



House of Commons
European Scrutiny Committee

**Tenth Report of
Session 2009–10**

Documents considered by the Committee on 3 February 2010

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 "Legal base") Treaty establishing the European Community
EM	Explanatory Memorandum (submitted by the Government to the Committee)
EP	European Parliament
EU	(in "Legal base") 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).

Staff

The staff of the Committee are Alistair Doherty (Clerk), Laura Dance (Second Clerk), David Griffiths (Clerk Adviser), Terry Byrne (Clerk Adviser), Sir Edward Osmotherly (Clerk Adviser), Peter Harborne (Clerk Adviser), Paul Hardy (Legal Adviser) (Counsel for European Legislation), Dr Gunnar Beck (Assistant Legal Adviser), Hannah Lamb (Senior Committee Assistant), Allen Mitchell (Committee Assistant), Mrs Keely Bishop (Committee Assistant), Dory Royle (Committee Assistant), Shane Pathmanathan (Committee Support Assistant), and Paula Saunderson (Office Support Assistant).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.uk

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1 Extradition between the EU and Iceland and Norway

(31231) 17706/09 COM(09) 705	Draft Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.
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<i>Legal base</i>	Articles 82(1)(d) and 218(6)(a); QMV; consent
<i>Document originated</i>	17 December 2009
<i>Deposited in Parliament</i>	6 January 2010
<i>Department</i>	Home Office
<i>Basis of consideration</i>	EM of 19 January 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	No date set
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Not cleared; further information requested

Background

1.1 EU Member States, the Kingdom of Norway and the Republic of Iceland are parties to a number of agreements relating to extradition, including the Council of Europe Conventions on extradition of 13 December 1957 and on the suppression of terrorism of 27 January 1977. The Nordic countries (i.e. Denmark, Finland, Iceland, Norway and Sweden) have adopted specific extradition legislation according to a common model which applies to extradition between those States. In the case of those Nordic countries which are also EU Member States (i.e. Denmark, Finland and Sweden), the European Arrest Warrant is applied, except where the Nordic arrangements further facilitate extradition.¹

1.2 In 2001, the Council authorised the Presidency to open negotiations with Iceland and Norway with a view to extending to those countries the parts of the EU Extradition Convention of 27 September 1996 which were not related to the Schengen Agreement. This authority was expanded in 2002, following the adoption by the EU Member States of the Framework Decision of 13 June 2002 on the European Arrest Warrant.² The Council then agreed that there would be a benefit from applying extradition arrangements on the European Arrest Warrant model in relations with Iceland and Norway. Successive Presidencies have since conducted negotiations with a view to adopting an Agreement on surrender procedure (extradition).

1.3 The signing of the Agreement was authorised by the Council Decision³ on 27 June 2006, but the Agreement has not yet been concluded. With the entry into force of the Lisbon Treaty on 1 December 2009, the procedures to be followed for conclusion of an

1 See the statements by Denmark, Finland and Sweden in relation to the European Arrest Warrant, OJ No. L 246, 29.09.03, p.1.

2 OJ No. L 190, 18.07.02, p.1.

3 2006/697/EC.

international agreement are governed by Article 218 of the Treaty on the Functioning of the European Union (TFEU). In the case of agreements covering fields to which the ordinary legislative procedure applies, the Council now has to obtain the consent of the European Parliament before adopting a Decision to conclude an international agreement.

The draft Agreement between the EU and Iceland and Norway

1.4 The draft Agreement is intended to improve judicial cooperation between EU Member States on the one hand, and Iceland and Norway on the other, by providing for an expedited extradition procedure along the lines of the European Arrest Warrant (EAW).

1.5 Under Article 1, the Parties agree to ensure that their extradition systems are based on a mechanism of surrender pursuant to an arrest warrant in accordance with this Agreement. For these purposes, an arrest warrant is a judicial decision issued by a State with a view to the surrender of a person from one State to another for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

1.6 Most importantly, and in contrast to the EAW, in Article 3(4) dual criminality⁴ is required as a condition for extradition, unless Iceland or Norway on the one hand, or the EU on behalf of any Member State on the other, makes a declaration that it will not require dual criminality if the offence is an offence listed in Article 3(4) and carries a penalty in the State requesting extradition of at least three years' imprisonment. The list of offences in Article 3(4) is the same as that set out in Article 2(2) of the EAW and accordingly includes terrorism, drug trafficking, sexual exploitation of children, fraud, money-laundering, environmental crime, counterfeiting and piracy of products, rape, arson, and crimes within the jurisdiction of the International Criminal Court, namely war crimes, crimes against humanity, and genocide. It also includes such concepts as "computer related crime", "racism and xenophobia", "swindling" (as opposed to "fraud"), "racketeering and extortion" and "sabotage".

1.7 The Agreement provides that the declaration that dual criminality will not apply, where made, is made on the basis of reciprocity. In these circumstances, the Agreement will operate in the same way as the EAW, so that if the issuing State classifies an offence under its law as "racism and xenophobia" or "swindling" etc. then such classification must be accepted by the executing State, whether or not the same conduct would be regarded as criminal there.

1.8 Article 4 of the Agreement sets out the same mandatory grounds for refusing to enforce a warrant as are set out in Article 3 of the EAW (amnesty, double jeopardy⁵ and insufficient age of suspect),⁶ and Article 5 reproduces the same optional grounds for refusing enforcement as are contained in Article 4 of the EAW. In both cases a State will be permitted to refuse to enforce a warrant in circumstances where the offence in respect of which it is issued is regarded by the law of that State as having been committed in whole or in part within its territory, or where such offence is committed outside the territory of the

4 I.e. the principle that the conduct for which extradition is sought must be a crime in both the requesting and the requested country.

5 The doctrines of *autrefois convict* and *autrefois acquit* at common law.

6 The doctrine of *doli incapax* at common law.

State issuing the warrant and the law of the executing State does not allow prosecutions for the same offences when committed outside its territory.

1.9 Article 6(1) of the Agreement provides that enforcement of a warrant may not be refused on the grounds that the offence is regarded by the executing State as a political offence, or as an offence inspired by political motives. Article 6(2) of the Agreement permits Iceland or Norway, or an EU Member State, to make a declaration that the rule in Article 6(1) is to apply only to terrorism cases (i.e. the offences referred to in Article 1 and 2 of the Council of Europe Convention on the Suppression of Terrorism, or Articles 1 to 4 of the Council Framework Decision on combating terrorism).⁷ Where a warrant is issued by a State having made such a declaration, or on whose behalf the EU has made a declaration, the executing State may apply the principle of reciprocity.

1.10 Article 7 of the Agreement makes special provision for the extradition of a State's own nationals. Article 7(1) prescribes the general rule that enforcement of a warrant may not be refused on the grounds that the person in question is a national of the enforcing State, but Article 7(2) provides that Iceland and Norway on the one hand, and the European Union on behalf of any of its Member States, may make a declaration that it will not extradite its own nationals and that extradition will be ordered "only under certain specified conditions".

1.11 The remaining provisions of the Agreement substantially reproduce those of the EAW, apart from the concluding formal provisions.

The Government's view

1.12 In her Explanatory Memorandum of 19 January 2010 the Parliamentary Under-Secretary of State at the Home Office (Meg Hillier) explains that the purpose of the Agreement is to improve co-operation between EU Member States and Iceland and Norway by putting in place an expedited surrender procedure between those countries. The surrender procedure is based on the principles and mechanisms of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States. However, it also allows those Parties who wish to do so to retain some additional elements of earlier extradition arrangements, in particular in relation to the application of dual criminality.

1.13 She confirms that Iceland and Norway will remain Category 2 territories for the purposes of the Extradition Act 2003 and will continue to be governed by Part 2 of the same Act. At present, the dual criminality requirement will not therefore be waived under UK law, and the conclusion of the Agreement will not require a change in UK law.

1.14 Under the scheme of the 2003 Act the UK can only extradite someone to a Category 2 territory where this would be consistent with their rights under the European Convention on Human Rights. Furthermore the UK cannot extradite anyone where to do so would lead to the imposition and implementation of a sentence of death or where the extradition request has been made for reasons of race, religion, nationality, gender, sexual orientation

7 OJ No. L 164, 22.06.02, p.3.

or political opinion. In view of these safeguards, and in light of the fact that Norway and Iceland are both parties to the European Convention on Human Rights, the Minister is satisfied that the conclusion and application of the EU-Norway & Iceland Extradition Agreement would be consistent with fundamental rights.

1.15 In terms of the opt-in, the Minister reports that the UK has three months to decide from the date of publication of the proposal. As the proposal was published on 17 December, the UK will need to inform the Presidency by 17 March. The main factors the UK will need to consider in taking into account whether or not to opt-in will be the fact that if the UK opted in to this Decision it would not in the future be able to conclude any extradition agreement with Norway or Iceland which would conflict with the terms of the EU-Norway & Iceland Agreement.

Conclusion

1.16 We ask the Minister to explain why it has taken over three-and-a-half years to conclude the Agreement.

1.17 We ask the Minister for an indication of whether the UK will opt into this Agreement.

1.18 We welcome the fact that the Agreement contains a dual criminality condition — the principle that the conduct for which extradition is sought must be a crime in both the requesting and the requested country — for European Arrest Warrant offences unless Parties agree on a reciprocal basis to waive it. But we would like to know the views of the Ministers' officials on the likelihood of this condition being waived by Iceland and Norway under Article 4(3) of the Agreement.

1.19 The proposal was published by the Commission on 17 December 2009 and yet the Explanatory Memorandum was deposited only on 19 January 2010. This delay is in contravention of the undertaking in Baroness Ashton's statement on JHA opt-ins that the Government will place an Explanatory Memorandum before Parliament "as swiftly as possible following publication of the proposal and no later than ten working days after the publication of the proposal". It leaves us with four weeks, rather than the agreed eight weeks, for scrutiny of the opt-in decision. We ask the Minister for an explanation of the delay and an undertaking that it will not be repeated.

1.20 Pending the Minister's replies the document remains under scrutiny.

2 Implementation of the Small Business Act

(31252) 5076/10 COM(09) 680	Commission Working Document: <i>Implementation of the Small Business Act</i>
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<i>Legal base</i>	—
<i>Document originated</i>	15 December 2009
<i>Deposited in Parliament</i>	15 January 2010
<i>Department</i>	Business, Innovation and Skills
<i>Basis of consideration</i>	EM of 27 January 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	No date set
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

2.1 The EU has long emphasized the important contribution which Small and Medium sized Enterprises (SMEs) can make to the overall economy, and in July 2008 the Commission put forward a Communication (*Think Small First: "A Small Business Act for Europe"*),⁸ which identified a number of policy areas where the Commission committed itself to take action and invited Member States to take corresponding measures at a national level in order to put SMEs at the forefront of decision-making. That Communication was subsequently adopted by the European Council and supported by the European Parliament, and the Commission has now sought in this document to summarise the progress achieved in 2009.

The current document

2.2 The Commission says that it has delivered on the major action announced in the Small Business Act, and that in particular it has adopted all five related legislative proposals — a general block exemption regulation (making it easier for Governments to support SMEs through aid measures); a reduction on VAT rates; a recast of the late payments Directive; a proposed European Private Company Statute; and a proposal on VAT invoicing (aimed at ensuring equal treatment of paper and electronic invoices). It adds that Member States have also shown strong political commitment to implementing the Act, though there have been differences in both the approach taken and the results achieved (with the UK having been singled out for producing a very detailed annex of the measures taken). The Communication then addresses the measures taken in a number of specific areas.

8 (29791) 11262/08: see HC 16–xxix (2007–08), chapter 8 (10 September 2008).

Implementing the “Think Small First” Principle

2.3 The Commission says that it has systematically applied an “SME Test” to assess the impact of all its major legislative and policy proposals, and that this has become part of its revised Impact Assessment Guidelines. It adds that major steps have been taken to achieve an earlier target of reducing administrative burdens by 25%, with the measures already taken expected to reduce costs by €7.6 billion, and those pending capable of adding a further €30.7 billion, equivalent in all to a 33% reduction: and it notes the commitment it has made to continue to reduce unnecessary administrative burdens in its 2009 Action Programme.⁹

2.4 More specifically, the Commission points out that the application of this principle has lain behind a number of initiatives at EU level, including exempting micro-enterprises from accounting rules, exempting non-professional drivers from work and rest times (and hence the obligation to use tachographs for a distance up to 100km), and improved guidance on risk assessment as regards health and safety. It also welcomes the fact that Member States have adopted national targets for reducing administrative burdens for SMEs, for example in relation to the start-up costs for private limited companies, and the legal procedures relating to the winding up of a business in the case of a non-fraudulent bankruptcy.

Access to finance

2.5 In addition to the new General Block Exemption Regulation, the Commission notes that it has adopted a Handbook on state aid rules which provides a concise overview of the permitted aid possibilities for SMEs; that its temporary framework for state aids in 2009–10 provided Member States with the opportunity to tackle the effects of the credit squeeze by granting subsidised loans, loan guarantees and risk capital for SMEs; that the European Investment Bank played a crucial role in easing SMEs’ access to finance in 2009 by increasing its lending facility from €8.1 billion to €11.5 billion, and by allocating €200 million for mezzanine finance in 2009; that good progress has been made with the JASMINE¹⁰ and JEREMIE¹¹ initiatives; and that the management rules for the Cohesion Policy and for the Seventh Framework Programme for Research and Technological Development have been simplified to increase SME involvement. It adds that, in response to the financial and economic crisis, Member States have also adopted measures to enhance SMEs’ access to liquidity, and to reduce late payments.

Access to markets

2.6 The Commission says that, in order to stimulate cross-border operations, it and the Member States have jointly decided to lower further the fees for EU-wide trade mark rights by 40% and to simplify the registration procedure; that it has invited Member States to facilitate SMEs’ access to public procurement contracts; that EU financial support to promote SMEs’ participation in the standardisation process has been increased; that it has

9 (31052) 15019/09: see HC 19–xxxi (2008–09), chapter 8 (11 November 2009).

10 Joint Action to Support Microfinance Institutions in Europe.

11 Joint European Resources for Micro to Medium Enterprises.

highlighted the importance of a full and timely transposition of the Services Directive; that Market Access Teams have been established in 30 key export markets, with business centres being set up in a selected number of these; and that the Enterprise Europe network provides business support in 44 countries, and organised more than 10,000 events in which around 400,000 SMEs participated.

Promoting entrepreneurship

2.7 The Commission notes that two major events in 2009 — the First European SME week and the Conference on the Small Business Act/European Charter for small enterprises— contributed to promoting entrepreneurship among the general public and providing opportunities for networking. It also draws attention to the European Enterprise Awards; to the European Network of Female Entrepreneurship Ambassadors; and to the ERASMUS¹² initiative for Young Entrepreneurs.

2.8 The Commission concludes by noting the good progress achieved in 2009, but stresses the utmost importance of continuing to implement the Small Business Act Action Plan vigorously at all levels, and to keep in sight the longer-term aim of creating a world-class environment for SMEs as a means of helping to deliver the forthcoming 2020 strategy.

The Government's view

2.9 In his Explanatory Memorandum of 27 January 2010, the Minister for Trade, Investment and Small Business (Lord Davies of Abersoch) says that there are no policy implications for the UK from this report, which simply outlines areas of progress in implementing the Small Business Act at Community and Member State levels, and does not put forward any new proposals. He adds that the UK supports the Small Business Act, which aligns very well with UK policy, and has particularly welcomed the emphasis on access to finance, better regulation and access to markets.

2.10 The Minister adds that the UK strongly supports robust measures to regulate better for SMEs at the EU level, and that it welcomes the inclusion of an SME Test in Commission impact assessments. He says that the key objective now is to embed the *Think Small First* approach, noting that the better regulation measures which the Commission has invited Member States to adopt are well-established in the UK, and that the UK supports measures to facilitate access to finance for viable SMEs, as well as access to markets. That said, he concludes by saying that the Government fully endorses the Commission's conclusion that, whilst progress has been made in key areas, it is essential to make tangible improvements to the EU business environment for SMEs, including in the context of broader EU strategies.

Conclusion

2.11 Although we do not think that this report raises issues which require further consideration, it provides a useful summary of the progress made in an important

12 European Region Mobility Action Service for Mobility of University Students.

policy area, and, for that reason, we are drawing it to the attention of the House, while clearing it from scrutiny.

3 Comitology

(31228) 5107/10 COM(09) 673	Commission Communication on the Implementation of Article 290 of the Treaty on the Functioning of the European Union
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<i>Legal base</i>	—
<i>Document originated</i>	9 December 2009
<i>Deposited in Parliament</i>	5 January 2010
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 19 January 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	—
<i>Committee’s assessment</i>	Legally and politically important
<i>Committee’s decision</i>	Cleared

Background

3.1 The Treaty of Lisbon entered into force on 1 December 2009. It amends the Treaty on European Union (TEU) and replaces the Treaty establishing the European Community with the Treaty on the Functioning of the European Union (TFEU).

3.2 The Treaty of Lisbon creates a distinction between the delegation of powers to the Commission to adopt delegated acts pursuant to Article 290 TFEU, and the delegation of powers to the Commission to adopt implementing acts pursuant to Article 291 TFEU. Article 290 TFEU authorises the Commission to adopt ‘non-legislative acts’ which are distinguished from ‘legislative acts’ defined in Article 289 TFEU. Legislative acts are adopted by the ordinary or special legislative procedures and directly involve the Council and the European Parliament. The non-legislative acts which the Commission may adopt must be of general application, and will amend or supplement certain non-essential elements of a legislative act (similar to secondary legislation in the UK Parliament). These powers are collectively known in the Treaty of Lisbon as “delegated acts.” For delegated acts, Article 290 TFEU replaces the system known as “comitology”, which consisted of committees of Member States’ representatives, chaired by the Commission.

The Document

3.3 The European Commission has prepared a Communication entitled ‘Implementation of Article 290 of the Treaty on the Functioning of the European Union’ to inform the Council and European Parliament of how it intends to implement Article 290 TFEU.

Article 290 replaces the ex-ante comitology system with a system of ex-post facto control by the Council and European Parliament. Article 290 TFEU makes available two powers to this end. First, once the Commission has adopted a proposal, either the Council or the European Parliament may be given the right to block the Commission proposal, within a specified period of time (right of opposition). If neither the Council nor the European Parliament opposes the delegated act within a certain period of time, the Commission proposal will come into force. Secondly, the Council and European Parliament may also be given the power to revoke the delegation from the Commission (right of revocation). The legislators, i.e. the Council and the European Parliament, need to specify the ex post control conditions in the underlying legislation authorising the delegation of powers to the Commission. They may impose the conditions in the alternative or cumulatively and thus vary the conditions from one case to the next.

3.4 The Commission has drawn up the Communication in response to concerns raised by Member States, including the UK, which felt there was too much uncertainty about how Article 290 TFEU would be implemented, in particular now that there is no longer a formal stage of comitology committees. To address these concerns the Commission response includes a model template which provides standard wording which the legislators may use to define the scope of the delegation of power in future instruments and the conditions to which the delegation is subject.

The Government's view

3.5 In his Explanatory Memorandum of 19 January 2010 the Minister for Europe (Chris Bryant) welcomes the Commission Communication and comments as follows:

“The Council has welcomed the Commission’s communication (please see Annex A for the Council declaration) as it commits the Commission to accompany delegated acts with explanatory memoranda and provides for the systematic consultation of Member State experts prior to Member States implementing the delegated acts when they have been adopted.

“This greatly enhances the ability of Member States to improve putative delegated acts compared with the provisions of Article 290, which do not provide for a formal stage of committee scrutiny before adoption of a measure by the Commission. The Council has also stated that it intends to review the functioning of the consultation of experts at an appropriate future juncture.

“The Communication annex contains “models” which can be used to put into effect any delegation of power under Article 290 on a dossier-by-dossier basis. The models are not binding and can be adjusted by the Council and European Parliament in individual negotiations. They have been produced to facilitate coherent implementation of Article 290 during the initial phase of its introduction and to avoid protracted and repetitive negotiations on each dossier.”

The Council Declaration on the Commission’s Communication referred to by the Minister reads as follows:

“COUNCIL DECLARATION

“The Council welcomes the Commission’s communication on the implementation of Article 290 of the Treaty on the Functioning of the European Union as well as the standard models attached to it in view of their insertion into legislative proposals adopted under the ordinary legislative procedure, when these confer delegated powers to the Commission on the basis of Article 290 of the TFEU.

“The Council attaches particular importance to the Commission’s commitment to, in the preparatory phase, systematically consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted. The Council emphasises that the communication constitutes guidelines for the Commission’s future exercise of powers delegated under Article 290. The Council notes further that the Commission will carry out the consultations in plenty of time, to give the experts an effective possibility to make a useful and effective contribution.

“The Council also notes with satisfaction the Commission’s commitment to inform the experts of the conclusions it believes should be drawn from the discussions, its preliminary reactions and how it intends to proceed. In addition, the Council regards as relevant and necessary the Commission’s commitment to accompany delegated acts by explanatory memoranda setting out in a detailed manner the grounds for the act and providing information about the preparatory work undertaken by the Commission.

“The Council draws the Commission’s attention to the fundamental importance of the immediate implementation of the above mentioned commitments in order to create confidence in the new procedure foreseen under Article 290 of the TFEU and to ensure a smooth and fruitful operation of the delegation of powers.

“In the light of the importance of the new procedure foreseen under Article 290 TFEU and once sufficient experience has been gained, the Council intends to assess how efficiently the consultation of experts is functioning.”

Conclusion

3.6 We thank the Minister for his summary of and comments on the Commission Communication. We agree that the Communication provides a helpful overview of the contents and remaining legislative options under Article 290 TFEU which has the potential of strengthening Member States’ control over the Commission’s delegated legislation. We clear the document from scrutiny and have no further questions to the Minister.

4 Restrictive measures against Zimbabwe

(31284) 5835/10 COM(10) 19	Draft Council Decision on adapting and extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement
(31287) — —	Council Decision extending restrictive measures against Zimbabwe

<i>Legal base</i>	Article 29 EU; unanimity
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 2 February 2010
<i>Previous Committee Report</i>	(a) None; but see (30343) —: HC 19–iv (2008–09), chapter 16 (21 January 2009) (b) None
<i>To be discussed in Council</i>	16 February 2010 Economic and Finance Council
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared

Background

4.1 The ACP-EC Partnership Agreement (the Cotonou Agreement), signed in 2000, provides the latest framework for a more than 20-year partnership for development aid to the 77 African, Caribbean and Pacific countries, funded mainly by the European Development Fund (EDF). It was revised in 2005, to provide for a stronger political foundation to ACP-EU development cooperation. Political dialogue is one of the key aspects of the revised arrangements. New issues which had previously been outside the scope of development cooperation, such as peace and security, arms trade and migration, were addressed. The element of *good governance* was included as an “essential element”, the violation of which could lead to the partial or complete suspension of development cooperation between the EU and the country in violation.¹³

4.2 If a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9, a process of consultation then ensues; if the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, “appropriate measures” may be taken. These procedures, under Article 96, are intended as a measure of last resort and can only be invoked when Cotonou’s “essential elements” are deemed to have been breached and all possible options provided through regular political dialogue have been exhausted. The aim of the process is to focus on the specific measures

¹³ See http://ec.europa.eu/development/icenter/repository/Cotonou_EN_2006_en.pdf for full details of the agreement.

to be taken by the Party concerned to remedy the situation and thus arrive at a solution acceptable to the Parties.

4.3 Council Decision 2002/148/EC partially suspended European Commission (EC) aid to Zimbabwe as part of the application of “appropriate measures” provided for under Article 96 of the Cotonou Agreement.

4.4 In 2004 the EU adopted Common Position 2004/161/CFSP. This imposed an arms embargo, assets freeze and travel ban, with certain exemptions. Council Common Position 2008/135/CFSP, adopted on 18 February 2008, extended Common Position 2004/161/CFSP until 20 February 2009. The current Common Position 2009/68/CFSP did not include any amendments or additional measures; the Annex listing the individuals subject to targeted measures was updated (two names were added; the names of two individuals amended; the name of one deceased individual was removed).

4.5 The objective of these restrictive measures is to encourage the persons targeted to reject policies that lead to suppression of human rights, of freedom of expression and of good governance. The measures are to be monitored and modified as necessary according to whether the objectives have been met in the context of political developments in Zimbabwe.

4.6 The unofficial text that became Common Position 2009/68/CFSP was considered by the Committee on 21 January 2009. In her Explanatory Memorandum of 15 January 2009, the then Minister for Europe at the Foreign and Commonwealth Office (Caroline Flint) recalled the “stolen election” in Zimbabwe in March 2008 and the subsequent Government pressure for further targeted restrictive measures to be imposed on Zimbabwe. The then Minister explained that, after a proposed power-sharing deal in late Summer 2008, the EU had refrained from imposing further measures to permit progress to be made between Robert Mugabe and Morgan Tsvangirai; but that little progress had been made, and the social, economic and humanitarian situation in Zimbabwe had deteriorated. The draft Common Position accordingly extended the restrictive measures (arms embargo, asset freeze and travel ban) for a further year and also listed a number of individuals and entities associated with the Zimbabwean regime who had contributed to, or were complicit in, activities that seriously undermined democracy, respect for human rights and the rule of law. For all those listed, it had been considered necessary and proportionate to impose financial and travel restrictions — and where entities had been designated, it had been assessed that the restrictions would have minimal economic impact on ordinary Zimbabweans and could not justifiably be portrayed as “economic sanctions”.

4.7 Although no questions arose, we reported this further extension because of the widespread interest in the House in developments in Zimbabwe, and cleared the document.¹⁴ It was adopted at the General Affairs and External Relations Council on 26/27 January 2009.

¹⁴ See headnote: (39343) —: HC 19–iv (2008–09), chapter 16 (21 January 2009).

The first Council Decision

4.8 The first Council Decision extends in slightly modified form the February 2002 Decision (as subsequently extended annually) that partially suspended European Community (now EU) aid to Zimbabwe in accordance with the application of “appropriate measures” provided for under the Cotonou Agreement “Article 96” process. The EU introduced these “appropriate measures” in response to the serious violations of human rights and political freedoms in Zimbabwe and in particular the Government of Zimbabwe’s attempts to prevent free and fair elections in March 2002.

The Government’s view

4.9 In his Explanatory Memorandum of 28 January 2008, the Minister for Europe at the Foreign and Commonwealth Office (Chris Bryant) explains that the “appropriate measures” include suspending budgetary support and support for projects that would be given directly to the Government of Zimbabwe, as well as suspending signing the 9th and 10th European Development Fund National Indicative Programmes; and that they explicitly do not affect support for humanitarian operations.

4.10 The Minister goes on to say that the measures were last renewed before the formation of a power sharing Inclusive Government in Zimbabwe, underpinned by a General Political Agreement (GPA), in February 2009. He describes the Inclusive Government’s performance as “mixed with good progress on economic reform and very limited political reform.” He sees the extension of slightly modified Article 96 measures as “consistent with HMG’s strategy of maintaining pressure on the hardliners to reform, while supporting the efforts of reformers to secure GPA implementation”, and says that “the EU will make clear that any further EU engagement will be dependent on further reform in Zimbabwe”. He notes that “elements of the Government of Zimbabwe” have continued to violate essential elements cited in Article 9 of the ACP-EC Partnership Agreement, and that the current conditions in Zimbabwe do not ensure respect for human rights, democratic principles and the rule of law. Against this background, “the EU therefore proposes to extend the measures identified”, with a minor modification to enable the EU to support projects to further GPA implementation.

4.11 He also notes that the “appropriate measures” also include suspending Article 12 of Annex 2 of the Cotonou Agreement, concerning current payments and capital movements, to allow the EU to take further restrictive measures, in particular freezing funds, and that these measures are independent of the EU’s targeted sanctions measures (the travel ban, asset freeze and arms embargo) imposed on Zimbabwe.

The second Council Decision

4.12 In his second Explanatory Memorandum of 2 February 2010, the Minister for Europe recalls the general background and that Common Position 2009/68/CFSP extended the list of individuals and entities subject to targeted measures to 203 individuals and 40 entities. He continues as follows:

4.13 The Minister explains that the draft Council Decision extends the targeted measures, with a minor modification, until February 2011:

“It lifts the measures on eight parastatal entities which are supervised by reformers and which no longer finance hardliners. It also technically updates the list to delete: four deceased persons; Oryx, a company which no longer exists; Thamer Al Shanfari, whose listing was linked to Oryx; and Dumiso Dabengwa, who left ZANU-PF to re-establish a separate party not opposed to reform.”

The Government's view

4.14 The Minister says that, in reaching a consensus on extending the measures:

“... the EU balanced the need to signal acknowledgement of the (mostly economic) reform achieved in Zimbabwe since the establishment of an Inclusive Government in February 2009, and to incentivise further progress, with the need to maintain pressure on hardliners.”

4.15 He says that this consensus will:

“... make clear the EU preparedness to calibrate its reengagement with Zimbabwe in response to implementation of the Global Political Agreement (GPA) which underpins the Inclusive Government. In communicating its decision on the targeted measures, the EU will make clear that any further easing of the targeted measures will be only in response to GPA implementation.”

4.16 By way of illustration, the Minister recalls that in January 2009, after the “stolen election” of March 2008 and related violence, the EU expanded the targeted restrictive measures on Zimbabwe, and describes the Government's approach thus:

“An Inclusive Government was established in Zimbabwe in February 2009, underpinned by the Global Political Agreement (GPA) signed by President Robert Mugabe, Prime Minister Morgan Tsvangirai and Deputy Prime Minister Arthur Mutambara. The UK Government supports the Inclusive Government and broadly the implementation of the reform outlined in the GPA. Significant economic reform has been achieved. Political reform has been more limited. To promote the prospects of further reform leading to free and fair elections, HMG's strategy is to support reformers and keep pressure on hardliners. Consistent with this strategy and given the limited GPA implementation to date, a significant easing of the targeted measures would not be appropriate. The proposed 12 month extension of slightly modified targeted measures would support the strategy.”

4.17 The Minister also notes that on 29 January, “the BBC reported that Tsvangirai supported an easing of the EU measures”, upon which he comments as follows:

“Tsvangirai is under considerable ZANU-PF pressure to secure the lifting of targeted measures. This is evidence of the effectiveness of the measures. The EU decided its position on targeted measures based on GPA implementation.”¹⁵

15 See <http://news.bbc.co.uk/1/hi/world/africa/8486814.stm> for the BBC report.

Conclusion

4.18 The BBC also reported that deputy prime minister Arthur Mutambara had also called for an end to sanctions against Zimbabwe and told the BBC that by keeping the sanctions in place, western governments were undermining Prime Minister Tsvangirai.¹⁶

4.19 We mention this not to take issue with the Minister, but rather to note that the situation is no longer as clear cut as once it might have seemed.

4.20 For this reason as well as more generally, we again report these developments to the House, and clear the documents.

5 The Lisbon Strategy

(31244) 5034/10 COM(09) 678	Commission Communication: <i>2nd Implementation Report for the Community Lisbon Programme 2008–2010</i>
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<i>Legal base</i>	—
<i>Document originated</i>	15 December 2009
<i>Deposited in Parliament</i>	11 January 2010
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 26 January 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	Not known
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

5.1 The Lisbon Strategy is the economic reform strategy for the Community. It was launched in 2000, re-launched in 2005 with a sharper focus on growth and jobs and is due to come to an end in 2010. The strategy is largely delivered through Member State level policies, but there is a Community Lisbon Programme designed to complement these policies. At the re-launch in 2005 it was agreed that the Lisbon Strategy should be governed in three-year cycles. The second cycle runs from 2008 — 2010 and in December 2007 the Commission proposed for this cycle a revised Community Lisbon Programme with ten objectives:

¹⁶ See <http://news.bbc.co.uk/1/hi/business/8483051.stm> for the BBC report.

- the Commission to propose a renewed Social Agenda by mid-2008, particularly covering education, migration, and demographic evolutions and to help to address the skills gap by improving the monitoring and forecasting of future skills requirements;
- the Commission to make proposals for a common policy on immigration in 2008;
- the Community to adopt a Small Business Act to unlock the growth potential of SMEs throughout their life-cycle;
- the Community to move towards the target to reduce Community administrative burdens by 25% by 2012 and implement an ambitious simplification programme;
- the Community to strengthen the single market, increase competition in services, take further steps to integrate the financial services market and to strengthen existing supervisory arrangements and enhance Community cross-border financial crisis management;
- the Community to make the “fifth freedom”, the free movement of knowledge, a reality and create a genuine European Research Area;
- the Community to improve the framework conditions for innovation, in particular for venture capital and intellectual property rights;
- the Community to complete the internal market for energy and adopt the climate change package in order to put in place the framework to achieve at least a 20% reduction in greenhouse gas emissions and reach a 20% renewables energy share by 2020;
- the Community to promote an industrial policy geared towards more sustainable production and consumption, focusing on renewable energies and low carbon and resource-efficient products, services and technologies; and
- whilst working to conclude the Doha multilateral trade negotiations, the Community to negotiate bilaterally with key trading partners to open up new opportunities for international trade and investment, improve market access focusing on countries and sectors where significant barriers remain, and promote international regulatory cooperation.¹⁷

5.2 The Spring 2008 European Council invited the Commission, the European Parliament and the Council, within their spheres of competence, to take forward work on the ten objectives identified in the Community Lisbon Programme, whilst taking into account the priorities identified by the Council, in its various formations.¹⁸ Discussion of a successor policy to the Lisbon Strategy is presently underway.¹⁹

17 (29288) 16752/07: see HC 16–ix (2007–08), chapter 18 (23 January 2008) and HC 16–xix (2007–08), chapter 11 (23 April 2008).

18 See http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/99410.pdf.

19 (31210) 16016/09: see HC 5–vi (2009–10), chapter 7 (13 January 2010) and HC 5–vii (2009–10), chapter 12 (20 January 2010).

5.3 The Commission's first progress report on the Community Lisbon Programme was presented in December 2008.²⁰

The document

5.4 This Communication is the second assessment of implementation of the Community Lisbon Programme, for the period up to November 2009. In the document the Commission asserts that, overall, further substantial progress has been made and a number of key milestones have already been achieved, but that there are a number of issues that still need to be addressed as the highest priority. The Commission summarises progress against the ten key objectives and suggests the most important milestones in the second year of the Community Lisbon Programme cycle to be:

- adoption of the renewed Social Agenda that addresses the need to enhance employment opportunities and ensuring solidarity (relevant to the first objective of the programme);²¹
- achieving the first step towards a common migration policy with adoption of the Directive on entry of highly skilled workers, the Blue Card Directive (relevant to the second objective);²²
- endorsement of the Small Business Act and the Commission's action plan by the Council and the European Parliament in December 2008 and substantial progress on implementation by both the Commission and Member States (relevant to the third objective);²³
- further progress by the Commission in implementing its better regulation agenda, notably in the area of the reduction of unnecessary administrative burdens (relevant to the fourth objective);²⁴
- the Commission's proposals aimed at reforming and strengthening the EU financial supervision system (relevant to the fifth objective);²⁵
- entry into force in August 2009 of a legal framework for the creation and operation of research infrastructures of EU interest, adopted in June 2009 (relevant to the sixth objective);²⁶
- adoption of the climate and energy package including a revised Emissions Trading Scheme Directive, a Decision setting targets for Member States for emissions

20 (30305) 17358/08: see HC 19–v (2008–09), chapter 10 (28 January 2009) and HC 19–xi (2008–09), chapter 17 (18 March 2009).

21 (29818) 11517/08 + ADDs 1–3: see HC 16–xxviii (2007–08), chapter 8 (22 July 2008).

22 (30052) 13748/08: see HC 16–xxxv (2007–08), chapter 16 (12 November 2008).

23 (29791) 11262/08 + ADDs 1–2: see HC 16–xxix (2007–08), chapter 8 (10 September 2008).

24 (31052) 15019/09: see HC 19–xxxi (2008–09), chapter 8 (11 November 2009).

25 (30950)-(30957) 13645/09, 13648/09, 13652/09–13654–09, 13656/09–13658/09: see HC 19–xxviii (2008–09), chapter 6 (21 October 2009), HC 19–xxx (2008–09), chapter 2 (4 November 2009) and HC 5–i (2009–2010), chapter 2 (19 November 2009) and *HC Deb*, 1 December 2009, cols. 989–1026.

26 (29896) 12259/08 + ADDs 1–2: see HC 16–xxxiii (2007–08), chapter 3 (29 October 2008), HC 19–ii (2008–09), chapter 5 (17 December 2008) and HC 19–xxi (2008–09), chapter 4 (24 June 2009).

reductions in sectors outside the trading scheme and a Directive on the promotion of renewable energy (relevant to the eighth objective);²⁷ and

- adoption of the Third Package on the Internal Energy Market, which was to supplement existing rules so as to ensure that the internal market operate smoothly for all consumers and to enable the EU to achieve a more secure, competitive, and sustainable energy supply, and substantial progress in implementation of the Community Lisbon Programme aspects of the European Economic Recovery Plan (also relevant to the eighth objective).²⁸

5.5 The Commission also draws attention to a considerable number of policy actions which it believes remain to be further developed or finalised and suggests, in particular, five areas more progress should be made:

- movement on the stalled draft Pension Portability Directive, which it says is essential to facilitate cross-border working (relevant to the first objective);²⁹
- integrating the retail mortgage market and other retail financial markets across the EU (relevant to the fifth objective);
- resolution, following encouraging progress, with political agreement in the Competitiveness Council on the EU Patent and the European and EU Patent Courts, of the outstanding issues such as translation arrangements of the patent, in order to bring about an affordable single EU-wide patent (relevant to the seventh objective);³⁰
- overcoming the regulatory and tax obstacles to cross-border venture capital investments that the Commission says seriously limit the availability of finances for innovation (also relevant to the seventh objective); and
- adoption of a number of the legislative proposals introduced as part of the Small Business Act (relevant to the third objective).

The Government's views

5.6 The Economic Secretary to the Treasury (Ian Pearson) says that the Government welcomes the progress that has been made in implementing the Community Lisbon Programme. Before turning to the five matters the Commission suggests as particularly needing progress, the Minister comments on it highlighting introduction of the Blue Card Directive as an example of an important milestone in the second year of the Community Lisbon Programme. He points out that:

27 (29405) 5421/08 + ADDs 1–2 (29401) 5849/08 + ADD 1 (29402) 5862/08 + ADDs 1–3: see HC 16–xiii (2007–08), chapters 1, 3 and 4 (27 February 2008), *Stg Co Debs*, European Committee, 22 April 2008, cols 3–32 and *HC Deb*, 3 June 2008, cols 687–712.

28 (28932) 13043/07 (28933) 13045/07 (28937) 13212/07 (28938) 13219/07 (28934) 13046/07 (28935) 13048/07 (28936) 13049/07: see HC 16–iv (2007–08), chapters 1 and 2 (28 November 2007) and *Stg Co Debs*, European Standing Committee, 5 February 2008, cols. 3–12 and (30213) 16097/08: see HC 19–i (2008–09), chapter 4 (10 December 2008) and *HC Deb*, 20 January 2009, cols 626–53.

29 (28993) 13857/1/07: see HC 16–i (2007–08), chapter 14 (7 November 2007).

30 (31127) 7928/09: see HC 5–iv (2009–10), chapter 4 (15 December 2009) and http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/111744.pdf.

- the UK has not opted-in to the Directive and therefore any movement rights between Member States obtained by a third country national through it would not apply to the UK;
- the chief factor in the Government’s decision not to opt in to the Directive was its effect on the UK’s policy for labour migration — it would require the UK to grant residence and employment rights to certain “highly qualified” third country nationals living in other Member States, in preference to those arriving from outside the EU; and
- this would conflict with the UK’s points based system, which is designed to match labour migration with the needs of the UK labour market.

5.7 On the proposed areas on which the Commission argues that more progress should be made the Minister says that:

- the draft Pension Portability Directive is intended to facilitate the free movement of workers, with aims of setting minimum standards for access to supplementary pension rights, ensuring that pension rights left in pension schemes are treated fairly and retain their value over time and allowing scheme members access to the information necessary to make an informed decision about changing employment;
- in this sense it builds on the Supplementary Pensions Directive, 98/49/EC) and was proposed on 30th October 2005 by the UK Presidency;
- successive Employment and Social Affairs Councils, in May 2007 and December 2007, failed, however, to reach an agreement;
- it was removed from the agenda for the Employment and Social Affairs Council in June 2008, when it became clear that no agreement could be reached, and no new proposals have been brought forward since;
- the Government expects, however, portability to form part of a wider piece of work on pensions which the Commission is expected to produce this year;
- it is not clear from the Commission Communication what further progress the Commission argues needs to be made on integrating the retail mortgage market and other retail financial markets across the EU — there is no specific mention in the document;
- the Government supports, overall, the drive for a strong, competitive, and integrated single market, including in financial services;
- the proposed supervisory package will fundamentally improve the quality of supervision, ensure more effective rulemaking and enforcement, and better identify risks in the financial system;
- the Government supports creation of the new European Supervisory Authorities and giving them a strong rulemaking role, a role in enforcing rules, a role in peer review to ensure high standards and the ability to settle disagreements between supervisors — such moves will improve the quality of supervision in the EU and

are supported by the City and in particular cross-border institutions operating from London;

- the Capital Requirements Directive will ensure a more robust system, with banks holding more and better quality capital, but the Government will seek to ensure that, where applicable, the Directive stays faithful to decisions made by the Basel Committee and that it is fully informed by cost benefit analysis;
- Solvency II will strengthen the Single Market in insurance, encourage best practice in risk management across the sector and introduce strong and risk sensitive capital requirements, however the Government has some concerns with regard to potential implementation measures and is working to resolve them;
- the Government supports improved EU crisis management arrangements, including ensuring that all Member States have access to a minimum set of resolution tools — recovery and resolution plans should play a key role in this area;³¹
- the Competitiveness Council agreement on EU patent regulation is a significant step forward in the long-running issue of patent reform — a EU patent would offer significant cost savings and greater choice for business when protecting their ideas;
- an effective EU patent system is crucial if innovative companies are to succeed in bringing new products to market quickly, generating jobs, growth and competitiveness in the single market;
- inability to agree on the languages of the EU patent has been a longstanding barrier to overall agreement — the Government expects the Commission to bring out a language proposal before the May 2010 Competitiveness Council and supports a cost-effective language solution that minimises expensive translations;
- negotiations on a European Patent Court are frozen pending the decision of the European Court of Justice on the compatibility of the agreement with the Treaties — the Government would support the opinion being issued during 2010 and, if so, these important negotiations would continue later in 2010;
- the Government is supportive of efforts to improve cross-border venture capital investment and is taking steps to expand the international coverage of its tax incentives for investment in small companies, supporting investments across the EU;

31 HC 19–xxviii (2008–09), chapter 6 (21 October 2009), HC 19–xxx (2008–09), chapter 2 (4 November 2009), HC 5–i (2009–10), chapter 2 (19 November 2009) and *HC Deb*, 1 December 2009, cols 989–1030, (30802) 12093/09 + ADDs 1–2: see HC 19–xxvi (2008–09), chapter 8 (10 September 2009), HC 19–xxvii (2008–09), chapter 8 (14 October 2009) and HC 5–ii (2009–10), chapter 13 (25 November 2009), (30966) 13688/09 + ADDs 1–2: see HC 19–xxix (2008–09), chapter 3 (28 October 2009) and HC 5–i (2009–10), chapter 20 (19 November 2009) and (29503) 6996/08: see HC 16–xxi (2007–08), chapter 6 (14 May 2008), HC 16–xxiv (2007–08), chapter 1 (18 June 2008), HC 16–xxvii (2007–08), chapter 18 (16 July 2008), HC 16–xxxv (2007–08), chapter 1 (12 November 2008) and *Stg Co Debs*, European Committee B, 14 July 2008, cols 3–18.

- at present, however, it remains unclear what tax obstacles the Commission has identified — the Government therefore awaits the report from the Venture Capital Group;³²
- if there are significant tax obstacles the Government will work with its EU partners to endeavour to find ways of removing these in ways that do not risk the sustainability of Member States' tax bases;
- there are no policy implications arising from the Communication in relation to the Small Business Act — the Government supports the Act, including the emphasis in the Commission's action plan on access to finance, the regulatory environment and access to markets;
- the Government was highly influential in the Small Business Act negotiation, securing an agreement that aligns closely with its policy and priorities;
- the Commission has published a report on Small Business Act implementation;³³ and
- in this Communication the Commission focuses on legislative proposals related to the Small Business Act, highlighting that some are yet to be adopted — the European Private Company Statute,³⁴ an amendment to the Late Payments Directive³⁵ and a Directive on VAT invoicing.³⁶

Conclusion

5.8 Whilst clearing this document we draw it to the attention of the House as it will be relevant to development of the Lisbon Strategy's successor policy.

32 The Venture Capital Group is an advisory committee of Member State experts convened and chaired by the Commission to consider such tax obstacles.

33 See (31252) 5076/10 in chapter 2 of this report.

34 (29790) 11252/08 + ADDs 1–3: see HC 16–xxx (2007–08), chapter 10 (8 October 2008).

35 (30554) 8969/09 + ADDs 1–2: see HC 19–xviii (2008–09), chapter 4 (3 June 2009) and HC 5–iv (2009–10), chapter 8 (15 December 2009).

36 (30406) 5985/09: see HC 19–ix (2008–09), chapter 4 (4 March 2009).

6 Transfer of passenger name records concerning flights from the EU to Australia

(31229) 17686/09 COM(09) 701	Draft Council Decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of EU-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service
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<i>Legal base</i>	Articles 82(1)(d), 87(2)(a) and 218(6)(a) TFEU; QMV; consent
<i>Document originated</i>	17 December 2009
<i>Deposited in Parliament</i>	6 January 2010
<i>Department</i>	Home Office
<i>Basis of consideration</i>	EM of 20 January 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	No date set
<i>Committee's assessment</i>	Legally important
<i>Committee's decision</i>	Cleared; further information requested

Background

6.1 The Agreement was signed by the EU and Australia on 30 June 2008 and has been applied provisionally from that date. This proposal for a Council Decision seeks to conclude the Agreement.

6.2 The Council Decision to sign the Agreement³⁷ was not deposited for scrutiny. The reasons for this were outlined in the letter of the Parliamentary Under-Secretary of State at the Home Office (Meg Hillier) to Lord Roper dated 29 January 2009: policy officials believed that there was an exception in putting third country agreements forward for scrutiny. The Minister's letter accepted the assertion that the Council Decision authorising signature of the Agreement should have been deposited for scrutiny, and apologised that it was not deposited.

6.3 The proposal was published by the Commission on 17 December. The UK has three months from the date of its presentation to the Council to decide whether to opt in. Under the new procedures set out in Article 218 of the Treaty on the Functioning of the European Union (TFEU), the Council must obtain the consent of the European Parliament before the Agreement can be concluded.

The Document

6.4 This short Agreement lays down rules governing the transfer of passenger name records (PNR) data held by air carriers in the EU to the Australian Customs Service on flights from the EU to Australia.

6.5 Under the terms of the Agreement the Australian Customs Service will process PNR data provided by EU carriers for flights 72 hours in advance of the flight. It is to be processed “strictly” for the purpose of:

- i. terrorism and related crimes;
- ii. serious crimes, including organised crime, that are transnational in nature; and
- iii. flight from warrants or custody for these crimes.

6.6 EU-sourced PNR may also be processed on a case-by-case under Australian law where it is necessary for protection of the vital interests of the data subject or other persons, in particular as regards the risk of death or serious injury to the data subjects or others, or because of a significant public health risk.

6.7 In order to comply with data protection laws the Australian authorities are obliged to provide a system, accessible by individuals regardless of their nationality or country of residence, for seeking access to, and correction of, their own personal information. They are also required to process EU-sourced PNR data received and treat individuals concerned by such processing “strictly in accordance with the data-protection standards set out in this Agreement and applicable Australian laws, without discrimination, in particular on the basis of nationality or country of residence”. The period of retention for PNR data is three-and-a-half years after receipt, after which it can be archived for a further two years.

6.8 In addition, the Australian Customs Service are obliged to make publicly available, including to members of the travelling public, information regarding the processing of PNR data, including general information regarding the authority under which the data will be collected, the purpose of the data’s collection, the protection that will be afforded to the data, the manner and extent to which the data may be disclosed, the procedures available for redress and contact information for persons with questions or concerns.

6.9 As an ultimate safeguard, authorities in EU Member States may exercise existing powers to suspend data flows to the Australian Customs Service in order to protect individuals with regard to the processing of their personal data where:

- i. there is a substantial likelihood that the standards of protection set out in this Agreement are being infringed;
- ii. there are reasonable grounds for believing that the Australian Customs Service is not taking or will not take adequate and timely steps to settle the case at issue; and
- iii. the continuing transfer would create an imminent risk of grave harm to data subjects.

The Minister's Explanatory Memorandum

6.10 The Parliamentary Under-Secretary of State at the Home Office (Meg Hillier) deposited an Explanatory Memorandum in Parliament on 20 January.

6.11 In overview, the Minister explains that the Government welcomes the proposal to conclude the Agreement with Australia on the processing of PNR data. She says that the UK, in common with other EU Member States, views Australia as a key partner. A clear EU-Australia PNR agreement will play a vital role in removing legal uncertainty for air carriers flying to Australia and will help ensure that, where appropriate, PNR information can be shared quickly and securely with all necessary data protection safeguards in place.

6.12 That said, the terms of the Agreement are not consistent with what the UK would want under an EU PNR proposal (for flights into the EU); the UK would like to have the ability to collect and process PNR data for a range of purposes broader than terrorism and serious crime (for example immigration offences). Council Conclusions agreed at the time of the EU-Australia negotiating mandate explicitly stated that the EU-Australia Agreement did not set a precedent for EU PNR discussions. However, the Minister reports that it has subsequently become clear during EU PNR negotiations that most Member States are hostile to the use of PNR for purposes other than the prevention of terrorism and serious crime. The UK Government is willing to abide by the terms laid down in the scope of this Agreement, as it values the legal protection on PNR data transfer that this Agreement provides, but will continue to lobby for a broader scope during EU PNR negotiations.

6.13 In terms of the impact of the Agreement on national law, the Minister states that:

- the UK has the ability to obtain passenger, crew and service data from carriers in advance of all movements into and out of the UK under the Immigration Act 1971, the Immigration, Asylum and Nationality Act 2006 and the powers of the HMRC Commissioners' Directions under the Customs and Excise Management Act 1979. Section 36 of the Immigration, Asylum and Nationality Act 2006 also creates a duty for the UK Border Agency, the police and HM Revenue and Customs to share that data among themselves where it is likely to be of use for immigration, customs, or police purposes;
- the Immigration and Police (Passenger, Crew and Service Information) Order 2008 (SI 2008/5) specifies the travel-related data that an immigration officer or a police officer can require from ships, aircraft and trains, entering and leaving the United Kingdom. The data are divided into:
 - a) mandatory data which includes Advance Passenger Information (API) which must be collected and supplied when requested, and;
 - b) additional data which includes PNR and must be supplied only to the extent to which the carrier knows the data.

This Agreement does not therefore have an impact on UK law.

6.14 Concerning fundamental rights, the Minister acknowledges that the Agreement provides for the processing and transfer of personal data and therefore engages Article 8 of

the European Convention on Human Rights (right to respect for private and family life). However, any interference with Article 8 rights would be justified under Article 8(2) of the Convention because the Agreement:

- restricts the purposes for which data can be processed to purposes included within Article 8(2) (the prevention of and combating of terrorist offences, serious crime and flight from warrants or custody for such crimes);
- makes express provision for data security in Article 7;
- has been entered into with regard to Article 6(2) of the Treaty on European Union on respect for fundamental rights, and in particular to the fundamental rights to privacy and the protection of personal data; and
- only permits onward data transmission to a third country on a case-by-case basis, and for the purposes of preventing and combating terrorism or serious crime. The data must also not be transmitted further without the permission of the Australian Customs Service.

6.15 The Minister is confident that this is a proper area for Europe-wide action. The legislation will establish the legal principles for processing and transfer of PNR data from the European Union to Australia, and encourage collaboration on the development of PNR systems in individual Member States. It does not therefore infringe the principle of subsidiarity.

6.16 Data protection was a key issue during negotiations. The data protection regime which will apply to PNR data transferred to Australia under the Agreement is considered to be comparable to EU standards i.e. the data protection rules are considered to be “adequate” by the EU.

6.17 On whether the UK will opt-in or not, the Minister states that if the UK opted into this Decision, it would not thereafter be able to conclude any PNR agreement with Australia which would conflict with the terms of the EU-Australia Agreement. The UK is satisfied that this will not have an adverse effect on future relations with Australia.

Conclusion

6.18 **We are concerned by the timing of the deposit of the Minister’s Explanatory Memorandum. The proposal was published by the Commission on 17 December 2009 and yet the Explanatory Memorandum was deposited only on 20 January 2010. This delay contravenes the undertaking in Baroness Ashton’s statement on JHA opt-ins that the Government will place an Explanatory Memorandum before Parliament “as swiftly as possible following publication of the proposal and no later than ten working days after the publication of the proposal”. It leaves us with four weeks, rather than the agreed eight weeks, for scrutiny of the opt-in decision. We ask the Minister for an explanation of the delay and an undertaking that it will not be repeated.**

6.19 **In terms of substance we note that the Agreement will assist with the prevention of international terrorism and serious crime, and that it complies with fundamental rights, particularly in respect to data protection; that it does not apply to sensitive**

personal data; and that it has relatively short retention periods for PNR data. We also note that the Agreement has been provisionally applied since its signature by the EU and Australia in June 2008, so any comments the Committee might have would have little if any impact on its contents at this late stage.

6.20 Accordingly we clear the draft Council Decision to conclude the Agreement from scrutiny but look forward to an early explanation from the Minister on the delay in deposit.

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

Department for Business, Innovation and Skills

(31272)
17798/09
COM(09) 697

Draft Council Regulation imposing a definitive anti-dumping duty on imports of ethanalamines originating in the United States of America.

(31286)
17775/09
COM(09) 677

Draft Council Regulation amending Regulation (EC) No. 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, inter alia, in the People's Republic of China.

Department for Environment, Food and Rural Affairs

(31235)
17787/09
+ ADD 1
COM(09) 696

Second Commission Annual Report on implementation of the European Fisheries Fund (2008).

(31236)
17812/09
+ ADD1
COM(09) 693

Commission Report on the State of Implementation of Integrated Product Policy.

Foreign and Commonwealth Office

(31281)
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Council Decision amending Common Position 2009/138/CFSP concerning restrictive measures against Somalia.

(31282)
—
—

Council Decision concerning restrictive measures against Eritrea.

(31283)
—
—

Council Decision amending Common Position 2008/109/CFSP concerning restrictive measures imposed against Liberia.

Home Office

(31247)
5200/10
COM(09) 669

Commission Report on the implementation of Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

Department for Transport

(31254)
5215/10
+ ADD 1
COM(09) 710

Commission Report on the application of Regulation (EC) No. 2111/2005 regarding the establishment of a Community list of air carriers subject to an operating ban within the Community and informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC.

HM Treasury

(31225)
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European Financial Integration Report 2009.

(31285)
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Fourth Quarterly Report of transfers of appropriations within the general budget for the financial year 2009

Formal minutes

Wednesday 3 February 2010

Members present:

Michael Connarty, in the Chair

Mr David S Borrow

Mr William Cash

Jim Dobbin

Mr David Heathcoat-Amory

Keith Hill

Angus Robertson

Mr Anthony Steen

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 7 read and agreed to.

Resolved, That the Report be the Tenth Report of the Committee to the House.

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

[Adjourned till Tuesday 9 February at 10.30 am.]

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*)