The review should also address sound financial management, project scoping and TEN-T management which have been inadequate in many cases; For instance, the UK would wish to see a clear definition on what defines the TEN-T network as complete.

“The UK has recently set out its latest strategic thinking in the *Delivering a Sustainable Transport Strategy* report.⁴⁷ Similar considerations have been conducted at regional level, for instance, in Northern Ireland the *Regional Strategic Transport Network Transport Plan*⁴⁸ outlines the key transport network and alongside the *Regional Transportation Strategy*⁴⁹ sets out the long-term transportation strategy for the Region.

“We shall stand ready to work closely with the EC Commission and Member States on the future definition and scope of the TEN-T policy and programme.”

...

47 <http://www.dft.gov.uk/about/strategy/transportstrategy/pdfsustaintranssystem.pdf>.

48 http://www.drndni.gov.uk/rts_main_doc-2.pdf

49 http://www.drndni.gov.uk/rstn_tp-2.pdf

“Which of these options is the most suitable?”

“From a principled perspective the UK view is that:

- Option 1, the current structure, has proven to have limited EU value added and looks like an unsustainable model for the future.
- Option 2, priority projects connected into a priority network would be our preferred option as it offers simplicity, clarity and a more focused output approach. The true network effect assumed in the Green Paper under option 3 would be more clearly achieved here since the integration into wider priority network would allow for a more comprehensive view of the TEN-T network.
- Option 3 would be our second preferred option provided that the definition of the “conceptual pillar” is clear. Special attention would need to be paid to the delivery under this option; the ambiguity and complexity of the so-called double layer approach could limit its European added value.”

12 Cross-border healthcare

(29786) 11307/08 COM(08) 414	Draft Directive on the application of patients’ rights in cross-border healthcare
+ ADDs 1–2	Commission staff working documents: impact assessment and summary of impact assessment
+ ADD 3	Commission staff working document: <i>Towards a renewed social agenda for Europe — citizens’ well-being in the Information Society</i>

<i>Legal base</i>	Article 95 EC; QMV; co-decision
<i>Department</i>	Health
<i>Basis of consideration</i>	Minister’s letters of 27 April 2009 and 3 June 2009
<i>Previous Committee Report</i>	HC 16–xxviii (2007–08), chapter 2 (22 July 2008) and HC 16–xxx (2007–08), chapter 7 (8 October 2008)
<i>To be discussed in Council</i>	9 June 2009
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared (decision reported on 21 October 2008). Further information now received

Previous scrutiny of the documents

12.1 When we considered this draft Directive (and an accompanying Commission Communication) in July 2008,⁵⁰ we noted that the European Court of Justice has consistently ruled that patients who go to another Member State for healthcare are entitled to reimbursement of the cost by their home Member State if they would have been entitled to the treatment in the home State. The Court's judgements have, however, left a good deal of uncertainty. So, in 2006, the Commission initiated consultations about what action, if any, is necessary to clarify the rights and duties of patients, Member States and health providers.⁵¹ In the light of the responses, the Commission produced the draft Directive.

12.2 It proposes, for example, that patients would be entitled to reimbursement, without prior authorisation, for the cost of treatment in another State which did not involve an over-night stay in hospital so long as they would have been entitled to the treatment in their home State. The amount reimbursed would be limited to what the cost of the care would have been in the home State.

12.3 The Minister of State at the Department of Health (Dawn Primarolo) told us that the draft Directive was helpful because it sought to clarify the case-law on cross-border healthcare. The Government believed it to be imperative for the home Member State to retain responsibility for deciding entitlements to healthcare and so Member States should be able to have a system of prior authorisation.

12.4 We agreed with the Minister and the Commission about the desirability of EC legislation to clarify the entitlement to reimbursement for cross-border healthcare and the responsibilities of the home Member State and the Member State in which the treatment is given. Because of its importance, we recommended the draft Directive for debate in European Committee C. The debate was held on 21 October.

12.5 In chapter 3 of our Report of 22 July, we asked questions about the draft Directive to which we believed it would be useful to have the Minister's answers before the debate. She replied on 9 September and we drew her answers to the attention of the House in our Report of 8 October.⁵² We also asked her to send us progress reports on the negotiations.

The Minister's letter of 27 April 2009

12.6 In October 2008, the Government issued a consultation paper on the draft Directive. The Minister sent us a copy. We asked her for a summary of the responses to it.

12.7 On 27 April 2009, the Minister sent us a copy of her Department's published summary of the responses. It also contains a statement of the Government's views on the responses.⁵³

50 See headnote.

51 (27900) SEC(06) 1195/4: see HC 34–xlii (2005–06), chapter 3 (7 November 2006).

52 HC 16–xxx (2007–08), chapter 7 (8 October 2008).

53 The European Commission's proposals for a Directive on the application of patients' rights in cross-border healthcare: UK Government's response to consultation — Department of Health, April 2009.

The European Parliament's amendments at first reading.

12.8 On 23 April, the European Parliament gave the draft Directive its first reading. It approved the text subject to 115 amendments. Most of the amendments are detailed and do not affect the substance of the draft Directive.

12.9 But the following European Parliament amendments do affect the substance of the proposal:

- exclusion from the scope of the Directive of residential homes, housing and assistance for elderly people or children provided by social workers, volunteers and professionals other than health professionals (amendment 7);
- exclusion from the scope of the Directive of organ transplantations (amendment 8);
- recognition that Member States may organise their healthcare and social security systems so as to provide for the entitlement to treatment to be determined at regional or local level (amendment 20);
- if there are several methods available for treating an injury or disease, the patient should have the right to reimbursement of the cost of any of the methods if sufficiently tried and tested by international medical science even if the method is not available in the patient's home State (amendment 21);
- deletion of Recital 45 and Article 8(2) of the Commission's draft of the Directive which provide for the Commission, using the comitology procedure, to draw up a list of treatments which require prior authorisation even though the patient does not require an over-night stay in hospital (amendments 34 and 75);
- exemption from prior authorisation for patients with rare diseases or who have life-threatening diseases and who are on a waiting list for treatment in their home State and who are in urgent need of care (amendments 83 and 145); and
- within 18 months of the Directive coming into effect, the Commission should propose legislation to set up a European Patients' Ombudsman to consider and, if appropriate, mediate on patients' complaints about prior authorisation, reimbursement or harm (Amendment 92).

The Minister's letter of 3 June 2009

12.10 On 3 June, the Minister sent us the text of the European Parliament's amendments and a transcript of the remarks made by Commissioner Vassiliou, on behalf of the Commission, at the end of the European Parliament's debate. The Minister's letter summarises the amendments and comments on them.

12.11 The Minister tells us that the Government welcomed many of the European Parliament's proposals but:

- the Government believes that patients who decide to travel abroad for treatment should not have an advantage over the vast majority of patients who wish to be treated near to

home and is, therefore, strongly opposed to the Directive giving cross-border patients entitlements to additional treatments;

- the Minister will be considering the European Parliament’s proposal that organ transplantation should be excluded from the scope of the Directive;
- the Government supports the European Parliament’s proposals for clarification of the way that prior authorisation will work but considers that yet further clarity is needed and, in particular, believes that all patients should be required to seek prior authorisation for hospital care;
- the Minister adds that it is not yet apparent why patients with rare diseases should be exempt from the requirement to seek prior authorisation — their treatment may well be highly specialised, potentially experimental and costly, which are the sorts of grounds held by the Courts to justify the use of prior authorisation schemes;
- the Government welcomes amendments 34 and 75 which would give Member States, rather than the Commission, the responsibility for defining what constitutes hospital care;
- but it notes that the European Parliament did not propose the deletion of the other comitology requirements in Chapter 4 of the draft Directive — in the Government’s view, any provision for comitology should be limited to actions agreed by Member States as being necessary at an EU level in order to codify existing case law;
- the Government welcomes the European Parliament amendments which recognise that quality standards are the responsibility of the Member State which provides the treatment. But, because quality and safety standards are so closely related, the Government considers that the draft Directive should be further amended to provide that safety standards, too, should remain the responsibility of the Member State of treatment; and
- the Government will carefully consider the proposal for a European Patients’ Ombudsman but, in general, takes the view that the Directive should remain focused on clarifying and codifying existing case law on patient mobility.

12.12 The Minister also tells us that it is too soon to predict the Council’s views on the European Parliament’s amendments and it is unclear when the Council might reach a “common position” on the Directive.⁵⁴ She promises to write to us again when it looks likely that a political agreement to a text will be sought.

Conclusion

12.13 We are grateful to the Minister for providing us with such a comprehensive commentary on the amendments proposed by the European Parliament.

⁵⁴ In this context, a “common position” is an agreement to a text which has been finalised by the jurist linguists before the Council sends it to the European Parliament for second reading.

12.14 We share her view that many of the amendments are welcome. We also share the Government's view that any provisions for the use of comitology should be rigorously justified and strictly limited. Moreover, we understand why, in the interests of taxpayers and the great majority of patients who do not wish to go abroad for treatment, the Government believes that all cross-border treatment should be subject to prior authorisation.

12.15 We are sceptical about the European Parliament's proposal for legislation to establish a European Patient's Ombudsman for two reasons. First, it seems to us that, in principle, any "European" Ombudsman should be concerned solely with the actions of European institutions and should not have power to investigate the actions of national or regional governments. Second, the European Parliament proposes that complainants should not have access to the European Patients' Ombudsman until "all the complaint options within the relevant Member State have been exhausted".⁵⁵ In effect, therefore, the European Ombudsman would be a court of appeal against the findings and conclusions of the national ombudsmen for health services; this, too, appears to us objectionable in principle. We should be grateful for the Minister's comments on these points and to know if she has consulted the UK's Health Services Ombudsmen about the proposal.

12.16 We should also be grateful if the Minister would tell us what conclusion she reaches on the European Parliament's proposal that organ transplantation should be excluded from the scope of the Directive and for further progress reports on the negotiations.

55 European Parliament amendment 92.

13 EU restrictive measures against persons and entities

(30560) 9042/09 COM(09) 187	Draft Council Regulation amending Regulation (EC) No.881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban
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<i>Legal base</i>	Articles 60, 301 and 308 EC; unanimity
<i>Document originated</i>	22 April 2009
<i>Deposited in Parliament</i>	27 April 2009
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 3 June 2009
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	To be determined
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

13.1 In its accompanying Explanatory Memorandum, the Commission recalls that since 1999, and acting in accordance with Chapter VII of the Charter of the United Nations (UN), the UN Security Council has applied sanctions, and in particular the freezing of funds and economic resources, against the Taliban, Al Qaida and Usama bin Laden. To that end, the UN established the UN Al Qaida and Taliban list of individuals and entities, which is binding under international law for all members of the UN, including all Member States of the European Union.

13.2 It then recalls that, on 27 May 2002, the Council adopted Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban. This Regulation, the Commission says, implements some elements of UN Security Council Resolutions 1267(1999) and 1390(2002) and in particular freezes the funds and economic resources of individuals and entities included in a list drawn up by the UN for this purpose. The Commission notes that Regulation (EC) No 881/2002 is in line with Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.

13.3 The Commission then explains that:

- on 3 September 2008 the European Court of Justice annulled Regulation (EC) No 881/2002, in so far as it concerned Mr Yassin Abdullah Kadi and Al Barakaat International Foundation. The Court held that the Community authority deciding to freeze the funds and economic resources of an individual or entity in accordance with Regulation (EC) No 881/2002 must communicate the grounds on which that decision

is based to the individual or entity concerned, in order to observe the rights of defence, in particular the right to be heard, and the right to judicial review;

- in order to comply with the Court’s judgment, the EU sought from the UN Sanctions Committee the relevant statements of reasons on which the two parties were listed and communicated those to the parties for comments;
- following an evaluation of the comments, the Commission says that it adopted a new Regulation maintaining Mr Kadi and Al Barakaat International Foundation on the list of individuals and entities subject to the freezing of funds and economic resources (Regulation (EC) No 1190/2008 of 28 November 2008).

13.4 The Commission says that it is now accordingly necessary to amend Regulation (EC) No 881/2002 to codify these new elements and to provide for a procedure respecting fundamental rights that will be followed as regards individuals and entities newly listed by the UN. The Commission explains that this new procedure is based on the procedure applied for the purpose of implementing Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism, which concerns the terrorism list drawn up by the EU itself, set out in Council document 10826/1/27 of 28 June 2007. It describes it as follows:

- upon notification by the UN Sanctions Committee of a new listing decision and the statement of reasons, the Commission will take a provisional decision to freeze the funds and economic resources of the individual or entity concerned;
- in parallel the Commission will send the statement of reasons to the individual or entity concerned without delay, in order to give him, her or it an opportunity to express his, her or its views;
- the Commission will examine the views that have been expressed and consult an advisory committee of experts of the Member States before taking the final decision.

13.5 The Commission then says that, in order to ensure that fundamental rights are respected, it is also necessary to address the position of individuals and entities already listed. It explains that UN Security Council Resolution 1822 of 30 June 2008 foresees a review of all names included in the UN list on 30 June 2008, and that this UN review should be completed by 30 June 2010.

13.6 The Commission’s Explanatory Memorandum concludes by examining some related technical issues (e.g., provisions to cover the possibility of having to handle classified information in support of the decision made and to provide clarity on the applicable rules for processing of personal data of listed individuals, and in particular for processing of data relating to offences, criminal convictions or security measures under this Regulation).

The Government’s view

13.7 In her Explanatory Memorandum of 3 June 2009, the then Minister for Europe at the Foreign and Commonwealth Office (Caroline Flint) reiterates that re-listing Mr Kadi and Al Barakaat means that the assets freeze against them remains in place at EU level.

13.8 She also explains that the technical amendments bring the text of Council Regulation (EC) No.881/2002 in line with current EU practice in the sanctions field.

13.9 The Minister describes the Regulation as “part of continuing work with EU and international partners to enhance implementation of international sanctions, to explore the implications of the Kadi case and to improve due process mechanisms.” The UK aims “to ensure that the Regulation addresses procedural shortcomings identified by the Court and strikes the correct balance between the Commission and Member States when setting up procedures for reviewing information”.

13.10 Both the Regulation and UN Security Council resolution 1822 of June 2008, the Minister says, reflect UK recognition of the need to strengthen procedures to enhance the efficiency and transparency of the regime; the UK “is working with international partners to address due process concerns at both the UN and EU levels”; UNSCR 1822 is “an important step forward.” The Minister notes that, once the cases of all individuals and entities on the UN list have been reviewed, narrative summaries of the reasons for listing should be provided for all persons named; the UN Sanctions Committee is, she says, working to provide listed individuals with summaries of reasons for listing as soon as possible.

13.11 Finally, the Minister says that European Parliament consultation is required regarding the Regulation; that this is not likely to take place until September; and that the document is therefore not likely to go to Council until October 2009.

Conclusion

13.12 We have no questions to put to the Minister and clear the document, which we are reporting to the House because of the importance of the issues involved.

14 EU Special Representative in Afghanistan

(30674)	Council Joint Action 2009/135/CFSP extending the mandate of the European Union Special Representative in Afghanistan to include Pakistan.
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<i>Legal base</i>	Articles 14, 18.5, and 23.2; QMV
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 3 June 2009
<i>Previous Committee Report</i>	None; but see (30379) — HC 19–vi (2008–09), chapter 14 (4 February 2009)
<i>To be discussed in Council</i>	15 June 2009 General Affairs and External Relations Council
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared, but further information requested

Background

14.1 EU Special Representatives (EUSRs) are appointed to represent Common Foreign and Security Policy where the Council agrees that an additional EU presence on the ground is needed to deliver the political objectives of the Union. They were established under Article 18 of the 1997 Amsterdam Treaty and are appointed by the Council. The aim of the EUSRs is to represent the EU in troubled regions and countries and to play an active part in promoting the interests and the policies of the EU.

14.2 An EUSR is appointed by Council through the legal act of a Joint Action. The substance of his or her mandate depends on the political context of the deployment. Some provide, *inter alia*, a political backing to an ESDP operation, others focus on carrying out or contribute to developing an EU policy. All EUSRs carry out their duties under the authority and operational direction of the High Representative (Javier Solana). Each is financed out of the CFSP budget implemented by the Commission. Member States also contribute directly, e.g. via secondment to the EUSR’s staff.

14.3 The EUSRs currently in office cover the following regions: Afghanistan, the African Great Lakes Region, the African Union, Bosnia and Herzegovina, Central Asia, Kosovo, the former Yugoslav Republic of Macedonia, the Middle East, Moldova, Sudan, the South Caucasus and, most recently, the Crisis in Georgia. Some EUSRs are resident in their country or region of activity, while others work on a travelling basis from Brussels.⁵⁶

14.4 On 6 February 2009, we cleared Joint Actions extending the mandate, for a further 12 months, of several of the EUSRs, including the EUSR for Afghanistan, Mr Ettore Sequi. His mandate encompasses support to the government of Afghanistan, in particular in the implementation of the EU-Afghanistan Joint Declaration, support to the United Nations in

⁵⁶ See http://consilium.europa.eu/cms3_fo/showPage.asp?id=263&lang=EN for full information on the EU Special Representatives

Afghanistan, liaison with regional countries in support of EU policy, supporting the EU's work on human rights and coordination of EU work in Afghanistan. In her accompanying Explanatory Memorandum of 27 January 2009, the then Minister for Europe at the Foreign and Commonwealth Office (Caroline Flint) said:

“The European Union and Afghanistan’s partnership is defined by the Strasbourg Declaration of 16 November 2005. The joint commitments made in this Declaration are kept under review by periodic meetings between the Afghan government and the EU.

“The EU (specifically, the European Commission and member states) is a major donor to Afghanistan, having disbursed or pledged \$7.5bn between 2002 and 2011, including over \$5bn of pledges in support of the Afghan National Development Strategy at the Paris conference in June 2008.

“EU member states provide approximately 16,000 troops to International Security Assistance Force. The EU launched its Police Mission to Afghanistan (EUPOL) in June 2007.

“The EU Special Representative will continue to play an important role in focusing the EU effort, and ensuring that it dovetails with the work of other bilateral and multilateral partners. The Afghan government and international partners, particularly the UN, continue to insist upon the need for greater international coordination in Afghanistan. In view of the many challenges facing the country this year, particularly the Presidential elections and the difficult security situation in the south and east of the country, the need for effective international engagement is even greater.”⁵⁷

Financial Implications

14.5 The costs of EU Special Representatives are met from the CFSP budget, to which the UK currently contributes approximately 17%. Information provided by the Minister on budget allocations for 1 March 2009–28 February 2010 for the EUSR to Afghanistan was:

Budget Allocation	Anticipated UK Contribution	Anticipated UK Contribution
€2,850,000 ⁵⁸	€484,000	£453,000

The draft Joint Action

14.6 The draft Joint Action that we cleared on 6 February was adopted on 9 February 2009 as Council Joint Action 2009/135/CFSP. The proposal is to amend the mandate set out in this Joint Action to include Pakistan.

57 See headnote: (30379) — HC 19–vi (2008–09), chapter 14 (4 February 2009).

58 The Minister said that this compare to an overall budget of €4.05 million (£3.8m) for 2008–9, the bulk of the savings have been made following Italy’s decision to provide gratis close protection for EUSR Sequi (who, prior to this appointment, was the Ambassador of Italy in Afghanistan).

The Government's view

14.7 In her Explanatory Memorandum of 3 June 2009, the then Minister for Europe says that the decision to extend EUSR Sequi's mandate to include Pakistan "reflects the direction of international debate on Afghanistan and broader regional challenges, particularly on Pakistan", and "also chimes with a message that the UK has been consistently delivering in the EU, that we need to be better equipped to address the regional dimension of policy on Afghanistan, particularly Pakistan."

14.8 The Minister continues as follows:

"The UK Government supports the extension of the mandate to include Pakistan as we have been pushing the EU to increase its engagement in both Afghanistan and Pakistan and to see the problems in both countries as interlinked. On 29 April, the Prime Minister made a statement to the House outlining the UK's Afghanistan-Pakistan strategy. This was designed to reinforce and be consistent with the new US strategy, which has similarly refocused its Afghanistan policy to include Pakistan. This followed the 22 January appointment of Richard Holbrooke as US Special Envoy to Afghanistan and Pakistan, and subsequent appointments of various other 'Af/Pak' Special Envoys, all of which highlight the international communities [sic] focus on the links between instability in both countries."

14.9 With regard to the Financial Implications, the Minister says that there are none "beyond costs already born through the EGC budget (the UK share of the cost of the EUSR for Afghanistan is 17% of €4.05m)."

Conclusion

14.10 We have no wish to hold up this amendment to the EUSR to Afghanistan's mandate, and accordingly clear the document, which we are reporting to the House because of the widespread interest in the subject matter.

14.11 However, we think that the Minister could and should have provided more background information. In the statement to which the Minister refers, the Prime Minister said that the Government's greatest international counter-terrorisms priority is "the border areas of Afghanistan and Pakistan", which he described as "the crucible for global terrorism.... the breeding ground for international terrorists [and] the source of a chain of terror that links the mountains of Afghanistan and Pakistan to the streets of Britain"⁵⁹ But "Af/Pak", so called, is not a concept that is universally endorsed.

14.12 Moreover, one oft-heard criticism of current arrangements in Afghanistan is that there are too many external participants and too little overall direction. It would have been helpful to have been assured that widening Mr Sequi's mandate to incorporate Pakistan corresponds to a similar analysis on the part of both the governments in question, or at least has their support. We ask that the Minister lets us know.

⁵⁹ This statement is available at <http://www.number10.gov.uk/Page19166>.

14.13 The proposed changes to Mr Sequi’s mandate say that his activities in Pakistan and in Afghanistan should take into account “the EU’s comprehensive approach towards cross-border and wider regional cooperation” and that, “more specifically, the EUSR shall *“contribute to the implementation of the EU-Pakistan Joint Declaration, as well as the relevant United Nations (UN) Security Council Resolutions and other relevant UN Resolutions; and “convey the European Union’s views on the political process in Pakistan, while drawing on key-principles emerging from the regular contacts between Pakistan and the international community, most notably in the context of the Group of Friends of Democratic Pakistan”*. We should be grateful if the Minister would also let us know what the essentials are of “the EU’s comprehensive approach towards cross-border and wider regional cooperation”; of the EU-Pakistan Joint Declaration; and of the Group of Friends of Democratic Pakistan. The Minister refers to “appointments of various other ‘Af/Pak’ Special Envoys”. The impression given is of a somewhat rushed exercise, designed to ensure that the EU is not left playing “catch-up”. We would like to know if the mandate is to be amended in ways other than extending the geographical scope and via the references cited in the preceding paragraph; and to know who the “various other ‘Af/Pak’ Special Envoys” are, and how the work of the EUSR for Afghanistan/Pakistan will relate to theirs.

14.14 We are also confused about the financial implications, and would be grateful if the Minister would explain the difference between the figures provided in February and now. Will the “expanded” EUSR have a presence in Pakistan? He will presumably need additional staff: where will they be based, and how will they be funded? Or are there other reasons for the differences between the two figures?

14.15 In short, we should like to know more of what extra the EUSR will be doing, how, where and in relation to whom.

14.16 We also feel bound to say that we are left with the impression that the new “quality assured” scrutiny process, in which senior staff would be providing more support to inexperienced desk officers, about which the Minister has recently been in correspondence with the Committee, has not got off a good beginning. We should be grateful for the Minister’s comments.

15 Pollution caused by ships

(29560) 7616/08 COM(08) 134	Draft Directive amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements
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<i>Legal base</i>	Article 80(2) EC; co-decision; QMV
<i>Department</i>	Justice
<i>Basis of consideration</i>	Minister's letters of 24 April, 29 April, and 15 May 2009
<i>Previous Committee Report</i>	HC 16–xxxii (2007–08), chapter 5 (22 October 2008), HC 16–xxi (2007–08), chapter 8 (14 May 2008), and see (24535) 7312/03: HC 42–ix (2003–04), chapter 12 (4 February 2004), HC 42–xiv (2003–04), chapter 3 (24 March 2004), HC 42–xxii (2003–04), chapter 8 (9 June 2004) and HC 42–xxvi (2003–04), chapter 3 (7 July 2004)
<i>To be discussed in Council</i>	June
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Cleared

Background

15.1 In 2003 the Commission presented a draft Directive, based on Article 80(2)EC, on pollution caused by ships (“ship-source pollution”). The proposal, as it then stood, sought to apply at Community level some of the requirements of the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (often referred to as MARPOL 73/78) and to ensure that any person who caused or contributed to a pollution incident through deliberate or grossly negligent behaviour was made subject to criminal sanctions.

15.2 The previous Committee identified two main issues. The first was the degree to which the Directive was consistent with the regime established by MARPOL 73/78 and with the United Nations Convention on the Law of the Sea (UNCLOS), notably on the question of liability where the discharge of polluting substances is the result of damage to a ship or its equipment (e.g. following a collision). MARPOL 73/78 contains an exception for discharges resulting from damage to a ship or its equipment, so that the owner or master is to be held responsible only if he acted with intent to cause damage to the ship or where he acted recklessly and with knowledge that damage would probably result, but the Directive limited the exception to international straits, the Exclusive Economic Zone of a Member State and the high seas.⁶⁰ As the then Minister commented at the time, this introduced a conflict with UNCLOS, which requires coastal States to comply with international rules

⁶⁰ The exception did not, therefore, apply to internal waters or the territorial waters of a Member State, these being referred to separately in Article 3(1)(a) and (b) of Directive 2005/35/EC. International straits, the Exclusive Economic Zone and the high seas are covered by Article 3(1)(d) and (e).

and standards, such as MARPOL, when dealing with foreign ships outside their territorial sea. The second main issue was the inclusion by the Commission of criminal law measures in a Directive proposed under the EC Treaty. A number of Member States, including the UK, objected to these provisions on the grounds that the Community lacked competence to prescribe criminal law rules. In the light of this objection, the Commission revised its proposal for a Directive and submitted an accompanying EU Framework Decision to specify criminal penalties for the acts prohibited by the Directive.

15.3 The Commission continued to argue, however, that the Community did have the necessary competence and brought proceedings for the annulment of the Framework Decision, shortly after it was adopted in 2005. In its ruling in October 2007 in Case C-440/05 *Commission v. Council* the ECJ found, annulling Framework Decision:

- that environmental protection was an objective of the common transport policy under Article 80(2) EC;
- that, as such, the Community could require Member States to introduce criminal penalties under Article 80(2) EC where these were considered to be “an essential measure for combating serious environmental offences⁶¹”;
- that ship-source pollution had sufficiently serious environmental consequences to justify the Community requiring Member States to apply criminal penalties to certain forms of conduct;
- but that the Community was not competent to determine the type and level of those criminal penalties.

Previous scrutiny

15.4 In 2008 the Commission subsequently proposed an adaptation of Directive 2005/35/EC⁶² which would incorporate the relevant provisions of the annulled Framework Decision. When we considered this proposal at our meeting on 14 May 2008 we noted the Government’s comment that the Commission’s approach to seeking to add a criminal law element to the 2005 Directive had the effect of distorting the overall scheme of the instrument and of creating a few potentially significant problems. One of these was that simply replacing the word “infringement” with “criminal offence” in the Directive would oblige Member States to apply the criminal law to discharges of polluting substances into the seas to the exclusion of any alternative administrative or civil sanctions. Another was that the proposed new Article 4(1) (which required Member States to criminalise discharges of polluting substances into any of the areas mentioned in Article 3(1))⁶³ could create a very broad obligation which could require Member States to ensure that the discharge of polluting substances in the high seas was treated as an offence under national law whatever the nationality of those responsible or the flag State of the vessel.⁶⁴ Further

61 Applying its reasoning in C-176/03 *Commission v. Council* (the Environmental Crime Case)

62 OJ No. L 255, 30.09.05, p.11.

63 I.e. internal waters, territorial sea, international straits, exclusive economic zones and the high seas.

64 A prescriptive jurisdiction on this wide basis appears to raise questions of compatibility with the United Nations Convention on the Law of the Sea (UNCLOS) which, save for a limited number of exceptions, reserves jurisdiction to

issues were the new Article 4, which took insufficient account of the exceptions under the existing Directive for discharges from any warship, naval auxiliary or other State-owned ship used only on government non-commercial service. Finally, in cases where damage to the ship or its equipment results in the discharge, the exception for crew members was wider under Article 2(2) of the annulled Framework Decision than it is under Article 5(2) of the Directive.⁶⁵

15.5 On 4 October 2008 the then Parliamentary Under-Secretary of State at the Ministry of Justice (Bridget Prentice) informed us by letter that the revised text “reflects UK drafting suggestions on key measures”. A drafting structure had been adopted which ensured that the obligations concerning criminal offences were incorporated without altering the basic provisions in the Directive on polluting infringements that could be dealt with through administrative means. The Minister explained that the Government believed that these changes, together with the inclusion of a recital making clear that the Directive imposes no obligation to apply penalties in any particular case, “satisfactorily ensure[d] that the criminal obligations do not exclude the possibility of Member States employing alternative administrative solutions where appropriate”. The Minister also explained that the new structure removed the need further to clarify the exceptions relating to warships, naval auxiliaries, and State-owned ships.

15.6 In addition, the Minister confirmed that the latest text contains updated cross-references to the MARPOL exceptions, notably in relation to cases where damage to the ship or its equipment results in a discharge. The Minister referred, in this regard, to the removal of the ambiguous reference to the crew having to be “acting under the master’s responsibility” in order to be exempted (a qualification which is not made in the MARPOL Convention). The Minister explained that the new text “does not achieve parity” with the MARPOL exceptions themselves, but that it went further than the provision of the annulled Framework Decision which it replaces, in that it applies to all the infringements referred to in the 2005 Directive, not merely those which were made criminal under the Framework Decision. The Minister concluded that the Government “is satisfied that this amounts to the best achievable balance between respecting the international standards whilst establishing an effective EU regime”.

15.7 In our Report,⁶⁶ we concluded that a number of useful improvements have been made to the proposal and that the points we had raised previously had been substantially addressed. In view of the opening of first reading negotiations with the European Parliament, we decided to hold the document under scrutiny but indicated to the Minister that she may agree to the text going forward as a basis for those negotiations. We looked forward to an account, in due course, of the outcome of those negotiations.

The Minister’s letter of 24 April 2009 and the Committee’s response

15.8 On 24 April 2009, the Parliamentary Under-Secretary of State at the Ministry of Justice (Lord Bach), wrote to the Committee informing us that, since the previous

the flag State over incidents occurring on the high seas (cf. UNCLOS Article 92(1)). It also appears that MARPOL 73/78 does not authorise the assertion of jurisdiction over vessels on the high seas by a non-flag State.

65 The Directive introduces the further qualification that the crew must have been acting under the master’s responsibility in order to qualify for the exception from liability.

66 HC 16 –xxxii (2007–08), chapter 5 (22 October 2008)

correspondence in October 2008, the Transport Committee of European Parliament (EP) had published its final report and recommendations for first reading amendments to the text in February, since when the draft had been subject to negotiation in JHA Counsellor and Trialogue (Presidency, Commission, EP Rapporteur) sessions. Although most of the amendments were “broadly acceptable” to the UK, the Minister wanted to take the opportunity to explain one that was not “ahead of a critical period of negotiations”.

15.9 The Minister explained that the EP was determined that “repeated, deliberate or seriously negligent discharges by ships must be regarded as criminal offences, *regardless* of whether they have a polluting effect.” The concept of criminalising repeated minor discharges was not, however, recognised in the original Directive of Framework Decision, but, according to the EP, criminalising such behaviour was the only way to halt a common practice, which has transformed the principle of the “polluter pays” into “pay to pollute”. This was “a key concern”, which the EP wished to have recognised both in a recital and an article.

15.10 In the Minister view, “where discharges have no polluting effect, they are by definition in the text itself regarded as ‘minor cases’ and should only be subject to administrative sanctions. Subject to agreed exceptions, the Directive already treats any discharges which *have* a polluting effect and which were committed with intent, recklessly or by serious negligence as criminal offences. At the point where repeated minor discharges do in fact have a polluting effect, the criminal offence would be committed. We prefer the current drafting because it enables Member States to retain prosecutorial discretion in less serious cases. The Government believes that the final Directive should not exceed the scope of the original dossiers nor should it introduce a new provision at this late stage. This view is shared by the Presidency, Commission and the majority of Member States.”

15.11 We wrote on 29 April in response to the Minister’s letter. In terms of the scrutiny process, we asked him to explain why we had not been informed of the opinion of the European Parliament long before 24 April, when there was sudden pressure for a first reading deal and negotiations were drawing to a rapid end. We reminded the Minister that the *Guidance for departments on parliamentary scrutiny of EU documents* required that the Scrutiny Committees be informed of the EP Opinion by a letter from the responsible Minister to the Committee Chairmen. In terms of substance, we added that we fully agreed with the Government, the Commission, and other Member States that the obligation to criminalise minor discharges went beyond the scope of the original Directive and would unacceptably interfere with prosecutorial discretion. We asked to be updated urgently on the emerging compromise text.

The Minister’s letter of 29 April 2009 and the Committee’s response

15.12 On 29 April the Minister wrote to update the Committee on the negotiations and “to share the Government’s positive view on the final compromise text which goes forward to ... Coreper on 29 April for approval with a view to the European Parliament delivering its opinion on 5–6 May. It is expected that agreement will be reached at First Reading and that the Council will then approve the Directive in the form amended by the Parliament”. A copy of the final compromise text was attached to the Minister’s letter.

15.13 The Minister informed us that, at the JHA Counsellor’s meeting on 27 April, the EP had put forward a compromise proposal, which clarified that repeat minor discharges would only be criminalised under the Directive if they had a “cumulative polluting effect”. This met the Government’s concerns, although the Minister comments that “such acts would have already been caught by the instrument as it stood”. He confirmed that this was the only issue that would have resulted in a significant change to the text from the version we considered in October. In addition, there was an important restatement (in a recital) from the original Framework Decision of the distinction between administrative sanctions for low-level, non polluting acts and criminal sanctions for serious discharges.

15.14 The Minister concluded overall that the Government’s objectives had been achieved. These were to ensure that: the text was compatible with MARPOL; followed a cogent drafting structure similar to that of the Environmental Crime Directive; the obligations to penalise conduct did not exclude alternative administrative penalties “where appropriate in less serious cases”; all categories of persons associated with the maritime industry were included within the scope of the proposed offences; and it represented a balanced interpretation of the intention of the original Directive and Framework Decision.

15.15 In relation to the lack of scrutiny of the first reading agreement by the Committee, the Minister wrote:

“I am very sorry for late sight of the final text for these negotiations [...] but this itself was only agreed on 28 April and I have sent it to you at the earliest opportunity. The repeat minor discharges issue led to some very difficult last minute timetabling and negotiation challenges for the Presidency. These were compounded by the push to secure first reading agreement at what will be the last plenary session before the European Parliament elections. I appreciate this set of circumstances has prevented the final text from being given due consideration by the Committee and the possibility of fully clearing scrutiny.”

15.16 We replied to the Minister on 6 May, making it clear that the timing of his letter — it was dated the same day as the final Coreper meeting — had left us no opportunity to scrutinise the final compromise text at all for a Community proposal which would amend national criminal legislation. We asked for a further report once the first reading deal had been agreed.

The Minister’s letter of 15 May

15.17 The Minister wrote again on 15 May to inform us that Coreper and the European Parliament agreed, on 29 April and 5 May respectively, to the compromise text. The Minister apologised again for not informing us in good time for us to be able to scrutinise the compromise text, explaining how fraught the negotiations were with a compromise proposal from the EP only appearing on 27 April. He mentioned again that the timetable was not helped by the Presidency’s desire to get a deal before the dissolution of the European Parliament for the June elections, hence why Coreper met so urgently on 29 April. He added, candidly, that:

“I regret that we did not send you the European Parliament’s Transport Committee’s report and recommendations for amendments to the text when they were published

in February, notwithstanding that these did not constitute a formal opinion at that stage. Given the expressed hope for a first-reading deal, I recognise that it would have been useful for the Committee to have been appraised [sic] earlier of the issues raised in the European Parliament. I apologise on behalf of my Department for this misjudgement.”

15.18 In concluding, he states that “officials are discussing whether there is anything more we could do to assist the Committee in situations such as this, which I believe occur only rarely” and offers “to come in to talk to the Committee about this unusual case and the implications of the co-decision legislative procedure more generally for the Parliamentary scrutiny of my Department’s dossiers”.

Conclusion

15.19 **We thank the Minister for his letters.**

15.20 **In scrutinising EC legislation we are particularly vigilant to ensure that the reach of Community law into national criminal law extends only so far as permitted by conferred powers or, as in this case, a judgment of the ECJ.**

15.21 **Had we been consulted in time, we would have had serious reservations about whether the European Parliament’s amendment to criminalise repeated minor cases of discharge, even where cumulatively they have a polluting effect, was “an essential element for combating serious environmental offences” that justified a criminal penalty, in accordance with the test laid down by the ECJ in Case C-440/05 *Commission v Council*. Whether this amendment was “essential” is in doubt given that the cumulative polluting effect of such minor discharges would already have been treated as a criminal offence in the text agreed by the Council, as the Minister states in his letters of 24 and 29 April. There is, therefore, a risk that the criminal penalties in this Directive go beyond the terms of the ECJ’s judgment.**

15.22 **We recognise that the Government, with many other Member States, was similarly concerned by the European Parliament’s amendment, negotiated hard to defeat it, and finally accepted what appeared to be the best possible compromise in the circumstances. But we very much regret that, through misjudgement of the Minister’s department, we were only informed rather than consulted on the entire first reading stage of this important proposal, leaving us no opportunity for scrutiny.**

15.23 **The adoption by the Council of the first reading agreement on 29 April amounts to a breach of the Scrutiny Reserve Resolution. The proposal now having been formally adopted, however, we have no other option than to clear it from scrutiny.**

15.24 **We take the Minister up on his offer to come before the Committee, when we will discuss both the contents of this Directive and how to ensure that similar scrutiny oversights on first reading agreements are avoided.**

16 Bilateral Agreements

<p>(a) (30333) 5146/09 COM(08) 894</p>	<p>Draft Council Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations.</p>
<p>(b) (30334) 5147/09 COM(08) 893</p>	<p>Draft Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations</p>

<i>Legal base</i>	Articles 61, 65 and 67(5) EC Treaty; unanimity; consultation.
<i>Department</i>	Ministry of Justice
<i>Basis of consideration</i>	Minister's letter of 22 May 09
<i>Previous Committee Report</i>	(a) HC 19–xii (2008–09), chapter 12 (25 March 2009) (b) HC 19–vii (2008–09), chapter 5 (11 February 2009); HC 19–xiii (2008–09), chapter 13 (1 April 2009), HC 19–xvii (2008–09), chapter 10 (13 May 2009).
<i>To be discussed in Council</i>	The next practicable JHA Council
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Cleared on 25 March 2009 (a) and 1 April 2009 (b); further information now received.

Background

16.1 The external competence of the Community is its capacity to act separately from its Member States internationally, in particular to negotiate and conclude binding international agreements and to belong to, and participate in, international organisations. The Community's external competence may be either exclusive or shared. Where the Community has exclusive external competence, Member States have no further power to act internationally in respect of that subject-matter. The European Court of Justice has established that the Community's external competence will normally be exclusive if, inter alia, an agreement falls into an area of law which, internally, is already largely covered by Community rather than national law, or if the effectiveness or purpose of Community's internal rules may be adversely affected or undermined by an international agreement concluded by Member States. The Community's external competence may thus be exclusive in areas of law where it only has shared internal competence.

The document

16.2 The purpose of these proposals is to establish a procedure to enable Member States in future to negotiate and conclude bilateral agreements with third countries in certain areas of family law with a cross-border dimension (document (a)) and relating to the choice of law concerning non-contractual and contractual obligations (document (b)). Subject to the satisfaction of certain conditions, this procedure would enable the Commission to authorise such negotiations and their conclusion.

16.3 Both subject areas have recently been covered by Community legislation, respectively EC Regulation No. 864/2007 (“Rome II”) and EC Regulation No. 593/2008 (“Rome I”) regarding applicable law concerning non-contractual and contractual obligations, and, in the field of family law, EC Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility as well as EC Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The consequence of this Community legislation is, in general terms, to establish far-reaching external Community competence in these areas, which may be exclusive at least in some areas. In principle this means that Member States may be prevented from entering into bilateral agreements which fall within the scope of this legislation. Particular concerns were also raised by some Member States during the negotiations on Rome II that the consequent extension of external competence in this area might prove too restrictive in some circumstances, for example in the context of cross-border infrastructure projects involving third countries, such as airports or tunnels, where it might be desirable to put in place special choice of law regimes which departed from the terms of the relevant Community legislation. The proposed regulations would limit the scope of the Community’s exclusive competence and ensure that Member States may continue to negotiate bilateral agreements with third countries in areas of law where the Community has in recent years largely ‘occupied the legislative field.’

16.4 When we originally looked at these proposals we broadly shared the Government’s general support for the proposed measures but expressed some concern about the imprecise description of the Commission’s powers to authorise Member States to exercise their competence to conclude bilateral agreements. The Government subsequently secured amendments of the relevant provisions, and on this basis we expressed support for the Government’s intention to ‘opt in’ to the proposed measures. We cleared both documents from scrutiny in March and April of this year. On 21 April the Minister (Lord Bach) informed us that the Government had officially notified the Council of its decision to ‘opt in’. We asked the Minister to keep us informed of any important developments during the very final stage of negotiations.

The Minister’s Letter

16.5 The Minister has now written with further information and in his letter of 22 May 2009 updates us as follows:

“I wrote to you on 21 April 2009 about these draft Regulations. I am writing again to inform your Committee about the final outcome which was agreed at COREPER today.

“There is one issue which I wanted to draw to your attention. This concerns the Regulation which deals with choice of law issues and in particular the provision which provides for the Commission’s review of the operation of that instrument (Article 10). The previous version of that provision provided that the possibility of extending the scope of that instrument to cover the recognition and enforcement of judgments falling within the scope of the Brussels I Regulation (44/2001) should be considered as part of the Commission’s assessment of the operation of the new Regulation.

“This was not an ideal outcome, but at least it would have ensured that the issue of such an extension would have remained firmly on the agenda for the future. Unfortunately as a result of opposition from the European Commission the current review provision contains no specific reference to such an extension. In place of such a reference are the attached draft statements to be made by the Council and the Commission. In these statements the Council invites the Commission to consider the possibility of such an extension; the Commission agrees to take note of this invitation to examine it carefully in the review process. This is not a strong form of words and must, I concede, represent a poor outcome for the UK on this issue. Nevertheless I have with some reluctance concluded that at this time it is not realistically possible to make further progress on this point. It must be hoped that the Commission’s view of the matter in that review will be more flexible and that the UK’s reasonable position will attract more support than is currently the case....”

16.6 The draft Statement, which is included in the Minister’s letter:

“Draft statements by the Council and the Commission on Article 10

“The Council invites the Commission to consider carefully, when preparing its report under Article 10, whether, in the light of the experience gathered on the application of the Regulation, the Regulation on its expiry should be replaced by a new one covering the same subject matters or including also other matters covered by other Community instruments. In the context of the report on the application of the Regulation on applicable law, the Commission should consider, in particular, whether a possible new Regulation should cover recognition and enforcement under Regulation (EC) No 44/2001.”

“The Commission takes note of this invitation and will examine it carefully in its report on the application of the Regulation, without prejudice to its own competences.”

Conclusion

16.7 We thank the Minister for his detailed update. We share the Minister’s disappointment at the opposition by the Commission and other Member States to the extension of the choice of law proposal (proposal (b)) to matters covered internally by the Brussels I Regulation. We note the text of the proposed Council statement in this connection and expect the Government to make appropriate representations in good time before the bilateral agreements Regulations are due for review by the Commission.

17 Documents not raising questions of sufficient legal or political importance to warrant a substantive report to the House

Department for Business, Enterprise and Regulatory Reform

(30618)
9389/09
+ ADD 1
COM(09) 206

Commission Communication: Report on the functioning of Regulation 1/2003.

Department for Environment, Food and Rural Affairs

(30634)
9607/09
COM(09) 213

Commission Communication on expenditure incurred by Member States and co-financed by the Community implementing monitoring and control systems applicable to the Common Fisheries Policy for the period 2001-2006.

(30644)
9838/09
COM(09) 224

Commission Communication *Consultation on Fishing Opportunities for 2010*.

Foreign and Commonwealth Office

(30629)
9524/09
COM(09) 142

Draft Regulation adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Five.

Department for International Development

(30565)
8998/09
SEC(09) 555

Commission Staff Working Document: Improving environmental integration in development cooperation.

(30636)
9683/09
COM(09) 194

Draft Regulation amending Regulation (EC) No. 1905/2006 establishing a financing instrument for development cooperation and Regulation (EC) No. 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide.

HM Treasury

(30611)
9248/09
COM(09) 193

European Union Solidarity Fund Annual Report 2008 and Report on the experience gained after six years of applying the new instrument.

Department for Work and Pensions

(30622) Commission Communication — *Dealing with the impact of an ageing
9200/09 population in the EU (2009 Ageing Report).*
COM(09) 180

Formal minutes

Wednesday 10 June 2009

Members present:

Michael Connarty, in the Chair

Mr David S Borrow	Keith Hill
Mr William Cash	Kelvin Hopkins
Mr James Clappison	Mr Lindsay Hoyle
Jim Dobbin	Mr Bob Laxton
Mr Greg Hands	Mr Anthony Steen
Mr David Heathcoat-Amory	Richard Younger-Ross

1. Scrutiny of Documents

Draft Report, proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.13 read and agreed to.

Paragraphs 1.14 to 1.17 read, amended and agreed to.

Paragraphs 2.1 to 16.7 read and agreed to.

Paragraph 17 read.

Amendment proposed in line 33, to leave out the words “Commission Communication promoting good governance in tax matters” — (*Mr William Cash*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6

Mr William Cash
Mr James Clappison
Mr Greg Hands
Mr David Heathcoat-Amory
Kelvin Hopkins
Richard Younger-Ross

Noes, 4

Mr David S Borrow
Jim Dobbin
Mr Keith Hill
Mr Bob Laxton

Resolved, That the Report, be the Twenty-first Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

[Adjourned till Wednesday 17 June at 2.30pm.]

Standing order and membership

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at www.parliament.uk.

Current membership

Michael Connarty MP (*Labour, Linlithgow and East Falkirk*) (Chairman)
Mr Adrian Bailey MP (*Labour/Co-op, West Bromwich West*)
Mr David S. Borrow MP (*Labour, South Ribble*)
Mr William Cash MP (*Conservative, Stone*)
Mr James Clappison MP (*Conservative, Hertsmere*)
Ms Katy Clark MP (*Labour, North Ayrshire and Arran*)
Jim Dobbin MP (*Labour, Heywood and Middleton*)
Mr Greg Hands MP (*Conservative, Hammersmith and Fulham*)
Mr David Heathcoat-Amory MP (*Conservative, Wells*)
Keith Hill MP (*Labour, Streatham*)
Kelvin Hopkins MP (*Labour, Luton North*)
Mr Lindsay Hoyle MP (*Labour, Chorley*)
Mr Bob Laxton MP (*Labour, Derby North*)
Angus Robertson MP (*SNP, Moray*)
Mr Anthony Steen MP (*Conservative, Totnes*)
Richard Younger-Ross MP (*Liberal Democrat, Teignbridge*)