



House of Commons

European Scrutiny Committee

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# Seventh Report of Session 2009–10

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Documents considered by the Committee on 13 January 2010,  
including the following recommendation for debate:

Financial management

Financial services





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Financial services

*Report, together with formal minutes*

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# 1 Financial management

(31226) 17588/09 + ADD 1 COM(09) 682	Commission Report on the follow-up to 2007 Discharge Decisions (Summary): Council Recommendations submitted pursuant to Article 276 of the EC Treaty, Article 180b of the EURATOM Treaty, Article 147 of the Financial Regulation for the general budget and Article 119(5) of the EDF Financial Regulation
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<i>Legal base</i>	—
<i>Document originated</i>	10 December 2009
<i>Deposited in Parliament</i>	17 December 2009
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 6 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>	For debate in European Committee B, together with the Commission's 2008 report on the fight against fraud, the European Court of Auditors' Annual Report for 2008 and other relevant documents

## Background

1.1 Each annual audit of the EU's general and other budgets by the European Court of Auditors is concluded by a discharge given to the Commission by the European Parliament on the recommendation of the Council. But the Commission is required to act on and report back on any observations made by the European Parliament in the discharge decisions and any comments accompanying the Council's recommendation. Any results from action on, and follow-up to, observations comments and recommendations feed into subsequent annual audits.

## The document

1.2 This document is a summary report from the Commission about its follow-up to the Council's discharge recommendations in relation to the 2007 budget. The summary is in four parts dealing with recommendations on:

- the General Budget;
- European Court of Auditors' special reports;
- the European Development Funds; and
- requests concerning individual agencies.

The summary cross-references to the Commission's annexed staff working document which gives a much more detailed account of the Commission's responses to the Council's comments.

1.3 In introducing its responses the Commission:

- states that, in response to the 90 requests made by the Council, it agrees to take the action asked for in 46 cases;
- asserts that action has already been taken in 44 cases, although in some instances the results of the actions need to be analysed;
- agrees that simplification will be key to reducing error rates in implementation of EU policies, although some complexity is inevitable, given that rules are the result of complicated legislative procedures and are fixed in line with policy objectives;
- says that it has made improvements to the legal bases for 2007–2013 programmes bases, has introduced some simplification for Structural Funds and is engaging in ongoing simplification efforts in the agriculture area;
- notes that the effect of simplified eligibility rules on error rates will only become apparent in the medium- to long-term;
- says that it is working to identify possible further steps towards simplification in the context of the triennial review of the Financial Regulation and will look at principles for greater simplification of the sectoral legislation for the next round of basic acts (those in force from 2014); and
- comments that simplified and well-implemented eligibility rules would reduce the underlying transactions' vulnerability to error and would thus enable less extensive and costly controls to be performed on them.

1.4 In the summary the Commission says, in relation to the Statement of Assurance, that:

- it will take due account of the European Court of Auditors' recommendations on the accounts;
- a new IT system operative from 2008 will improve the reliability of information on financial recoveries; and
- it has increased its action to ensure reliable information from Member States on financial corrections and recoveries in funds under shared management, working under the Structural Funds action plan.

1.5 On its internal control the Commission says that:

- its Communication *Impact report on the Commission action plan towards an integrated internal control framework*, adopted in early 2009, detailed that 13 of the

16 original actions had been completed by the end of 2008 and three actions either could not be completed or were progressed by other means;<sup>1</sup>

- it took steps to implement in its services' 2008 annual activity report commitments made in the 2007 Synthesis Report<sup>2</sup> to improve its assessment of supervisory and control systems;
- it will continue to work with Member States to improve the annual summaries provided by the latter on funds under shared management;
- all Member States complied with the legal requirements for these summaries in 2008, with seven adding an additional statement of assurance;
- it considers that these and other elements add value and has revised its guidance note on the summaries to stress the incentives for doing so;
- it will continue its work on the concept of a tolerable risk of error, assessing that this will provide clarity on the cost effectiveness of the overall control system;
- the work required and its timing will vary between policy areas and therefore it plans to provide analysis on a tolerable risk of error for the different areas in steps to the end of 2012; and
- it will make proposals in the areas of research, energy and transport and rural development in the first half of this year with proposals on external aid, development and enlargement and administrative expenditure in the second half.

1.6 On budgetary management the Commission outlines ongoing efforts towards realistic and adequate budgeting of resources, including through analysis of Member States' expenditure forecasts and says that it has improved its reporting on implementation of Community programmes and presented fuller and more reliable figures in the 2008 accounts. On revenue it says that newly-introduced management visits, which are ongoing, have resulted in the lifting of several longstanding reservations connected to VAT own resources.

1.7 The Commission then turns to the areas of expenditure, saying first, of agriculture and natural resources, that:

- for the post-2007 period the management and control system for rural development has been aligned to the European Agricultural Guarantee Fund system for the first pillar of the Common Agricultural Policy;
- weaknesses in Member States' management and control systems make recovery of irregular payments difficult in some cases; and
- the financial corrections imposed on Member States through the conformity clearance mechanism provides an incentive to improve these systems.

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1 (30423) 6145/09: see HC 19–ix (2008–09), chapter 13 (4 March 2009).

2 (29752) 10696/08: see HC 16–xxvii (2007–08), chapter 26 (16 July 2008).

1.8 On cohesion policy expenditure the Commission says that:

- for the closure of the 2000–2006 programmes it is focusing on removing irregular expenditure through financial corrections and on ensuring that the residual risk of such expenditure in closed programmes is low;
- to prevent errors in future it is completing its compliance assessment for new programmes in the 2007–2013 period, providing guidance and training, and simplifying operating conditions — this includes the use of flat rates and lump sums in some cases and simplifications to speed up disbursement of Cohesion Funds in the light of the financial crisis;
- the volume of financial corrections in 2008 has increased substantially from 2007, as has the number of decisions on payment suspension; and
- this reflects action taken by the Commission under the action plan to strengthen its supervisory role in this area.

1.9 In relation to research, energy and transport the Commission says that:

- it has introduced a control and audit strategy to improve the legality and regularity of expenditure under the research Framework Programmes each year;
- it has taken steps to simplify the seventh Framework Programme, including introducing a “participants guarantee fund”, reducing the certification required and working towards a full electronic system for the whole process of proposal and grant management; and
- deeper simplifications are required and support will therefore be needed to modify the legislative bases for the preparation of the eighth Framework Programme.

1.10 On external aid, development and enlargement expenditure the Commission says that:

- it is taking steps to support implementing organisations and beneficiaries of EU external aid projects in the management of Union funds, including through development of a financial management toolkit;
- it is working with the UN to improve verification systems;
- standard terms of reference for financial and systems audits were made available from 1 October 2007, which should help towards improving the quality of audits;
- guidelines for budget support are being revised to promote a more rigorous, results-oriented approach;
- in the enlargement area national authorities have implemented the required segregation of functions and staffing levels have increased;
- it prioritises constant monitoring and further follow-up in this area; but

- some delays in the follow-up of closure audits are inevitable due to complexity and the need for accuracy.

1.11 In relation to education and citizenship the Commission says that previous recommendations for simplification have been taken into account in the design of the 2007–2013 programmes, all national authorities have provided the required *ex ante* and *ex post* declarations of assurance, it issued more precise guidelines for the annual declarations, it has held specific meetings with national authorities and steps have been taken to improve the sharing of audit results and *ex ante* control for communication expenditure. On economic and financial affairs expenditure the Commission says that as most conclusions from the European Court of Auditors in this area concern the research Framework Programmes, action taken is covered under the research heading of the report.

1.12 Finally, on expenditure, the Commission turns to administrative and other outlays, outlining the information it provides annually to the Council on pension expenditure, building needs and agencies' budgets, its assistance to decentralised agencies and its engagement in the evaluation of EU decentralised agencies, due to report by the end of 2009.

1.13 On the Council requests in relation to the European Development Funds the Commission says that:

- an independent study showed its assumptions on estimates of invoices to be mostly correct;
- it will implement recommendations made for a different approach in some cases for 2009; and
- in future it will provide more detail on budget support issues in future annual reports on the “European Community’s development and external assistance policies and their implementation”.

1.14 In the summary the Commission notes that the accompanying staff working document details its responses to the Council’s requests in relation to European Court of Auditors special reports on capacity development, conservation of fisheries resources, the research and technological development Framework Programmes, major investment projects, binding tariff information, the EU Solidarity Fund, milk quotas in new Member States, EU agencies and rehabilitation aid following the tsunami and Hurricane Mitch and in relation to individual agencies concerning the handover of activities to the Commission from the European Agency for Reconstruction and the GNSS Supervisory Authority.

## The Government’s view

1.15 The Economic Secretary to the Treasury (Ian Pearson) says:

“This report provides a useful summary of action taken by the Commission in response to the recommendations of the Council on discharge of the 2007 EC Budget. These actions should lead to improvement in the management of the budget. Nevertheless, considerable further effort is required by all concerned, notably the Commission and member states, to continue in their efforts to improve financial

management if the European Court of Auditors is to provide a positive Statement of Assurance on the EC budget.

“Looking forward, the Government will continue to engage actively with the Commission to encourage further progress in areas such as effective simplification, and in evaluating the results of those measures taken so far. In the area of tolerable risk, the Government will consider any future Commission proposals in line with the approach set out in [the Government’s Explanatory Memorandum of 9 February 2009 on the Commission Communication *Towards a common understanding of the concept of tolerable risk of error*.<sup>3</sup>

“The Commission considers action at Member State level to be central to improving the level of assurance on EU expenditure. HM Treasury published the second Consolidated Statement, and accompanying NAO Audit Opinion, on the use of EU funds in the UK, in October 2009.<sup>4</sup> The Government will continue to work closely with others to encourage other Member States to undertake similar initiatives.”

## Conclusion

**1.16 This document usefully summarises Commission attempts to improve management of the Community’s finances. As such we recommend that it should be debated together with the Commission’s 2008 report on the fight against fraud, the 2008 report of the European Court of Auditors and other relevant documents, which we have already recommended for debate in European Committee.<sup>5</sup>**

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3 (30320) 17592/08 + ADD 1: see HC 19–viii (2008–09), chapter 8 (25 February 2009) and HC 19–xxvii (2008–09), chapter 33 (14 October 2009).

4 See [http://www.hm-treasury.gov.uk/d/statement\\_eufunds151009.pdf](http://www.hm-treasury.gov.uk/d/statement_eufunds151009.pdf).

5 (30811) 12139/09 + ADDs 1–2 (30819) — (30864) 12668/09 + ADD 1: see HC 19–xxvii (2008–09), chapter 2 (14 October 2009), (31051) 14998/09 + ADD 1: see HC 5–iii (2009–10), chapter 2 (9 December 2009), (31188) —: see HC 5–iv (2009–10), chapter 1 (15 December 2009) and (31201) —: see HC 5–iv (2009–10), chapter 2 (15 December 2009).

## 2 Financial services

(a) (30624) 9494/09 + ADDs 1–2 COM(09) 207	Draft Directive on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC
(b) (31089) 15162/09 —	European Central Bank Opinion on a Draft Directive on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC

<i>Legal base</i>	(a) Article 47(2) EC; co-decision; QMV (b) —
<i>Deposited in Parliament</i>	(b) 6 November 2009
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	(a) Minister’s letter of 17 December 2009 (b) EM of 18 November 2009
<i>Previous Committee Report</i>	(a) HC 19–xviii (2008–09), chapter 9 (3 June 2009) and HC 19–xxii (2008–09), chapter 3 (1 July 2009) (b) None
<i>To be discussed in Council</i>	Not known
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Both documents for debate in European Committee B

### Background

2.1 In its Communication *Driving European Recovery* the Commission said “To deliver responsible and reliable financial markets for the future, the Commission will propose an ambitious new reform programme, with five key objectives.” The second objective was “To fill gaps where European or national regulation is insufficient or incomplete, based on a ‘safety first’ approach.” Amongst the proposals in this connection that the Commission said it would make was “A comprehensive legislative instrument establishing regulatory and supervisory standards for hedge funds, private equity and other systemically important market players.”<sup>6</sup>

2.2 In document (a) the Commission has proposed an Alternative Investment Fund Managers Directive which would harmonise Community regulation of managers of hedge funds, private equity funds and any other form of investment fund, apart from pension funds and the already harmonised UCITS (Undertakings for Collective Investments in Transferable Securities) funds (as in the recast UCITS Directive of July 2009).<sup>7</sup> The

6 (30474) 7084/09 + ADD 1: see HC 19–xii (2008–09), chapter 1 (25 March 2009) and *Stg Co Debs* European Committee, 29 June 2009, cols 3–23..

7 (29873) 12149/08 + ADDs 1–2: see HC 16–xxxii (2007–08), chapter 4 (22 October 2008), HC 16–xxxv (2007–08), chapter 1 (12 November 2008) and *Stg Co Deb*, European Committee, 25 November 2008, cols. 3–24.

Commission presented the draft Directive as part of a programme to extend appropriate regulation and oversight to all actors and activities that embed significant risks and noted calls for closer regulatory engagement in the sector from the European Parliament<sup>8</sup> and in the de Larosière Report.<sup>9</sup>

2.3 When we first considered this document, in June 2009, we heard that the Government supported the principle of harmonising regulation of Alternative Investment Fund Managers across the Community, but that it planned to seek important improvements to the draft Directive to ensure that it avoided imposing unnecessary burdens on the industry, while at the same time delivering the necessary improvement in regulatory standards. We noted particularly that:

- on non-Community firms and funds, the Government planned to argue for a more open approach to funds, managers and service providers from outside the Community;
- on private equity disclosure, the UK private equity industry had already taken voluntary action in this area through the Walker guidelines<sup>10</sup> — the Government believed stakeholders were broadly content with the level of disclosure provided by these guidelines and therefore intended to oppose the imposition of new regulatory requirements which could, in any case, only apply to Community-managed private equity funds and not to other forms of private ownership, for example non-Community private equity funds or family ownership;
- on greater supervisory discretion, the Government agreed that greater oversight of the potential systemic risks posed by Alternative Investment Fund Managers was necessary — it believed, however, that to do this effectively supervisors would have to exercise judgement over which data to collect and the Government intended to argue for this approach to be permitted under the Directive;
- the Government was establishing a number of stakeholder groups to give affected firms an opportunity to share views on the draft Directive, Council working group discussion of which was likely to continue at least until the end of 2009, and to gain a more developed understanding of the cost impacts of the proposal;
- the Commission impact assessment did not include a specific estimate of administrative costs — it argued that they would depend on existing national legislation — and the Government would seek further information on the likely impacts on affected sectors from UK firms.

2.4 We said that the draft Directive clearly could have a significant effect on Alternative Investment Fund Managers and that it was likely that in due course we would wish to

8 See <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0425&language=EN&ring=A6-2008-0338> and <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0426&language=EN&ring=A6-2008-0296>.

9 See [http://ec.europa.eu/commission\\_barroso/president/pdf/statement\\_20090225\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf), seventh recommendation, page 25.

10 The Walker Guidelines set standards for public disclosure by private equity portfolio companies — see [www.walker-gmg.co.uk](http://www.walker-gmg.co.uk).

recommend it for debate. But before considering that possibility further we asked to hear about:

- the outcome of the Government's consultations on the matter, including information on possible impacts; and
- progress in negotiations on the Government's aspirations in relation to non-Community firms and funds, private equity disclosure and greater supervisory discretion.

2.5 When we considered the matter again, in July 2009, we heard about both the Government's discussions with affected firms and progress in negotiations in relation to non-Community firms and funds, private equity disclosure and greater supervisory discretion. On the Government's consultative discussions we were told that:

- there had been group meetings at official level with managers of hedge funds, private equity funds and traditional or long-only funds,<sup>11</sup> involving around one hundred firms and trade bodies in total, and a number of ministerial meetings with senior industry representatives;
- the Government had drawn the conclusion from these discussions that the proposed Directive would impose significant new burdens and constraints on affected firms if implemented as drafted;
- some of these were justified by the additional regulatory protections they would offer, particularly the provision for enhanced data collection from managers to monitor systemic risk;
- many affected managers had indicated their support for such provisions;
- other proposals, however, appeared to impose unnecessary burdens;
- hedge fund managers were concerned at the proposal to impose leverage caps on the funds they managed, arguing that this could force them to liquidate assets at times of market stress, since leverage generally rises following a fall in the value of a fund's assets;
- they also argued that leverage was not a good proxy for risk, since this depended to a considerable extent on the volatility and structure of a fund's assets;
- the Government agreed with the Commission that excessive leverage in hedge funds and other vehicles could contribute to systemic risk — it believed, however, that the best way to deal with this risk was for supervisors to monitor leverage across significant market sectors and to intervene in exceptional circumstances where necessary, to prevent unsustainable degrees of leverage developing on an aggregate basis;

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<sup>11</sup> A long-only fund is not allowed to take short positions, that is bet on the price of investments falling. Because short selling is used much more widely in newer fund management styles, for example, hedge funds, long-only is also used partly as a descriptor of the traditional fund management industry (unit trust managers, etc).

- leverage caps which were set on a fund-by-fund basis risked being counterproductive in this process since the Government would expect any systemic risks to stem from the combined behaviour and leverage of a number of funds rather than any one fund on its own;
- for private equity firms the proposals for stringent disclosure requirements on portfolio companies were a major concern — managers argued that this would put the firms in which their funds had invested at a competitive disadvantage to competitors held in other forms of private ownership, for example family ownership;
- the Government agreed with the concern expressed and was pushing in negotiations for substantial rewriting of the relevant aspects of the draft Directive;
- for traditional or long-only managers the requirement for the fund's assets to be valued by an external valuer would pose significant difficulties and differed from the model prescribed in the UCITS Directive;
- the Government would argue for a more proportionate approach in this area, emphasising that an internal valuation subject to appropriate external oversight and audit could deliver the necessary checks and balances;
- for closed ended funds (those which do not create or redeem shares on demand) there were a number of significant practical issues stemming from the fact that the Directive seemed to have been drafted mainly with the open ended sector in mind — for example, liquidity requirements on the fund or controls on marketing of shares in the fund by the manager were not generally relevant to this sector; and
- the Government believed that as far as possible existing Community rules, including the Prospectus Directive and the Transparency Directive, should continue to govern this sector and would push for this approach.

2.6 On progress in negotiations we heard that so far there had been two meetings of the Council working group and it had considered only the early articles of the Directive, so it was difficult to have a complete overview. Nevertheless we were told that:

- based on those meetings and bilateral discussions with other Member States, the Government believed that there was widespread acceptance that the Commission's proposal was technically deficient in a number of areas and that the Council should work pragmatically to develop appropriate remedies; and
- the Government therefore believed it likely that the negotiations would deliver significant improvements in the quality of the draft Directive and reductions in unjustified cost impacts.

2.7 We noted the Government's optimism about the likelihood of obtaining significant improvements to the drafting of the proposal in the continuing negotiations. And we said that we were now clear that we wished to recommend this document for debate. But before doing so we asked to hear again about the continuing working group negotiations,

particularly as to progress on obtaining more certainty on the significant improvements in the drafting, of which the Government was hopeful.<sup>12</sup>

### The new document

2.8 In June 2009, as part of its consideration of the draft Directive, the Council asked the European Central Bank for an Opinion on the Commission's proposal — document (b) is the Bank's response. In the Opinion the Bank says that it:

- supports the intention to provide a harmonised regulatory and supervisory framework for the activities of Alternative Investment Fund Managers in the EU;
- considers the proposed reporting obligations on Alternative Investment Fund Managers to their supervisors should, in principle, contribute to improved financial stability monitoring and a better-informed assessment of the financial stability risks posed by Alternative Investment Fund Managers and the funds they manage;
- considers that the harmonised rules and resulting passporting for Alternative Investment Fund Managers to sell their funds across the EU should benefit financial integration;
- urges the Commission to continue dialogue with international partners, particularly the US, to ensure a globally coherent regulatory framework and to avoid risks of regulatory arbitrage and evasion;
- considers that the provisions of the proposed Directive could be better tailored to reflect the fundamental differences between alternative investment funds;
- suggests the need to include other provisions in the Directive, for example, 'fit and proper' criteria and minimum experience requirements for senior Alternative Investment Fund Managers, to maintain the EU financial *acquis* and so avoid regulatory arbitrage between Alternative Investment Fund Managers, insurance companies and credit insurance companies;
- considers that provisions that have a horizontal impact, for example, short selling or acquisition of controlling influence on companies, should be dealt with separately in legislation that maintains the level playing field and not through this proposal;
- welcomes the reporting obligations on Alternative Investment Fund Managers and the mechanisms for exchange of information between supervisory authorities;
- considers, however, that more analysis is needed to focus reporting obligations on data relevant for monitoring financial stability;

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12 See headnote.

- considers that the proposed European Systemic Risk Board and the European Supervisory Authorities should be able to obtain the information necessary to fulfil their respective tasks;
- suggests that the use of standardised reporting would minimise the reporting burden of alternative investment funds;
- comments that should include reporting on a fund's balance sheet, income statements, cash flow statement and projections (including primary sources of funding, list of prime brokers and contingency liquidity arrangements in different scenarios), investor redemptions restrictions, assets held using a mark to model valuation, leverage, positions in derivatives (including notional amount and collateral posted), illiquid assets and non investment grade assets and the use of short selling;
- considers that the Commission's proposal to set leverage limits requires a balanced and appropriately risk-adjusted leverage limits applicable to alternative investment funds that take their full risk profile into account while not excessively hindering their investment flexibility; and
- considers that the definition of leverage should be further clarified.

## The Government's view of the new document

2.9 The Financial Services Secretary to the Treasury (Lord Myners) says that in the main the Bank's Opinion is similar to the Government's, noting again that the Government supports the intention to provide a harmonised regulatory framework for the activities of Alternative Investment Fund Managers. The Minister comments further that:

- the Government considers that the reporting obligations on Alternative Investment Fund Managers should help improve financial stability, but thinks that it should be up to national supervisors to determine what information they require, taking appropriate account of the size and risk of the manager concerned;
- the Financial Services Authority's hedge fund managers' survey, which is being piloted, will give it much improved oversight of the impact of hedge fund's trading and leverage on assets markets;
- much of the data suggested by the Bank is already being captured in the Authority's survey;
- the Authority is in contact with the Bank about the survey as it refines the survey's parameters;
- the Government agrees that the proposed Directive should be better tailored to reflect the different types of alternative investment funds — this has been one of its key negotiating objectives;
- the Government does not agree with giving the Commission *ex ante* [before the event] powers to set leverage limits as this control might have the perverse effect of

increasing instability, particularly in a market downturn, when Alternative Investment Fund Managers may be forced sellers of assets to simply meet their leverage limit;

- the Government also considers that there is a high risk that any *ex ante* leverage limit would severely reduce investment flexibility;
- the Government does agree, however, that national supervisors should have powers to set leverage limits or take any other relevant measures to deal with a risk to financial stability; and
- the Government is giving the Financial Services Authority a new stability objective and powers to intervene wherever it identifies immediate systemic risks, which would include the ability to set leverage limits.

### The Minister's letter

2.10 In his letter the Minister gives us a further account of developments on the draft Directive. Reminding us first of the Government's view that, although containing a number of deficiencies, which it has been working to address, the proposal has the potential to open up the Union market, providing new opportunities for EU managers, and to extend EU cooperation on systemic issues, which the Government supports, the Minister tells us that:

- several meetings have been held by the Swedish Presidency to try and find a compromise that would allow the Council to agree a general approach;
- as some Member States have, however, been unwilling to compromise at this stage, the Presidency decided that it was better to pause the negotiations to allow heads to clear over the Christmas break;
- the Presidency produced a progress report and one further compromise text<sup>13</sup> to hand over to the incoming Spanish Presidency;
- the Government expects the Spanish Presidency to seek a general approach sometime between March and May 2010;
- the Government had been expecting this development for some weeks and is not unduly concerned; and
- in all the Government's dealings with Spain so far its government has been clear, much like Sweden's, that its focus will be on agreeing legislation which is properly thought through and which works.

2.11 The Minister then outlines the main changes in the Swedish Presidency compromise:

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13 See <http://register.consilium.europa.eu/pdf/en/09/st17/st17330.en09.pdf>.

### *Leverage*

- the original Commission proposal would give powers to the Commission and national supervisors to set *ex ante* leverage caps;
- the compromise text removes the Commission's power in this area, leaving it to national regulators to set caps where justified by an immediate systemic risk — something the Government supports;

### *Portfolio company disclosure*

- the compromise text maintains the requirement for additional disclosure requirements on private equity portfolio companies, but substantially pares back those requirements so that they require only notification to the target once a controlling interest is attained and a summary annual financial statement;
- it also includes a requirement for private equity firms to disclose leverage in a portfolio company to its supervisor immediately prior to a buy-out, six months after a buy-out and 12 months after;

### *Delegation*

- the Commission proposal would prevent delegation of portfolio management outside of the EU;
- the compromise text would allow delegation of portfolio management to non-EU firms, provided those firms were authorised as asset managers — which the Government strongly supports;

### *Valuation*

- the compromise text would make valuation the responsibility of the manager and removes the requirement for an independent valuer;
- the Government welcomes this as it would remove the independent valuation obligation from classes of fund manager, particularly private equity, for which it is not appropriate;
- the Government is, however, seeking clarifications to ensure that managers could continue to use independent valuers where appropriate;

### *Capital*

- the compromise text aligns capital requirements more closely to the UCITS Directive, on the grounds that the original proposal would have created too much of a distortion in requirements between a UCITS manager and an Alternative Investment Fund Manager;

- there is also now an option for small and medium size private equity firms to opt into the proposed Directive to benefit from the passport, but to have a lower capital requirement of €50,000 to €60,000 (figure yet to be discussed by the Council);

### *Short selling*

- the compromise text removes rules in this area on the basis that the Commission should bring forward proposals to govern the market as a whole;

### *Liquidity*

- the compromise text removes the provision for the Commission to set quantitative liquidity thresholds;

### *Passport*

- as part of the overall compromise, the Swedish Presidency has proposed restricting the passport to funds both managed and domiciled in the EU;
- only EU domiciled and managed funds could be sold without restriction to all EU professional investors;
- all other funds, that is third country funds, even with an EU manager, would be subject to national private placement rules, that is subject to the marketing requirements in each Member State;
- EU managers with third country funds would still have to comply with the draft Directive, except for the depositary requirements;
- some of the larger Member States do not agree with the carve out of the depositary requirements so this will be a key area for discussion during the Spanish Presidency;

### *Access to the EU market for third country fund managers*

- under the Commission proposal non-EU managers would only be allowed to sell their funds in the EU where their local regulation had been deemed equivalent to that in force in the EU and managers which met that test would benefit from the passport;
- the compromise text removes both of these provisions;
- Member States would retain discretion over how much to open their market to third country managers and those managers will not benefit from a passport;
- the Government broadly supports this as it ensures the UK can maintain its open approach, allowing professional investors access to the best global managers;

### *Depositaries*

- the compromise text clarifies that for assets which could not sensibly be held in independent custody, for example shares in unlisted companies, real property or derivatives, the depositary should be responsible only for verifying that the assets were held by the fund;
- there is also provision for a broader range of entities to act as depositary including Markets in Financial Instruments Directive investment firms and suitably authorised entities outside the EU and clarification of depositaries' liability for loss of assets and other failures;

### *Remuneration*

- the majority view in the Council is that these rules should draw heavily on the agreed rules in the Capital Requirements Directive;
- the initial compromise text had a requirement to defer 40% of the bonus over three years or 60% where the bonus element to fixed remuneration was particularly high;
- the present compromise text removes the hard time limit for bonus deferral and now links it to a time period appropriate to the type of fund;
- this change, and the ability to apply the requirements on a proportionate basis, offers flexibility in making sure that these requirements can be applied sensibly;
- the Government will, nevertheless, continue to argue that the quantitative limits of 40 and 60% should be removed;

### *Supervision*

- in relation to greater discretion for supervisors there is some support for allowing supervisors discretion to collect additional information where justified on systemic grounds, although there is a concern from the Commission that such additional requirements should not get in the way of an effective single market;
- the compromise text tries to balance these positions by requiring certain basic information to be provided routinely by all managers and for other information to be provided on request by the supervisor; and
- the Government believes this strikes an appropriate balance.

## **Conclusion**

**2.12 We are grateful to the Minister for his latest account of where matters stand on this draft Directive, document (a). In the light of his report we think the time is now appropriate for a debate on the draft Directive. So we now recommend that there should be such a debate in European Committee B, which would allow Members to explore to what extent the revisions proposed to the original text improve the proposal and what further improvements might be necessary.**

2.13 We recommend also that the European Central Bank’s comments on the proposal, document (b), should be debated at the same time.

### 3 State aid “scoreboard”: Autumn 2009

(31219) Commission Report: *State aid scoreboard: Autumn 2009 update*  
 17430/09  
 + ADD 1  
 COM(09) 661

<i>Legal base</i>	—
<i>Document originated</i>	7 December 2009
<i>Deposited in Parliament</i>	14 December 2009
<i>Department</i>	Business, Innovation and Skills
<i>Basis of consideration</i>	EM of 6 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

3.1 The Commission reports twice yearly on state aid and state aid issues, the main aim of recent reports (“scoreboards”) having been to consider to what extent Member States have responded to the Lisbon Strategy, particularly the specific commitments agreed at the Stockholm European Council in 2001 to show a downward trend in the level of state aid relative to Gross Domestic Product (GDP) while redirecting aid from specific sectors to “horizontal” objectives, such as research and innovation. This latest update focuses on the state aid situation in the twenty-seven Member States for the year 2008 together with the underlying trends, and it also looks at the state aids related to the financial crisis, the steps taken to simplify the state aid rules, and their enforcement.

#### The current document

##### *State aid in 2008*

3.2 The scoreboard reports that in 2008 the total of state aid granted by Member States was €279.6 billion, with financial aid measures accounting for €212.2 billion, and other aid around €67.4 billion. In the latter case, five Member States<sup>14</sup> accounted for 60% of the total aid (€40.5 billion), with 78% of aid going to industry and services, 4% to the coal industry,

<sup>14</sup> Germany €15.7 billion, France €10.3 billion, Italy €5.5 billion, Spain €5.2 billion and the UK €3.8 billion.

and the balance being shared between agriculture (17.5%), fisheries (0.4%) and transport (3.6%).

### *Trends and Patterns of state aid in the Member States*

3.3 The report observes that, from a long-term perspective, overall aid in the 1980s was around 2% of Gross Domestic Product (GDP), falling to just below 1% in the 1990s, and to around 0.6% in the years 2003 to 2007, with the fall being particularly pronounced in the newest Member States. However, due to the financial crisis, the level rose to more than 2% in 2008, though expenditure on other aids remained similar to that in recent years, with Member States also continuing to direct a high level towards horizontal objectives, notably regional development, environmental protection, research and development, and employment, which accounted for some 88% of aid to industry and services (€46.3 billion) in 2008, compared with only 50% in the mid 1990s. The remaining 12% (€6.5 billion) aid was for structural development, with non-crisis rescue and restructuring aid amounting to about €557 million, compared with €872 million in 2006–2008.

### *State aid related to the Financial Crisis*

3.4 The report notes that in October 2008 the Commission published a Communication on how Member States could best support financial institutions in the current financial crisis whilst respecting EU state aid rules, and that it provided in the spring 2009 scoreboard a detailed overview regarding state aid in the context of the financial and economic crisis.<sup>15</sup> It adds that, between October 2008 and October 2009, the Commission approved 73 crisis measures (32 schemes and 41 individual cases), and that the total crisis support made available by Member State and approved by the Commission in 2008 amounted to €3,361 billion, though the nominal amount of crisis support actually implemented that year was €958 billion. It also points out that the state aid element of this amount was significantly lower, notably because the aid element of state guarantees normally constitutes only a small fraction of the guaranteed amounts and that real budgetary expenditure materialises only when a state guarantee is actually drawn upon. More recently, the Commission approved further rescue and stabilisation measures from January to March 2009, amounting to €96 billion.

### *Simplification of state aid rules*

3.5 The report recalls that in June 2005 the Commission launched a review of almost all the state aid rules and procedures, based on the principles of less and better targeted state aid; a refined economic approach; more effective procedures, better enforcement, higher predictability, and enhanced transparency; and a shared responsibility between the Commission and Member States. As a result, it introduced substantial changes to its state aid controls to make procedures and decision-making faster and more efficient, the new arrangements being based on a “3-stream system” — block (and *de minimis*) exemptions, standard assessments, and detailed assessments. However, between 2007 and mid 2009, a

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<sup>15</sup> (30548) 8812/09: see HC 19–xvii (2008–09), chapter 14 (3 June 2009).

detailed assessment was carried out in only 25 out of 177 of research, development and innovation cases and in only 10 out of 49 of risk capital cases.

3.6 The Commission subsequently introduced in September 2009 a simplified procedure which allows compatible aid to be approved within an accelerated time period of one month, based on a complete notification from the Member State. Also, aid measures can increasingly be block exempted, meaning that prior approval from the Commission is not required, and in 2008 66% of measures were dealt with in this way, 25% in schemes subject to notification by the Commission, and 5% under individual aid measures. In terms of aid volumes (excluding crisis measures), around 19% (or €10 billion) of aid was granted through block exemptions; 76% (or €40 billion) under schemes, and 5% (or €2.5 billion) as individual aid.

### *Enforcing the state aid rules*

3.7 A state aid measure is considered to be unlawful under Article 88(3) of the EC Treaty (now Article 108(3) TFEU) if Member States implement it before they have received approval from the Commission. The scoreboard reports further progress in the recovery of illegal and incompatible aid. Thus, at the end of June 2009, €9.4 billion has been recovered compared with €2.3 billion in December 2004, whilst, at the end of June 2009, 9% of unlawful aid was still outstanding compared with 75% at the end of 2004. The report also notes that the Commission adopted in April 2009 a new notice on the Enforcement of state Aid Law by National Courts, which has two main objectives — to give clear guidance to national courts and to potential claimants on the different issues which can arise in the context of domestic state aid litigation, and to intensify the Commission's cooperation with national courts in individual cases.

### **The Government's view**

3.8 In his Explanatory Memorandum of 6 January 2010, the Minister for Business, Innovation and Skills (Pat McFadden) says that there are no direct policy implications from this document, which is intended to increase transparency and to emphasise the need for Member States to continue their efforts in reduce the overall level of state aid as a percentage of GDP and to ensure that aid is better targeted. He adds that, on the broader state aid reform issues, the Government strongly supports an effective state aid regime, and is committed to the aim agreed at the Lisbon and Barcelona European Councils to reduce state aid and to redirect it towards broad policy objectives, rather than supporting individual companies. As the Commission continues to review the effectiveness of its rules and procedures, the UK will continue to engage with it positively to help ensure the delivery of its policy goals, especially taking into account current economic instability.

### **Conclusion**

3.9 **In clearing this document, we are drawing it — like previous scoreboards — to the attention of the House as a useful summary as regards state aid policy.**

## 4 Climate Change and International Security

(29565) S113/08 —	Paper from the High Representative and the European Commission to the European Council: <i>Climate Change and International Security</i>
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<i>Legal base</i>	—
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	Minister’s letter of 14 December 2009
<i>Previous Committee Report</i>	HC 16–xviii (2007–08), chapter 14 (2 April 2008)
<i>Discussed in Council</i>	December 2008 European Council
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared (reported to the House on 2 April 2008); further information provided

### Background

4.1 In June 2007 the European Council invited the then Secretary General/High Representative, Javier Solana, and the European Commission to draw up a joint report on “Climate Change and International Security”. The 13–14 March 2008 Spring European Council welcomed it as underlining the importance of this issue, and invited the Council “to examine the paper and to submit recommendations on appropriate follow-up action, in particular, on how to intensify cooperation with third countries and regions regarding the impact of climate change on international security by December 2008 at the latest.”<sup>16</sup>

### The Joint Report

4.2 The report argues that climate change will have a growing and significant impact on global security, multiplying existing threats such as shortages of food and water, and exacerbating tensions and instability, particularly for states and regions that are already fragile and conflict-prone. It first examines thematically “some of the forms of conflicts driven by climate change”, under seven headings:

- Conflict over resources;
- Economic damage and risk to coastal cities and critical infrastructure;
- Loss of territory and border disputes;
- Environmentally-induced migration;
- Situations of fragility and radicalisation;
- Tension over energy supply;

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<sup>16</sup> Paragraph 26 of the Council Conclusions: see [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/99410.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/99410.pdf)

— Pressure on international governance.

4.3 Then, noting that the EU’s neighbours include some of the most vulnerable regions to climate change, e.g. North Africa and the Middle East, and that migratory pressure at the European Union’s borders and political instability and conflicts could increase in the future, with a significant impact on Europe’s energy supply routes, the Report illustrates how climate change is multiplying existing pressures in Africa, South Africa, the Middle East, Central Asia, South Asia and the Arctic.

4.4 Finally, the Report considers how the instruments at the EU’s disposal can be used alongside mitigation and adaptation policies to address the security risks. “Special consideration” should be given to the US, China, India, and “what the implications mean for the EU’s long-term relations with Russia.” The then-upcoming examination of the implementation of the 2003 European Security Strategy “should take account of the security dimension of climate change”.

4.5 Areas recommended for further study were:

*Enhancing capacities at the EU level*, including monitoring and early warning regarding situations of state fragility and political radicalisation, tensions over resources and energy supplies, environmental and socio-economic stresses, threats to critical infrastructures and economic assets, border disputes, impact on human rights and potential migratory movements; and further building up of EU and Member State civil protection and disaster response capabilities;

*EU multilateral leadership to promote global climate security*, including the possible strengthening of international law, including the Law of the Sea, and consideration of “environmentally-triggered additional migratory stress in the further development of a comprehensive European migratory policy”;

*Cooperation with third countries*, including giving more attention to the impact of climate change on security in the EU’s cooperation and political dialogue instruments, its regional strategies and the EU’s Global Climate Change Alliance with the most vulnerable developing countries, and examining the development of “an EU Arctic policy based on the evolving geo-strategy of the Arctic region, taking into account i.a. access to resources and the opening of new trade routes.”

4.6 In his Explanatory Memorandum of 27 March 2008, the then Minister for Europe saw the EU as “in a unique position to respond to the impacts of climate change on international security, given its leading role in development, global climate policy and the wide array of tools and instruments at its disposal”, and agreed with the report’s view that “the security challenge plays to Europe’s strengths, including its comprehensive approach to conflict prevention, crisis management and post-conflict reconstruction, and as a key proponent of effective multilateralism.” He strongly welcomed the report as “an excellent starting point for deeper EU engagement on the foreign and security implications of climate change”. He said that it was now increasingly recognised that climate change posed security — as well as economic and social — challenges, and that it was “therefore imperative that we achieve a secure climate and work together with the EU and external partners to build the climate challenge into security planning”.

## Our assessment

4.7 Although not the sort of document that we customarily considered (it being neither draft legislation nor a Commission Communication), this was not the first such joint paper that we had asked to be deposited because of its inherent importance and potential widespread policy implications. We were accordingly grateful to the Minister for his informative Explanatory Memorandum and for his views, and cleared the document.

4.8 This dimension of the EU's security policy could, the Committee felt, only grow. While this Report was not directly relevant to other documents on various other EU policy responses to climate change that we had recommended for debate at our meeting on 7 March 2009 (which dealt with the promotion of energy from renewable resources; carbon capture and storage; reduction of greenhouse gas emissions by 2020; and review of the emissions trading scheme),<sup>17</sup> its relevance to EU stability and prosperity was already manifest in the shape of the widespread concern over economic migration. We therefore looked forward to hearing more from the Minister in due course about whatever proposals were put forward for consideration by the December 2008 European Council.<sup>18</sup>

## The Minister's letter of 8 December 2009

4.9 In his letter, the Minister for Europe at the Foreign and Commonwealth Office (Chris Bryant) encloses a Joint Commission/Council Secretariat/Presidency follow-up report of 25 November 2009, which outlines the progress made in the 18 months since the original report and makes recommendations for next steps.

4.10 The Minister notes that the Foreign and Commonwealth Office has been closely involved in this work, sitting as a member on the informal EU steering group once it was extended from the original troika, and in the development of the progress report. He describes it as “in line with UK policy as stated in both 2008 National Security Strategy and the 2009 updated version”, and continues as follows:

“Climate change will have significant implications for international security, and the impacts of climate change greatly raise the risk of future instability. Climate change will threaten the basis of our current prosperity and security, through serious impacts on resource distribution and availability, stress in food and water availability, increased migration, and exacerbating the challenges that poverty and poor governance pose.”

4.11 The progress report, the Minister says:

“... makes strong recommendations for implementing policies to ensure the EU makes the necessary plans to deal with the security consequences of unavoidable climate change whilst acknowledging that we can only limit the threat to our security through reducing emissions to limit global average temperature rise to 2 degrees C.”

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17 See HC 16–xiii (2007–08), chapters 1–4, 7 and 8 (27 February 2008). See <http://www.publications.parliament.uk/pa/cm200708/cmgeneral/euro/080513/80513s01.htm> and <http://www.publications.parliament.uk/pa/cm200708/cmgeneral/euro/080422/80422s01.htm> for the record of those debates.

18 See headnote: HC 16–xviii (2007–08), chapter 14 (2 April 2008).

4.12 The Minister summarises the report's key recommendations thus:

- CCIS needs to have a more formal home and be integrated into the new structures created by the Lisbon treaty.
- CCIS should be integrated into current EU policies and strategies including on development, crisis management, conflict prevention, early warning systems and humanitarian assistance.
- The EU should commission further research to understand the security implications in more detail, particularly looking at the interlinkages between food, energy, water and demographics.
- The EU should drive forward debate in the UN and enhance cooperation between UN agencies.
- The debate needs to continue to be widened particularly to include regional organisations.”

4.13 The Minister then says that what he describes as:

“... the process of implementing and operationalising the report's recommendations will help the UK in following a similar process in preparation for any potential future security review or update of the National Security Strategy. Part of the process for UK policy development is under the Departmental Adaptation Plans, which departments agreed to complete as part of the Climate Change Act 2008 follow-up due for publication in March 2010.”

4.14 The Minister concludes by strongly welcoming this report and the increasing interest among EU member states and other countries, globally, on this issue, and by saying that he will endeavour to keep the Committee more regularly informed of progress in this area and any future work relating to this report.

4.15 The Minister also encloses the Conclusions adopted by the 8 December 2009 General Affairs and External Relations Council, which are reproduced at Annex 1 of this chapter of our Report.

## Conclusion

**4.16 We are grateful to the Minister for this further information, which we are reporting to the House because of the widespread interest in the issues discussed.**

## Annex 1: Council conclusions on Climate change and security<sup>19</sup>

“1. The Council endorsed the “Joint Progress Report and Follow-up recommendations on Climate Change and International Security, (CCIS) as a follow-up to the Joint Paper in March 2008 to the European Council by the High Representative and the Commission, the report of the implementation of the European Security Strategy (ESS) presented to the Council in December 2008, and the report on the implementation of the Joint Paper presented to the Council in December 2008.

“2. The Council stated that climate change and its international security implications are part of EU’s wider agenda for climate, energy and the Common Foreign and Security Policy, and therefore central to the endeavours of the EU. This adds an incentive to strengthen EU’s comprehensive efforts to reduce emissions and to increase its energy security.

“3. The Council underlined the possible international security implications of climate change, and the potential risk for increased natural disasters and conflicts over scarcer resources, its effect on migration and state and regional instability, which will add additional stress on the increasingly interdependent global system and structures. This is a global challenge that requires global solutions.

“4. The Council concluded that more vulnerable parts of human society in developing countries and emerging economies will be adversely affected, and will need our support, but developed countries will also suffer. Adaptation to climate change, sound policies on displacement, migration and conflict prevention are the most effective ways of dealing with the international security implications of climate change. We will address these issues in a spirit of partnership between developed and developing countries and confirm our commitment to take bold action on climate change mitigation in order to limit temperature increases to below a threshold of 2C and to effectively address adaptation in the Copenhagen summit. An ambitious and comprehensive international agreement (UNFCCC) will be an important factor in preventing and reducing the security implications of climate change.

“5. The Council welcomed that the UN has taken a leading role on CCIS demonstrated by the UN General Assembly resolution A/63/281 of June 2009, expressing deep concern for the possible security implications of climate change, followed by the Secretary General’s report A/64/350 on Climate Change and its possible Security Implications of September which was discussed in the UN General Assembly in November this year. The Council recalled the UN Security Council thematic debate on Energy, Security and Climate in April 2007 and looked forward to further debates in the UN Security Council on the issue. The EU stands ready to support this global endeavour. In order to play a role commensurate to its commitment, the EU needs to call upon the full range of policies and instruments at its disposal.

“6. The Council noted with satisfaction that considerable progress has been made to enhance EU capacities for early warning, analysis and response to climate-induced international security implications and to foster international cooperation with the aim to

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<sup>19</sup> Available at [http://www.se2009.eu/polopoly\\_fs/1.27021!menu/standard/file/111827.pdf](http://www.se2009.eu/polopoly_fs/1.27021!menu/standard/file/111827.pdf).

create dialogue, common awareness, share analysis and cooperatively address the challenges in all relevant existing fora, including the UN.

“7. The Council supported the recommendations in the Progress Report; to promote EU multilateral leadership in cooperation with the UN and third parties, reinforce the EU’s institutional capacity to deal with CCIS in the implementation of the Lisbon Treaty, include security aspects in climate change in EU development assistance, build knowledge, hone and sharpen the EU’s crisis management capabilities relevant to dealing with CCIS and to follow up the implementation through a report to the Council during the latter part of 2010.”

## 5 EU-Russia relations

(a) (26607) 8799/05 + ADD 1 —	EU-Russia: Road Maps for the Common Economic Space, the Common Space of Freedom, Security and Justice, the Common Space of External Security and the Common Space on Research, Education and Culture
(b) (30107) 15299/08 COM(08) 740	Commission Communication: <i>Review of EU-Russia Relations</i>
(c) (30108) 15300/08 SEC(08) 2786	Commission Staff Working Document accompanying the Commission Communication <i>Review of EU-Russia Relations</i>

<i>Legal base</i>	—
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	Minister's letter of 8 December 2009
<i>Previous Committee Report</i>	(a) HC 16–iv (2007–08), chapter 27 ( 28 November 2007); HC 41–xxxiii (2006–07), chapter 8 (25 July 2007); HC 41–xxv (2006–07), chapter 9 (13 June 2007); HC 41–v (2006–07), chapter 12 (10 January 2007); HC 34–xxxiii (2005–06), chapter 15 (28 June 2006); HC 34–i (2005–06), chapter 6 (4 July 2005) (b) and (c) HC 19–i (2008–09), chapter 2 (10 December 2008) and HC 19–xxii (2008–09), chapter 10 (1 July 2009); and see (29944) —: HC 16–xxx (2007–08), chapter 18 (8 October 2008)
<i>To be discussed in Council</i>	—
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	(a) Cleared (Resolution of the House 21 October 2005) (b) and (c) Cleared (Resolution of the House 20 January 2009)

### Background

5.1 The Common Strategy instrument was created by the Amsterdam Treaty, as the means of setting out the objectives, overall policy guidelines, organisation and duration of the EU's external policies towards geographic or thematic areas. The EU's Common Strategy on Russia — its first — was adopted at the June 1999 Cologne European Council, for a period of four years. It had four objectives:

- encouraging the democratic reform process in Russia;

- encouraging economic reform;
- promoting regional and global stability and security; and
- promoting cooperation with Russia on areas of common concern such as international crime and environmental questions.

## The Four Common Spaces

5.2 In July 2004, our predecessors considered a Council Report on the main lines of a proposed successor. The Common Strategy — described by the then Minister for Europe as “long and diffuse” — had never enjoyed any “buy-in” from Russia and had been overtaken by developments elsewhere in the EU-Russia relationship. The May 2003 St Petersburg EU-Russia summit had now envisaged the development of relations taking place within an Action Plan embracing Four Common Spaces — a common economic space (building on the notion of a Common European Economic Space); a common space of freedom, security and justice; a space of cooperation in the field of external security; and a space of research and education. Work accordingly proceeded on this proposal, within the framework of the existing Partnership and Co-operation Agreement.

5.3 The history of the Committee’s consideration of these issues is set out in the Report of our meeting on 4 July 2005.<sup>20</sup> The then Minister for Europe said that the challenge was to press ahead with implementation and deliver practical, mutual benefits. As “political documents [and] not legally binding agreements”, the Road Maps would not be put formally to the Council for approval, but submitted for the Council to take note. The confidentiality of the negotiations had left him unable to share any of the contents of the Road Maps with the Committee earlier.

5.4 Our predecessors felt that, though it might no longer be called a Common Strategy, any “framework for the EU’s relations with Russia” was self-evidently of immense importance. They also felt that the relationship should arguably aspire to somewhat more than “practical benefits”, and that the challenge was likely to be in making progress in those areas that tend to be grouped under the notion of “shared values” and which revolved around “good governance”, but which nonetheless had a real bearing on the attainment of long-term practical benefits. Although our predecessors did not wish the Minister to hold up agreement in the Council, they nonetheless recommended that the Four Common Spaces “Road Maps” be debated in European Standing Committee B, ahead of the 4 October 2005 EU-Russia Summit. The debate did not in fact take place until 20 October 2005, when European Standing Committee B agreed that the Road Maps provided “a valuable framework for the EU to achieve its objectives in its relations with Russia in the medium term”.<sup>21</sup>

5.5 The Minister also agreed to update the Committee after each bi-annual Summit. One of the Committee’s concerns has been that, since these post-Summit reports were, in a sense, a substitute for the transparency lost in the change from a Common Strategy (which required regular assessments) to the “Four Spaces” approach, they should be more than a

<sup>20</sup> See headnote: (26607) 8799/05: HC 34-i (2005–06), chapter 6 (4 July 2005).

<sup>21</sup> *Stg Co Deb*, European Standing Committee, 20 October 2005, cols. 1–28.

recital of the topics discussed; rather, what we wanted to know was what was said, and how each party responded to the other, and what the Government thought of the outcome, the challenges for ensuing Presidencies and how best to approach them.

5.6 Our most recent Report summarises developments since, culminating in a letter of 12 September 2008 accompanying his Explanatory Memorandum, from the then Minister for Europe (Mr Jim Murphy), which updated the Committee “on events over the summer in Georgia [and] set out the UK’s role.” Lengthy as it was, the Committee thought that it was of sufficient breadth and importance for it, and the annex to it, to be set out in full at the Annex to that chapter of the Committee’s Report.

5.7 In that letter, the Minister said that, at the Extraordinary European Council meeting on 1 September, “in response to Russian actions, the Council decided to conduct a comprehensive review of EU-Russia relations.” This evaluation would continue up to the EU-Russia Summit in Nice on 14 November 2008. The EU had also suspended negotiations with Russia on the new EU Partnership and Co-operation Agreement (PCA). The review would “allow us to take a considered decision about the future of EU-Russia relations.” Then, in his customary post-GAERC letter to the Committee, the Minister also noted that, during the discussion on Georgia, “the Foreign Secretary intervened to reinforce the need for a thorough audit of the EU’s relationship with Russia, in the run up to the 14 November EU-Russia Summit.” Given the Committee’s continuing interest in these Summits and their impact on endeavours to take the present PCA/Four Spaces framework forward, the Committee asked him to write before the summit with a summary of the audit and his views on its implications. As well as reporting these developments to the House, we also forwarded this chapter of our Report to the Foreign Affairs Select Committee.<sup>22</sup>

5.8 The subsequent Commission Communication and accompanying Commission Staff Working Document provided a summary and detailed description of the state of the EU-Russia relationship and a short assessment of why the Commission believed that the PCA negotiations, suspended since the Russia-Georgia conflict, should continue — namely that a PCA with Russia provides a framework for unified EU negotiations. The report did not draw any conclusions about how the EU should engage with Russia.

5.9 The Communication was submitted to the Council on 5 November. The re-opening of negotiations was subsequently agreed at the 10 November General Affairs and External Relations Council.

5.10 In her 14 November 2008 Explanatory Memorandum, the then Minister for Europe at the Foreign and Commonwealth Office (Caroline Flint) noted that, although the Communication drew no conclusions, it did, however, consider the future areas of cooperation that a PCA would need to cover, including “a substantial section on energy, enshrining the principles of the Energy Charter Treaty”, which was “consistent with the expectation that a new EU-Russia agreement would provide a comprehensive, legally binding, framework to cover all main areas of the relationship.” She also said that the Communication would “inform discussions on how the EU should be engaging with

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22 See headnote: 29944 —: HC16–xxx (2007–08), chapter 18 (8 October 2008).

Russia, including on the process of negotiations towards a successor to the Partnership and Co-operation Agreement (PCA)". She "and the overwhelming majority of EU Member States" believed that pursuing negotiation of a new PCA with Russia was the best way to pursue UK and EU interests across a range of other important issues; a Presidency statement had "made it clear that the resumption of PCA negotiations is put in the context of the EU review of engagement with Russia and that this is not a return to business as usual" or "a turning of the page on Georgia." The government would "continue to work with EU partners to ensure that the EU takes a hard headed approach to Russia relations and sticks to the tough mandate agreed for the negotiations." The review was "the beginning of the process of determining the future shape of EU-Russia relations. It provides a baseline to inform further examination and discussion by Member States of whether specific areas of engagement should continue."

5.11 In her letter of 26 November 2008, the then Minister for Europe (Caroline Flint) reported that the Nice EU-Russia Summit of 14 November had focused mainly on *Georgia*, *pan-European security* and the *international financial crisis*. Referring to the resumption of negotiations on the new PCA announced at the Summit, the Minister said "hard headed engagement and not isolation" was "the way forward in the EU's relationship with Russia". The PCA provided "a mechanism for the EU to engage Russia in a more coherent and united way". The mandate was "ambitious and comprehensive", covering a range of important issues such as Climate and Energy Security, Trade, Human Rights etc. Negotiations on the PCA would "also provide further opportunities for the EU to press the Russians on the need to work to resolve frozen conflicts." But the then Minister was "clear that this does not mean a return to a "business as usual" relationship between the EU and Russia"; the government would "continue to insist on full Russian implementation of the ceasefire agreements and their cooperation in the Geneva talks." The then Minister also welcomed "the earlier EU commitment to ensure that the EU-Russia audit will inform negotiations on a possible successor to the PCA."

5.12 With regard to *pan-European security*, the then Minister said that the EU had expressed its concern about President Medvedev's speech in Berlin and his statements on the potential deployment of Russian missiles, stating that no missiles should be deployed until the new geopolitical conditions of pan-European security had been discussed.<sup>23</sup> President Medvedev had in turn reiterated Russian views that current European security mechanisms were "imperfect" and pressed for a discussion on their proposals for a new "European Security Architecture"; President Sarkozy had proposed holding a meeting in mid-2009, in the framework of the OSCE, to discuss these proposals. The government was "open to this suggestion" and would coordinate with Allies how to move forward. Though it was too early to say what would be on the agenda for such a conference or where the most appropriate forum for discussion would be, the then Minister was "absolutely clear that any discussion on European security should include transatlantic allies."

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23 We presumed this was a reference to the speech by President Medvedev made in Berlin on 5 June, on his first trip to Europe after his inauguration, when he said military expansion led by America and Nato "worried" Moscow and could destroy relations between East and West "in a radical way, for a long time", warned against American plans to build a ballistic missile shield involving radar installations in Poland and the Czech Republic and called for a "regional pact" to replace current security arrangements. Also see President Medvedev's speech of 15 July 2008 to the diplomatic corps in Moscow, summarised at <http://www.dw-world.de/dw/article/0,2144,3486571,00.html>.

## Our assessment

5.13 We felt that talk of a new “European Security Architecture” raised profound questions, particularly about Russia’s objectives (did Russia have a strategy of confronting the West? Did she have a strategy at all?) and how Member States should respond (which we felt would no doubt depend on how the new US administration acted, and which at least raised the question of whether proposals to tie countries like Ukraine, Georgia and Azerbaijan more closely to the West were not dangerously premature, until the US, Russia and Europe had first worked out the basis of their own relationship). We noted that the Minister had made no mention of the critical remarks by President Sarkozy, made at the Summit, about proposals for the deployment of anti-ballistic missile defence systems in Poland and the Czech Republic, notwithstanding the apparent lack of any mandate for the Presidency so doing. Nor of the possible implications of the recently-enunciated principles of Russian foreign policy — compliance with international law; a multi-polar world; full and friendly relations with all countries; the “unquestionable priority” of “protecting the lives and dignity of Russian citizens, wherever they may be”; a right to give “special attention” to particular regions in which Russia has “privileged interests” — which, as experienced observers had pointed out, were contradictory and contained no mention at all to the maintenance of international security.

5.14 We looked to the Minister to ensure that the Committee was kept informed about the possible developments to which she referred. In the meantime, the last Standing Committee debate on EU-Russia relations having been over three years previously and in view of what had happened since then, and the serious issues dealt with in the Communication and the Minister’s letter, we recommended that the document be debated in on the Floor of the House.<sup>24</sup> That debate took place on 20 January 2009.<sup>25</sup>

5.15 In his letter of 17 June 2008, the then Parliamentary Under-Secretary of State at the Foreign and Commonwealth Office (Chris Bryant) provided an update on the EU-Russia Summit that took place in Khabarovsk, in the Russian Federation, on 22 May, hosted by President Medvedev. He said that the Summit discussed the *state of play in EU-Russia relations*, including progress in *negotiations on the New EU-Russia Agreement*, the *economic and financial crisis*, *energy security*, *Georgia*, *climate change* and various international issues including *MEPP*, *Iran* and *Afghanistan*. His account is set out in detail in our most recent Report.<sup>26</sup>

5.16 On *Energy security*, he noted that President Medvedev had said that, on the whole, Russia was satisfied with energy cooperation between the EU and Russia: the EU would remain Russia’s main customer for energy, and Russia was and would remain a reliable supplier of energy to the EU; but the Energy Charter Treaty (ECT) was not up to date, did not provide solutions to existing problems, did not take Russian interests fully into account, was therefore unacceptable, and Russia would not be ratifying it; a new treaty should incorporate all the best elements of the existing ECT, while taking into account the

24 See headnote: (30107) 15299/08 and (30108) 15300/08: HC 19–i (2008–09), chapter 2 (10 December 2008).

25 See [http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090120/debtext/90120-0012.htm#column\\_680](http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090120/debtext/90120-0012.htm#column_680) for the record of that debate.

26 See headnote: HC 19–xxii (2008–09), chapter 10 (1 July 2009).

interests of producer countries; if Russian proposals were taken into account, Russia might accept a revised ECT in the future.

5.17 We thought that the disappointment the Minister expressed concerning Russian behaviour towards both OSCE and, then, UN missions in Georgia would, we felt, no doubt not have been allayed by the news that, on the eve of President Obama's first visit to Russia, the Russian authorities had increased tensions, viz., the launching of "Caucasus 2009" — a military exercise close to the border with Georgia and involving both Russian troops in Abkhazia and South Ossetia and naval and air forces, whose aim according to a Russian military spokesman is "to establish the state of battle readiness and troop mobilisation deployed in Russia's southwest region" — and the Russian Ambassador to NATO, a day after the alliance resumed military ties with Russia, frozen since the war, seemingly threatening Georgia with the loss of more territory by reportedly calling on Georgia to "abstain from military operations" against South Ossetia and Abkhazia and reportedly saying that "each time Georgia takes this step, it runs the risk of shrinking in size."

5.18 Moreover, though it was now summer time, we felt that there was little comfort in the report of this Summit for those who had suffered during the recent winter from the failure of Russian gas to be delivered to EU markets, or from Russian endeavours to "divide and rule" in the construction of pipeline and storage networks, which showed little sign — on the contrary — of a real desire to "create an "energy union" comprising the EU and Russia, to ensure energy security and promote energy efficiency."

5.19 Given the high interest in the House in EU-Russia relations, we again drew the Minister's report to its attention.

### **The Minister's letter of 8 December 2009**

5.20 The Minister for Europe at the Foreign and Commonwealth Office (Chris Bryant) writes about the 24<sup>th</sup> EU-Russia Summit, which took place in Stockholm on 18 November 2009, with what he describes as "a flavour of the event, ... as always ... with the caveat that, as this was an event where we were represented by the Presidency, we are reliant on those present for a readout."

5.21 After listing the principals on both sides, and noting that there was a parallel meeting of the "EU-Russia Industrialists Roundtable" immediately after the Summit (which he says discussed issues including "conditions for trade and investment between the EU and Russia, future Russian accession to the WTO and problems arising from corruption"), the Minister continues as follows:

#### **Deliverables**

"The following agreements were reached at the Summit:

- European Commissioner for Energy Andris Piebalgs and Russian Energy Minister Sergei Shmatko signed an Enhanced Early Warning Mechanism on energy. This agreement will enable EU monitors to observe developments in the Russia-Ukraine gas relationship.

- Five agreements were signed launching Cross Border Cooperation Programmes between the EU and Russia.
- Expert level talks were initiated on cooperation in crisis management, building on the positive experience in Central African Republic/Chad.
- Russia was invited to participate in a ‘partnership for modernisation’. This initiative will focus on aligning regulatory frameworks.

### **Summit Discussions**

“The Summit focused on a number of common challenges including climate change; economy and energy; EU-Russia relations; and international issues.

#### **Climate Change**

“The EU expressed its hope for a constructive Russian contribution at the Copenhagen climate summit. President Medvedev pledged to reduce Russian greenhouse gas emissions by between 20 and 25% emissions by 2020 against 1990 levels (the previous Russian offer was a reduction of 10–15%), subject to the positions adopted by other major emitters.

“Russia and the EU agreed on the need to involve big business in Russia and the EU in discussion of using energy efficiency as a key tool in the fight against climate change.

#### **Economy**

“The EU underlined its continuing support for Russian accession to the World Trade Organisation (WTO) and, noting the EU-Russia agreement currently being negotiated, raised concerns as to the forthcoming entry into force of a customs union between Russia, Belarus and Kazakhstan. President Medvedev reiterated Russia’s desire to join the WTO. Elvira Nabuillina, Minister for Economic Development, confirmed that recent tariff increases as a result of the economic crisis would not be made permanent. The parties agreed that much had been accomplished with the G20 and G8 to tackle the economic and financial crisis. Russia and the EU still needed to work with the other leading economies, particularly on a consolidated strategy of recovery.

#### **Energy**

“The EU and Russia stressed the need for continued, constructive cooperation on energy, underlining the importance of stability of supply. Russia suggested that cooperation on energy be extended to alternative energy sources, including biofuels and hydrogen fuel. The EU regretted Russia’s decision to withdraw from the Energy Charter Treaty.

“Both sides agreed on the importance of new pipelines for the delivery of hydrocarbons to the EU. Russia was grateful to Sweden, Denmark and Finland for agreeing to Nord Stream.

“EU-Russia Relations

“Progress in negotiations between the EU and Russia on a successor to the Partnership and Cooperation Agreement was noted.

“The parties discussed a broad range of issues under the four EU-Russia Common Spaces. The EU expressed concern regarding the situation in the North Caucasus and the state of human rights, democracy and rule of law in Russia. The EU encouraged Russia to ratify Protocol 14 to the European Convention on Human Rights as soon as possible.

“The EU welcomed the good cooperation on crisis management and looked forward to an early signing of the agreement on classified information. It had been anticipated that this agreement would be signed at the summit, but the Russians were unable to do so for administrative reasons.

“The Commission briefed Russia on the implications of the Lisbon Treaty, explaining that the Commission President and the High Representative would work together effectively in tandem.

“International issues

“Six external issues were discussed. These were the Iranian nuclear issue; Afghanistan and Pakistan; the Middle East Peace Process; Western Balkans; European Security; and stability and security in the EU-Russia common neighbourhood. The EU called on Russia to comply fully with its commitments under the Sarkozy/Medvedev agreements following the August 2008 war in Georgia; and for EUMM to be able to access South Ossetia and Abkhazia. Russia insisted on agreement from the entity authorities.

“The EU acknowledged the constructive role played by Russia in recent improvements in Turkish-Armenian relations and stressed the need to find a solution to the conflict over Nagorno Karabakh.

**Assessment**

“The Summit delivered positive outcomes on several EU priorities. The new Russian commitment on climate change, and the endorsement of a new Early Warning Mechanism are important, and the latter reinforces the EU’s message that Russia and Ukraine must take their energy responsibilities seriously if we are to avoid another winter gas crisis. Engagement with Russia on the full range of issues, not shying away from those where we disagree, is in the EU’s interests.”

5.22 The Minister concludes by expressing the hope that the Committee “will find this readout useful”.

**Conclusion**

5.23 **The readout is useful up to a point. Again, all sorts of questions are raised about what was actually said, which it is difficult to believe would not have been covered in subsequent discussion between Member States and the Presidency, and which we would**

(as we have said before) have hoped the Minister would have shared with the House. For example:

- if Russia is to agree to withdraw from the ECT, what is to replace it?
- if both sides agreed on the importance of new pipelines for the delivery of hydrocarbons to the EU, and Russia acknowledged Sweden, Denmark and Finland's cooperation with regard to Nord Stream, was there any corresponding undertaking by Russia with regard to proposed pipelines to connect southern Europe with central Asia?
- what progress has actually been made on a successor to the Partnership and Cooperation Agreement? What has happened to the audit referred to by his predecessor a year ago (c.f. paragraph 5.11 above)?
- what was the Russian response to EU concern regarding the situation in the North Caucasus and the state of human rights, democracy and rule of law in Russia, and EU encouragement to ratify Protocol 14 to the European Convention on Human Rights as soon as possible?
- what was said under the six external issues discussed, in which Russian cooperation has hitherto not always been forthcoming and in which it is essential to make progress?

5.24 There is also no mention of President Medvedev's proposals for a new "European Security Architecture" and President Sarkozy's proposed meeting in mid-2009, in the framework of the OSCE, to discuss these proposals, to which the Government professed itself "open", with the caveat that "any discussion on European security should include transatlantic allies" (c.f. paragraph 5.12 above).

5.25 We do not expect the Minister to respond to these questions, since there are a variety of ways in which interested Members can pursue them. Our purpose is to draw them to the House's attention, given the widespread interest in the subject matter.

5.26 Given their scope, we are also drawing this chapter of our Report to the attention of the Foreign Affairs Committee.

## 6 Public private partnerships

(31181) 16586/09 COM(09) 615	Commission Communication on mobilising private and public investment for recovery and long term structural change: <i>Developing Public Private Partnerships</i>
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<i>Legal base</i>	—
<i>Document originated</i>	19 November 2009
<i>Deposited in Parliament</i>	27 November 2009
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 7 January 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	None planned
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

### Background

6.1 Public private partnership (PPP) describes a public service or private business venture which is funded and operated through a partnership of a national, regional or local government and one or more private sector companies. PPP involves a contract between a public sector authority and a private party, in which the private party provides a public service or project and assumes substantial financial, technical and operational risk in the project. In some types of PPP, the cost of using the service is borne by the users of the service and not by the taxpayer. In other types (notably the private finance initiative), capital investment is made by the private sector on the strength of a contract with a government to provide agreed services and the cost of providing the service is borne wholly or in part by the government.

6.2 The Commission, in a 2004 Green Paper on PPPs and public contracts and concessions, said of such partnerships:

“The term public-private partnership (‘PPP’) is not defined at Community level. In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.

“The following elements normally characterise PPPs:

The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.

The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds — in some cases rather substantial — may be added to the private funds.

The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.

The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.”<sup>27</sup>

6.3 The Government describes such partnerships in the following terms:

“Public private partnerships (PPPs) are arrangements typified by joint working between the public and private sector. In the broadest sense, PPPs can cover all types of collaboration across the interface between the public and private sectors to deliver policies, services and infrastructure. Where delivery of public services involves private sector investment in infrastructure, the most common form of PPP is the Private finance initiative.”<sup>28</sup>

## The document

6.4 In this Communication the Commission suggests a framework for encouraging more frequent and better use of PPPs to meet existing and future needs for investment in public services, infrastructure and research in the EU. After considering in the Communication’s introduction what PPP is, the Commission discusses the case for using PPPs citing improved delivery of projects, increased value for money, spreading of the cost of financing over the lifetime of the asset, improved risk sharing and capacity to leverage private funds and pool them with public resources. The Commission cites the particular importance of the last point in the present economic conditions.

6.5 The Commission then says that it wishes to promote PPPs as a useful delivery tool and wants to ensure EU rules and actions do not impede their development. However, it reminds Member States that projects should take account of relevant regulations governing such projects, such as those on accounting transparency, procurement procedures and state aid. That said it illustrates types of EU financing options available to PPP projects, citing:

- the Joint Technology Initiatives, which promote cross-Union research in the areas of innovative medicines, aeronautics, fuel cells and hydrogen, nanoelectronics and embedded computing systems;

27 (25648) 9206/04: see HC 42–xxiii (2003–04), chapter 16 (16 June 2004).

28 See [http://www.hm-treasury.gov.uk/ppp\\_index.htm](http://www.hm-treasury.gov.uk/ppp_index.htm).

- structural funds, including JASPERS, a project development facility launched together with the European Investment Bank and the European Bank for Reconstruction and Development, which aims at providing assistance as required for any stage of a PPP/infrastructure project cycle,<sup>29</sup> the JESSICA initiative for sustainable urban investment for PPPs/urban projects included in an integrated urban development plan<sup>30</sup> and the JEREMIE initiative in support of new business creation and improving access to finance for enterprises;<sup>31</sup>
- the European Investment Bank, which has made nearly €30 billion (£26.64 billion) available in loans for PPPs since the late 1980s;
- Trans-European Transport Network instruments, including loan guarantees, construction cost grants and provision of risk capital; and
- the Risk Sharing Finance Facility and Competitiveness and Innovation Programme to support PPPs in the areas of research, technological development, demonstration and innovation.

6.6 The Commission argues that PPPs have not yet reached their full potential and has explored the reasons behind this, drawing three main conclusions:

- the credit crunch has led to an increase in the cost of debt, has reduced the maturities offered by banks on this debt and has resulted in committed finance only becoming available at the end of a procurement process;
- PPPs are traditionally complex to procure, requiring significant resources and skills within the public sector, which have not always been available, and issues around securing long-term political commitment to projects and risk allocation between the public and private sectors have also contributed to their limited use; and
- the regulations governing the Joint Technology Initiatives are too restrictive and have hindered its ability to deliver.

6.7 In order to address these conclusions, the Commission suggests the intention to develop “an effective and enabling cooperation framework between public and private sector”. Whilst noting that “the ultimate decision to use PPPs lies with the Member States’ public authority and it is for Member States to review the national framework as necessary to enable it”, the Commission says that it will, through a range of activities:

- improve access to finance for PPPs;
- facilitate setting up PPPs through public procurement of PPPs;
- ensure proper debt and deficit treatment of PPPs;
- improve information and disseminate relevant expertise and know-how; and

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29 See [http://ec.europa.eu/regional\\_policy/funds/2007/jjj/jaspers\\_en.htm](http://ec.europa.eu/regional_policy/funds/2007/jjj/jaspers_en.htm).

30 See [http://ec.europa.eu/regional\\_policy/funds/2007/jjj/jessica\\_en.htm](http://ec.europa.eu/regional_policy/funds/2007/jjj/jessica_en.htm).

31 See [http://ec.europa.eu/regional\\_policy/funds/2007/jjj/jeremie\\_en.htm](http://ec.europa.eu/regional_policy/funds/2007/jjj/jeremie_en.htm).

- address the specific challenges of Joint Technology Initiatives and financing for innovation.

6.8 The Commission concludes that in 2010 it will focus on five key actions:

- work with the European Investment Bank to increase the amount of funding available to PPPs, strengthen and streamline existing financing instruments and develop guarantee instruments;
- where EU funding is involved, develop better rules and procedures to ensure a level playing field between conventionally delivered projects and those delivered through PPP;
- propose a more effective framework for delivering research and innovation through PPPs;
- consider developing legislation on concessions, as a particular sub-category of PPP — the decision to proceed would be based on the outcome of an ongoing impact assessment; and
- improve dissemination of information and exchange of best practice by setting up a new PPP group to discuss concerns and consider future developments in PPPs.

The Commission says it intends to review the impact of this work plan before the end of 2011 and, if necessary, propose further new initiatives to maintain momentum.

### **The Government's view**

6.9 The Economic Secretary to the Treasury (Ian Pearson) says that the Government welcomes the development of a framework on PPPs and the actions proposed to encourage and simplify the delivery of such partnerships. He comments further that:

- the vast majority of expenditure on the UK's public services has been, and will continue to be, procured and funded through conventional means;
- innovative procurement approaches, such as PPPs, have, however, been used to deliver some of the Government's most complex and significant public sector infrastructure projects and programmes;
- working with the European Investment Bank to, amongst other things, increase the amount of funding available to PPPs is desirable;
- the Government also welcomes the intention to create a level playing field between conventional and PPP projects seeking EU funding and to deliver a more effective framework for research PPPs;
- the UK has considerable experience in delivering PPPs and works with many fora across the EU and internationally to spread the lessons learned and best practice;
- the European PPP Expertise Centre is a joint initiative between the Commission, the European Investment Bank and Member States, including the UK;

- the Centre provides advice and assistance to the Commission on developing public sector capacity to implement PPP projects and programmes, improving PPP planning and contributing to the spread of best PPP practice between countries and regions;
- given that the UK is heavily involved in contributing to Centre, the Government will consider plans for a new PPP group once they have been developed further and in light of the similar work already under taken in this sphere by the Commission through the Centre; and
- until more information is provided on the nature of the Commission’s plans for legislation on concessions, the Government would have a cautious approach to expanding the Union’s role in setting the legislative framework for PPPs.

## Conclusion

**6.10 Efforts to improve the role of public private partnerships in public expenditure are important — so we draw this Commission Communication to the attention of the House. However, whilst we are content to clear the document, we applaud the Government’s caution about the possibility of proposals which might expand the EU’s role in legislation concerning public private partnerships — we would wish to scrutinise closely any such proposals which might arise.**

## 7 EU policies until 2020

(31210) 16016/09 COM(09) 647	Commission Working Document: Consultation on the Future “EU 2020” Strategy
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<i>Legal base</i>	—
<i>Document originated</i>	24 November 2009
<i>Deposited in Parliament</i>	11 December 2009
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 6 January 2010
<i>Previous Committee Report</i>	None
<i>Discussed in Council</i>	European Council 10–11 December 2009
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared

## Background

7.1 In 2000 an action plan, known as the Lisbon Agenda or Lisbon Strategy, was launched to “make Europe, by 2010, the most competitive and the most dynamic knowledge-based

economy in the world”. In 2005 the action plan was relaunched for the remainder of the decade as the Lisbon Strategy for Jobs and Growth.

7.2 From time to time, particularly at the start of a new term of office, the Commission sets out its ideas for future EU policies generally or for particular areas.

## The document

7.3 This Commission Working Document has been published to seek the views of citizens, organisations and public authorities on the future “EU 2020” Strategy as a successor to the current Lisbon Strategy for Growth and Jobs. It sets out broad proposals for policies over the next ten years intended to enable the EU to make a full recovery from the economic crisis, while speeding up the move towards “a smarter, greener economy”. It describes the need for structural reform in the Union, proposes some policy priorities and highlights possible delivery mechanisms.

7.4 The need for structural reform is attributed to:

- the threat of unemployment rising to double digit figures in 2010 — a level not seen for a decade;
- the need “to shape the next generation of public policies in a very different set of circumstances”;
- a call for “a new sustainable social market economy, a smarter, greener economy, where our prosperity will come from innovation and from using resources better, and where the key input will be knowledge”; and
- the challenge of an ageing society.

The policy priorities proposed are:

- creating value by basing growth on knowledge;
- empowering people in inclusive societies; and
- creating a competitive, connected and greener economy.

And the delivery mechanisms highlighted are:

- fully exploiting the single market;
- setting “EU 2020” in a global context, for example working with the G20 and the World Trade Organisation;
- supporting growth through full use of the Stability and Growth Pact;
- reflecting political priorities in public budgets, including the EU budget; and
- establishing clear governance to make the new strategy effective.

7.5 The document was sent to the relevant sectoral Councils on 7 December 2009 and discussed at the European Council on 10–11 December 2009. The European Council’s

Conclusions recorded that it “takes note of the consultation launched by the Commission on the future strategy and looks forward to discussing an ambitious proposal as early as possible in 2010 with a view to full discussion in the European Council, including at its 2010 Spring meeting”.<sup>32</sup> The public consultation is to close on 15 January 2010 and the Commission intends to present a formal proposal for a strategy early this year, possibly following an informal European Council on 11 February 2010, with a view to adoption of the strategy at the Spring European Council.

## The Government’s view

7.6 The Economic Secretary to the Treasury (Ian Pearson) says that the Government welcomes the Commission’s launching of a public debate on the policies needed to enable the Union to make a full recovery from the economic crisis and speed up the move towards “a smarter, greener economy”. He notes that the Working Document:

- “picks up on a number of the themes that the Prime Minister has been pressing with European colleagues”; and
- is in line with the call of the December 2010 European Council for an “ambitious and revamped new strategy” focused on the reforms needed to boost Europe’s sustainable growth potential.

He comments that this focus includes “sustainable public finances ... preserving investment and social welfare, ... inclusive and efficient labour markets”, a strengthened internal market, and external trade and openness, as well as “the benefits offered by a greener economy, the improvement of the business climate ... and the enhancement of the knowledge base”. He adds that the European Council agreed that further reflection was needed “on how to improve coordination of economic policies and ... enhance national ownership” and that the Government will continue to work with EU partners on the details of such a strategy. Finally the Minister notes that there are no financial implications at this stage but draws attention to the statement in the document that “these new priorities need to be reflected in budgetary policies. The Commission intends to take them up in the [EU] budget review it will publish next year and in its proposals for the next multi-annual financial framework”.

## Conclusion

**7.7 Whatever plan is adopted to follow on from the Lisbon Strategy for Jobs and Growth will be an important determinant for a range of EU policies in the years up to 2020. Thus, while we are content to clear this present consultative document, we are clear that we will wish to recommend the Commission’s formal proposal, once published and deposited, for debate before the Spring 2010 European Council. Meanwhile, if the Government decides to respond to the call for comments on the Commission Working document, we should wish to see the response as soon as possible.**

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32 See [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/111877.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111877.pdf).

## 8 EU Committee on Internal Security

(31206) 16075/1/09 —	Draft Council Decision on setting up the Standing Committee on operational cooperation on internal security
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<i>Legal base</i>	Article 240(3) TFEU; — ; simple majority
<i>Department</i>	Home Office
<i>Basis of consideration</i>	Minister’s letter of 11 January 2010
<i>Previous Committee Report</i>	HC 5–iv (2009–10), chapter 7 (15 December 2009)
<i>To be discussed in Council</i>	No date set
<i>Committee’s assessment</i>	Legally important
<i>Committee’s decision</i>	Cleared

### Previous scrutiny

8.1 In December, we considered this draft Council Decision.<sup>33</sup> We noted that the purpose of the Decision would be to give effect to Article 71 of the Treaty on the Functioning of the European Union (TFEU). Article 71 requires a standing committee to be set up within the Council to improve and strengthen operational cooperation on internal security in the EU.

8.2 The main provisions of draft Decision are as follows:

- COSI’s function would be to promote and strengthen coordination of the operational actions of Member States’ internal security authorities;
- COSI would facilitate and ensure effective operational cooperation and coordination on police and customs cooperation, asylum, immigration, visas, the control of the external borders of the EU and judicial cooperation in criminal matters;
- COSI would evaluate the “general direction” and efficiency of operational cooperation, spot weaknesses and recommend remedies;
- COSI would be expressly prohibited from conducting operations itself;
- COSI would also be prohibited from involvement in the preparation of legislation;
- COSI would be able to invite representatives of Europol, Eurojust, FRONTEX and other relevant bodies to attend meetings as observers;
- COSI would be required to make regular reports to the Council about its activities; and

<sup>33</sup> See headnote. We also considered an unofficial draft of the Decision which the Government had sent us in September. We cleared the unofficial draft because it had been superseded by the official text of the proposed Decision.

- the Council should keep the European Parliament and national parliaments informed of COSI's proceedings.

8.3 In her Explanatory Memorandum of 10 December, the Parliamentary Under-Secretary of State at the Home Office (Meg Hillier) told us that the Government was content with the proposal and would be represented on COSI. She also told us that the draft Decision had received wide support from other Member States.

8.4 In the conclusion to our report on the draft Decision, we said that we recognised the potential benefits of practical cooperation between Member States through the creation of the Committee on Internal Security. The drafting of proposed Decision was clear and we had no questions about the substance of the document.

8.5 We had doubts, however, about the use of Article 240(3) TFEU as the legal base for the measure. It requires the Council to act by a simple majority on procedural matters and for the adoption of its rules of procedure. Our doubts about whether Article 240(3) is appropriate arise from the fact that Article 242 TFEU is expressly and specifically about “the rules governing the committees provided for in the Treaties”.<sup>34</sup> Accordingly, we asked the Minister why Article 242 should not be cited as the legal base and whether Article 240(3) is appropriate. Pending the Minister's reply, we kept the draft Decision under scrutiny.

### The Minister's letter of 11 January 2010

8.6 In her reply of 11 January, the Minister says:

“I acknowledge that Article 242 TFEU would appear to be an appropriate legal base as it is specifically targeted at rules for committees provided for under the Treaties. However, the Government believes that Article 240(3) is also credible as it is the more generic legal base for procedural matters within Council, including Coreper and its rules of procedure. The use of these two legal bases under the previous comparable Treaty provisions demonstrates that they have been used flexibly.<sup>35</sup> For example, the statutes of the Economic Policy Committee and the Economic and Financial Committee were brought forward under the predecessor to Article 242, whereas the predecessor to Article 240 was used to establish the Political and Security Committee and the EU Military Committee. The Government believes therefore that Article 240(3) is an acceptable legal base ... .”

### Conclusion

**8.7 We are grateful to the Minister for her prompt and clear reply to our question. It seems to us that, if the Treaty provides a specific legal base for a measure, it is reasonable to expect that the specific power rather than a general one should be used. However, we accept that the Government's view is not unreasonable and that the legislation setting up committees required by the EC Treaty provides a precedent for**

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<sup>34</sup> Article 242 provides that: “The Council, acting by a simple majority shall, after consulting the Commission, determine the rules governing the committees provided for in the Treaties.”

<sup>35</sup> Articles 207 and 209 of the EC Treaty.

using the general power in some cases and the specific power in others. We have decided, therefore, not to pursue the point further and to clear the draft Decision from scrutiny.

## 9 Resettlement of refugees from third countries

(a) (30894) 12986/09 COM(09) 447	Commission Communication on the establishment of a joint EU resettlement programme
+ ADDs 1–2	Commission staff working document: impact assessment of the proposal and summary of the assessment
(b) (30893) 12985/09 COM(09) 456	Draft Decision to amend Decision No. 573/07/EC establishing the European Refugee Fund for the period 2008–13

<i>Legal base</i>	(a) — (b) Article 63(2)(b) EC; co-decision; QMV
<i>Department</i>	Home Office
<i>Basis of consideration</i>	Minister’s letter of 4 January 2010
<i>Previous Committee Report</i>	HC 19–xxvii (2008–09), chapter 10 (14 October 2009)
<i>To be discussed in Council</i>	Date not known
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	(Both) Cleared

### Previous scrutiny of the documents

9.1 Last October, we considered document (a), a Commission Communication proposing the establishment of an EU programme for the resettlement in participating Member States of third country nationals who are temporarily resident in a third country and have been granted refugee status. We also considered document (b), the draft of Council Decision to make consequential amendments to the rules of the European Refugee Fund.<sup>36</sup>

9.2 We noted that, at present, only ten Member States (of which the UK is one) have programmes for the resettlement in their areas of refugees temporarily living in a third country as their “first country of asylum”. There are no formal arrangements for Member States to cooperate with each other on their plans for resettlement or to agree a common position in negotiations with the UNHCR and others on resettlement matters.

<sup>36</sup> See HC 19–xxvii (2008–09), chapter 10 (14 October 2009).

9.3 The Communication explains why the Commission considers the present situation is unsatisfactory and why it proposes a joint EU resettlement programme. Participation in the programme would be voluntary. Each Member State would remain free to decide whether to allow any resettlement in its area, how many refugees to accept and who to take. Every year, an Expert Group (comprised of representatives of every Member State, the UNHCR, the International Organisation for Migration and relevant NGOs) would give the Commission the draft of a Decision defining common EU priorities for the resettlement of refugees from particular regions, or of particular nationalities, or who are particularly vulnerable. Member States would be entitled to a one-off payment from the European Refugee Fund of €4000 for the resettlement of each refugee who falls into one or more of the categories specified in the Decision on the common EU priorities for that year.

9.4 We noted that the objective of the programme would be to increase the number of resettlements, encourage more Member States to have national resettlement programmes, achieve economic and efficiency gains through cooperation between Member States, benefit from closer cooperation with the UNHCR and strengthen the EU's influence and standing in its relations with third countries.

9.5 The Minister of State at the Home Office (Mr Phil Woolas) told us that the Government broadly supported the Commission's proposals for the joint programme and believed that the amendments included in the draft Decision were acceptable. There were a few points on which the Government would seek information or clarification.

9.6 In the conclusion to our report on the proposals, we said that we did not doubt the potential benefits of greater practical cooperation between Member States in planning for and implementing the resettlement of refugees from third countries. Moreover, so long as participation remained entirely at the discretion of each Member State, we could see the advantages of developing a joint EU resettlement programme along the lines the Commission proposed.

9.7 We noted that the Government intended to seek clarification from the Commission of the estimates of the effect of the proposals on the number of resettlements and the annual cost of the payments to Member States. We asked the Minister to tell us the Commission's response. We also asked him to provide us with progress reports on the negotiations and to tell us the Government's decision whether to opt in to the draft Decision. Meanwhile, we kept documents (a) and (b) under scrutiny.

### **The Minister's letter of 4 January 2010**

9.8 In her letter of 4 January, the Parliamentary Under-Secretary of State at the Home Office (Meg Hillier) provides the information for which we had asked. It is as follows:

- the Commission estimates that, if the joint EU programme were adopted, more Member States would decide to accept refugees for resettlement, leading to a 15% increase in the number of resettlement places (about an additional 765 places);
- the Commission also estimates that the annual cost of the increase to participating Member States would be €11.475 million in total; and

- Member States would receive a contribution from the European Refugee Fund of €4,000 for each resettled refugee falling into one of the categories defined by the annual priority-setting exercise.

9.9 The Minister also provides us with a summary of the discussion of the proposals in the Asylum Working Group and in bilateral talks with the Commission and other Member States. Notably, the Government has succeeded in gaining agreement to an amendment to Article 1(4) of the draft Decision to require consultation with the UNHCR and Member States before the Commission establishes the EU annual priorities for resettlement.

9.10 Finally, the Minister tells us that the Government has decided to opt into the draft Decision.

## Conclusion

9.11 We are grateful to the Minister for her letter. The Government's decision to opt into the proposal was expected. We have no further questions to ask and we are content now to clear documents (a) and (b) from scrutiny.

## 10 Guidelines and model provisions on EU criminal legislation

(31220)	Draft Council Conclusions on model provisions, guiding the
—	Council's criminal law deliberations
—	

<i>Legal base</i>	—
<i>Department</i>	Justice
<i>Basis of consideration</i>	Minister's letter of 6 December 2009
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	No date set
<i>Committee's assessment</i>	Politically and legally important
<i>Committee's decision</i>	— Further information requested.

## Background

10.1 The Parliamentary Under-Secretary of State at the Ministry of Justice (Lord Bach) wrote on 6 December to inform the Committee of the draft Council conclusions “on model provisions, guiding the Council's criminal law deliberations” which were agreed and adopted at the Justice and Home Affairs Council on 1 December 2009. Although Council conclusions are not subject to Parliamentary scrutiny and have no legally binding effect, the Minister states that he nevertheless wanted to make us aware of them.

10.2 The Lisbon Treaty has collapsed the third pillar of the EU, which means the formulation of EU criminal legislation is no longer an intergovernmental affair but adopted by the Council and European Parliament, in most cases under the “ordinary legislative procedure” (formerly “co-decision”) in which both institutions have equal legislative powers. These Council conclusions, an initiative of Sweden and Germany, establish guidelines on assessing the need for criminal provisions in future EU legislation and provide model criminal provisions to be used in future proposals. The Minister reports that they are aimed in particular at providing assistance to non-criminal law experts, who are likely to be required to consider criminal provisions more frequently under the Lisbon Treaty arrangements. They are, however, only a starting point: the Council, European Parliament and Commission are tasked to further “develop and refine” the conclusions once the Lisbon Treaty is in force.

## Council conclusions

### *Introduction*

10.3 The Council conclusions fall into two parts: guidelines and model provisions. They are annexed to this Report, and summarised below.

10.4 Guidelines and model provisions on criminal law are said to be necessary because: a) the Lisbon Treaty is likely to have the effect that criminal law provisions will be discussed within the Council to an even greater extent than at present; and b) this may result in incoherent and inconsistent criminal provisions in EU legislation, thus creating unnecessary difficulties when implementing and interpreting EU law.

10.5 The advantages are enumerated as follows:

- guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions;
- increased coherence would facilitate the transposition of EU provisions in national law;
- legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements.

### *Guidelines*

10.6 The conclusions set out the following guidelines as “a starting point for discussions in the Council”. They do not “introduce obligations or constraints that go beyond what is set out in the Treaties”.

10.7 *Assessment of the need for criminal provisions:*

- “Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort.”
- “Criminal provisions should be adopted in accordance with the principles laid out in the Treaties, which include the principles of proportionality and of subsidiarity,

to address clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures:

- (a) in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis,<sup>37</sup> or
  - (b) if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.”<sup>38</sup>
- “When there seems to be a need for adopting new criminal provisions the following factors should be further considered, while taking fully into account the impact assessments that have been made:
    - the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications;
    - how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU;
    - the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.”

#### 10.8 *The structure of criminal provisions:*

- “The description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning.”
- “The criminal provisions should focus on conduct causing actual harm or seriously threatening the right or essential interest which is the object of protection; that is, avoiding criminalisation of a conduct at an unwarrantably early stage. Conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection.”

#### 10.9 *Intent:*

- “EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally.”
- “Negligent conduct should be criminalised when a case-by-case assessment indicates that this is appropriate due to the particular relevance of the right or essential interest which is the object of protection, for example in cases of serious negligence which endangers human life or causes serious damage.”

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37 This follows the wording found in Article 83(1) of the Treaty on the Functioning of the European Union (TFEU).

38 This follows the wording found in Article 83(2) TFEU.

- “The criminalisation of an act that has been committed without intention or negligence, i.e., strict liability, should not be prescribed in EU criminal legislation.”

#### 10.10 *Inciting, aiding and abetting, and attempt:*

- “The criminalisation of inciting, aiding and abetting of intentional offences should normally follow the criminalisation of the main offence. Attempts to commit an intentional offence should be criminalised if it is necessary and proportionate in relation to the main offence. Consideration should be given to the different regimes under national law.”

#### 10.11 *Penalties:*

- “When it has been established that criminal penalties for natural persons should be included it may in some cases be sufficient to provide for effective, proportionate and dissuasive criminal penalties and leave it to each Member State to determine the level of the penalties. In other cases there may be a need for going further in the approximation of the levels of penalties. In these cases the Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties should be kept in mind, in the light of the Lisbon Treaty.”

#### 10.12 *Model provisions:*

- “Once it has been established that criminal provisions should be adopted, either as the only option or as an alternative, there is a need to establish a range of concurrent rules, e.g., rules on liability of legal persons. There may also be a need to differentiate between conduct that should be prohibited but does not necessarily have to be established as a criminal offence and conduct that should be criminalised.”

10.13 The model provisions are set out in annex to the conclusions, and cover infringements; criminal offences; inciting, aiding and abetting and attempt; criminal penalties for individuals with and without approximation of levels; and liability of and penalties against corporations.

### **Minister’s letter of 6 December**

10.14 The Minister sees value in this initiative, considering that it will facilitate coherent and consistent use of criminal provisions in future EU proposals. In particular, he takes the view that it will be useful in the context of future negotiations to underline that the Council considers the use of criminal sanctions as a last resort and attaches particular importance to the principles of subsidiarity and proportionality when assessing the need for such sanctions. He adds that during negotiations the Government secured the inclusion of a recommendation that the impact of criminal provisions at EU level on different legal systems should be considered.

10.15 One issue that arose during negotiations was the question of negligence. As originally drafted, the guidelines would have foreseen negligence being considered as a matter of course when criminal sanctions were contemplated. The Government did not think this was appropriate, having in mind the seriousness of the conduct with which some EU

legislation deals. He comments that the final draft is much improved in this respect, and provides for consideration of negligence within criminal provisions on a case-by-case basis, which the Government could accept.

10.16 The Minister reports that the conclusions, although only a starting point for negotiations, met with a mixed reception from the Commission. In particular, at the JHA Council, the Commission made a statement to the effect that the guidelines and model provisions were premature and restricted the interpretation of Article 83 of the Treaty on the Functioning of the European Union (TFEU). The Government does not agree. It takes the view that the coming into force of the new Treaty does not conflict with the agreement of the Council conclusions: they are merely guidelines and are not capable of restricting interpretation of Treaty provisions. The Commission further asserted that these are unilateral guidelines of the Council and are without prejudice to the Commission's right of initiative. The Government fails to see how such guidelines could interfere with the right of initiative.

10.17 Nonetheless, to address these concerns, the conclusions include a statement encouraging discussion of the conclusions with the other institutions of the Union after the entry into force of the Lisbon Treaty.

## Conclusion

10.18 **We are grateful to the Minister for sending us a copy of the Council conclusions, and for the further explanation contained in his letter, particularly, as he notes himself, because Council conclusions are not depositable EU documents under the Committee's Standing Order No. 143.**

10.19 **The fact that a document as important as this is not depositable causes us great concern. It matters little that these conclusions are non-binding "soft law": they contain model provisions for use in Council working group negotiations and so are likely to have a considerable influence on the shape of future EU criminal legislation. As the Minister knows, the impact of EU criminal law on national sovereignty and on the relationship between State and citizen is a key concern of this Committee, and we would have had several comments to make. Yet these conclusions were adopted without any parliamentary scrutiny whatsoever.**

10.20 **The deposit of Council conclusions is a matter we are pursuing with the Government through other channels, and so need not trouble the Minister. But we do ask that he deposit a further draft version of the conclusions in time for the Committee to comment if, as he says, they are to be "refined and developed" at the insistence of the Commission.**

## Annex 1: Draft Council conclusions on model provisions, guiding the Council's criminal law Deliberations

Since the entry into force of the Amsterdam Treaty, several Framework Decisions have been adopted on the basis of Articles 31 and 34 of the TEU, establishing minimum rules

concerning the definition of criminal offences and sanctions in various areas, inter alia terrorism, computer crime and organised crime.

In addition, the European Court of Justice has clarified that criminal law provisions may under certain conditions be included in specific areas of Community law.

The Lisbon Treaty is likely to have the effect that criminal law provisions will be discussed within the Council to an even greater extent than at present. This may result in incoherent and inconsistent criminal provisions in EU legislation. Furthermore, provisions negotiated within the Council might unjustifiably deviate from wording that is normally used in EU criminal legislation, thus creating unnecessary difficulties when implementing and interpreting EU law.

While noting the understanding reached in the JHA Council on 21 February 2006 on the procedure for the future handling of legislative files containing proposals relevant to the development of criminal law policy, the Council acknowledges the need for further action and coordination to ensure coherent and consistent use of criminal law provisions in EU legislation.

To this end, it would be useful if the Council were to agree on guidelines and model provisions for its work on criminal law.

Foreseeable advantages of guidelines and model provisions for criminal law include:

- Guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions;
- Increased coherence would facilitate the transposition of EU provisions in national law;
- Legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements.

The following guidelines should be conceived as a starting point for discussions in the Council. These guidelines do not introduce obligations or constraints that go beyond what is set out in the Treaties. On this basis, the Council suggests that the Presidency should conduct future discussions on criminal law within the EU, taking these conclusions into account. Furthermore, the Council should seek, together with the European Parliament and the Commission, as soon as possible after the entry into force of the Lisbon Treaty, to further develop and refine these conclusions, and it invites the Presidency to take the necessary measures to that end.

The Council adopts the following conclusions:

### *Assessment of the need for criminal provisions*

(1) Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort.

(2) Criminal provisions should be adopted in accordance with the principles laid out in the Treaties, which include the principles of proportionality and of subsidiarity, to address clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures;

- a) in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, or
- b) if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

(3) When there seems to be a need for adopting new criminal provisions the following factors should be further considered, while taking fully into account the impact assessments that have been made:

- the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications;
- how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU;
- the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.

### *Structure of criminal provisions*

(4) The description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning.

(5) The criminal provisions should focus on conduct causing actual harm or seriously threatening the right or essential interest which is the object of protection; that is, avoiding criminalisation of a conduct at an unwarrantably early stage. Conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection.

### *Intent*

(6) EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally.

(7) Negligent conduct should be criminalised when a case-by-case assessment indicates that this is appropriate due to the particular relevance of the right or essential interest which is the object of protection, for example in cases of serious negligence which endangers human life or causes serious damage.

(8) The criminalisation of an act that has been committed without intention or negligence, i.e. strict liability, should not be prescribed in EU criminal legislation.

### *Inciting, aiding and abetting, and attempt*

(9) The criminalisation of inciting, aiding and abetting of intentional offences should normally follow the criminalisation of the main offence. Attempts to commit an intentional offence should be criminalised if it is necessary and proportionate in relation to the main offence. Consideration should be given to the different regimes under national law.

### *Penalties*

(10) When it has been established that criminal penalties for natural persons should be included it may in some cases be sufficient to provide for effective, proportionate and dissuasive criminal penalties and leave it to each Member State to determine the level of the penalties. In other cases there may be a need for going further in the approximation of the levels of penalties. In these cases the Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties should be kept in mind, in the light of the Lisbon Treaty.

### *Model provisions*

(11) Once it has been established that criminal provisions should be adopted, either as the only option or as an alternative, there is a need to establish a range of concurrent rules, e.g., rules on liability of legal persons. There may also be a need to differentiate between conduct that should be prohibited but does not necessarily have to be established as a criminal offence and conduct that should be criminalised.

(12) The model provisions set out in Annex II should guide future work of the Council on legislative initiatives that may include criminal provisions.

### *Model provisions*

The following wording shall guide future legislative work in criminal and related matters within the EU. The aim is to achieve coherent and consistent criminal law provisions, and to avoid unnecessary difficulties in the interpretation of EU law and problems for national legislators in the process of implementation.

## ***A — Provision on infringements and penalties that do not necessarily have to be criminal***

### *Infringements*

Each Member State shall lay down the rules on penalties applicable to infringements of the provisions adopted pursuant to this Directive. The penalties provided for must be effective, proportionate and dissuasive.

## ***B — Criminal law provisions and related provisions***

### *Criminal Offences*

Each Member State shall ensure that the following conduct constitutes a criminal offence, when [unlawful and]<sup>39</sup> committed intentionally [or with at least serious negligence].

#### *Inciting, aiding and abetting and attempt*

1. Each Member State shall ensure that inciting, aiding and abetting the intentional conduct referred to in Article (Article on Criminal Offences) is punishable as a criminal offence.
2. Each Member State shall ensure that attempting the intentional conduct referred to in Article (Article on Criminal Offences) is punishable as a criminal offence.

#### *Criminal Penalties (for natural persons, without approximation of levels)*

Each Member State shall take the necessary measures to ensure that the offences referred to in Articles (Article on Criminal Offences) are punishable by effective, proportionate and dissuasive criminal penalties.

#### *Criminal Penalties (for natural persons, with approximation of levels)*

Each Member State shall take the necessary measures to ensure that an offence referred to in Article (Article on Criminal Offences) is punishable by (penalty levels) of imprisonment.<sup>40</sup>

#### *Liability of legal persons*

1. Each Member State shall [take the necessary measures to] ensure that a legal person can be held liable for offences referred to in Articles (Article on Criminal Offences) where such offences have been committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a) a power of representation of the legal person,
- b) an authority to take decisions on behalf of the legal person, or
- c) an authority to exercise control within the legal person.

[2. Each Member State shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles (Article on Criminal Offences) for the benefit of that legal person by a person under its authority.]

<sup>39</sup> Text within square brackets indicates that the inclusion of such text should be considered on a case by case basis.

<sup>40</sup> The Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties which indicates four levels of penalties (doc. 9141/02) should be kept in mind, in the light of the Lisbon Treaty.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles (Article on Criminal Offences).

4. [For the purpose of this Directive] ‘legal person’ shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations. [NB: This paragraph is preferably included in an Article on definitions, if such a provision exists.]

### *Penalties against legal persons*

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article (Article on Liability of legal persons) is punishable by effective, proportionate and dissuasive penalties [which shall include criminal or non-criminal fines and may include other penalties, such as:

- a) exclusion from entitlement to public benefits or aid;
- b) temporary or permanent disqualification from the practice of commercial activities;
- c) placing under judicial supervision;
- d) a judicial winding-up order;
- e) temporary or permanent closure of establishments which have been used for committing the offence.]

## 11 Rights of victims of crime in the EU

(31221)	Council Conclusions on a strategy to ensure fulfilment of the rights of and improve support to persons who fall victim to crime in the EU
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<i>Legal base</i>	—
<i>Department</i>	Justice
<i>Basis of consideration</i>	Minister’s letter of 8 December 2009
<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>	—

## The Minister's letter of 8 December

11.1 The Parliamentary Under-Secretary at the Ministry of Justice (Lord Bach) writes to inform the Committee of the Council's conclusions on victims of crime in the EU, which were adopted by the Justice and Home Affairs Council on 23 October. (They were sent to the Committee for information in early November, but the Minister subsequently decided to submit them "more formally".) The conclusions are a political statement. They agree that fulfilling victims' rights and improving support to victims should be given higher priority in the European Union. They also state that there is a need to agree a common strategy which will guide future work on victims, while taking into account the different legal systems of Member States and the roles of the victim in those systems. The conclusions then describe principles, factors and actions to guide future measures in relation to victims. The conclusions are therefore intended to be a basis for future EU proposals, and the Stockholm Programme now refers to the need for an integrated and co-ordinated approach to victims in line with these Conclusions.

11.2 The Minister continues that the Government strongly supports the aims and content of the conclusions, agreeing that it is important to ensure that victims' rights are respected and fulfilled, to improve support to victims, and to ensure that they are "at the heart of the criminal justice system in every Member State, whether a party to proceedings or not".

## Council conclusions

11.3 A summary of the Council's conclusions is set out below.

11.4 The Council concludes that there is a need to agree on a common strategy on fulfilling the rights of and improving support to victims of crime in the EU. This strategy should be guided by the following principles:

- the need to respect the rights of both the victim and the accused;
- respect for and non-discrimination of persons who fall victim to crime;
- persons who fall victim to crime should be given the possibility to request and obtain compensation, in order to relieve the harm caused to them;
- the importance for persons who fall victim to crime to be treated properly and professionally in their contacts with representatives of the judicial and law enforcement system;
- persons who fall victim to crime should have appropriate access to information of relevance to their case and necessary for the protection of their interests and the exercise of their rights, as far as possible in a language that they understand;
- persons who fall victim to crime should be protected, as far as possible, from secondary and repeat victimisation;
- persons who fall victim to crime and who are in a particularly vulnerable situation or state should be given special attention and treatment;

- if appropriate, close family members of persons who fall victim to crime should also benefit from the assistance and protection offered to persons who fall victim to crime;
- new or amended legislation and policies should aim at ensuring fulfilment of the rights of and improving support to victims in connection with criminal proceedings;
- new or amended legislation and policies should be based on good practices, evaluation of existing legislation and policy and empirical knowledge.

11.5 The Council concludes that the following factors are of utmost importance for the fulfilment of the aims of this strategy, as well as for the work to prevent primary, secondary and repeat victimisation:

- cooperation among relevant actors such as law-enforcement agencies, health and social welfare services as well as with non-governmental organisations;
- development of applied research in order to increase knowledge on victimisation and its inherent components and to provide information for evaluation and policy decisions;
- evaluation of existing indicators used for measuring the phenomenon, its magnitude and trends as well as, if needed, development of such indicators;
- development of monitoring and evaluation of the implementation and effectiveness of adopted European Union legislation and policy;
- collection of good practices on assistance and support to persons who fall victim to crime, in order to increase the knowledge of measures in practice and dissemination of such knowledge to policy makers and other relevant actors.

11.6 The Council concludes that the following actions should be undertaken in future work to fulfil the aims of this strategy:

- further development of provision of assistance to and protection of persons who fall victim to crime;
- further measures aiming at enhancing and facilitating possibilities for persons who fall victim to crime to claim compensation e.g. through improvement of the application of the Council Directive relating to compensation to victims of crime in cross-border situations;
- promotion and development of the use of technical measures, where appropriate, in order to facilitate the participation of victims of crime in criminal proceedings, in accordance with the role of victims in the relevant justice system;
- further development of victim support. Specialised services and non-governmental organisations acting at national, regional or local levels throughout the European Union should be given possibilities of offering appropriate service to persons who fall victim to crime;

- provision of training to personnel of law-enforcement agencies, specialised services and nongovernmental organisations who in their profession or voluntary work come into contact with victims of crime;
- further raising of public awareness of the possibilities for victims of crime to get support and advice;
- further research on and, if appropriate, development of mediation and other restorative justice practices, while safeguarding the rights of victims of crime;
- further development of appropriate provision of information, interpretation and translation for victims of crime in criminal proceedings.

11.7 *Inter alia* the Council also:

- calls on Member States and the Commission to consider various ways of facilitating and improving the provision of information to victims of crime, in particular on their role in criminal proceedings, in all official languages of the institutions of the European Union;
- calls on the Commission to support, by all suitable means, Member States in these efforts and, if appropriate, proceed to put forward a relevant legislative proposal or other measures;
- underlines the importance of giving this strategy proper consideration in the framework of the Stockholm Programme; and
- invites the Commission to co-ordinate its activities in the area of victims of crime with the work carried out by Member States and within the Council of Europe, the latter along the lines drawn up in the Memorandum of Understanding between the European Union and the Council of Europe.

## Conclusion

**11.8 We thank the Minister for sending us the Council conclusions on the protection of the rights and interests of victims of crime. But, as with the conclusions on guiding the Council’s criminal law deliberations also reported this week, it is axiomatic that we are unable to scrutinise an EU initiative once adopted: we simply report it to the House.**

**11.9 We note that, though non-binding, the Council conclusions will be taken into account in the implementation of the Stockholm Programme and that they also contain an invitation to the Commission to put forward a legislative proposal. Consequently they are, in reality, an important EU initiative. We would therefore have wished to scrutinise them in draft form, and consider this a further example of why Council conclusions should be formally deposited in Parliament.**

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

### Department for Business, Innovation and Skills

(31227)  
17021/09  
COM(09) 659

Draft Council Regulation repealing the anti-dumping duty imposed by Regulation (EC) No.172/2008 on imports of ferro-silicon originating in the former Yugoslav Republic of Macedonia.

### HM Treasury

(31202)  
16989/09  
COM(09) 644

Amended Draft Council Decision on the signing, on behalf of the European Union, and provisional application of the Cooperation Agreement between the European Union and its Member States, of the one part, and the Principality of Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests and to ensure exchange of information on tax matters.

(31203)  
16990/1/09  
COM(09) 648

Amended Draft Council Decision on the conclusion, on behalf of the European Union, of the Cooperation Agreement between the European Union and its Member States, of the one part, and the Principality of Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests and to ensure exchange of information on tax matters.

(31215)  
17342/09  
COM(09) 668

Draft Council Decision authorising the Republic of Lithuania to extend the application of a measure derogating from Article 193 of Council Directive 2006/112/EC on the common system of value added tax.

# Formal minutes

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**Wednesday 13 January 2010**

Members present:

Michael Connarty, in the Chair

Mr Adrian Bailey

Mr Adrian S Borrow

Mr William Cash

Jim Dobbin

Mr Greg Hands

Mr David Heathcoat-Amory

Keith Hill

Kelvin Hopkins

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 12 read and agreed to.

*Resolved*, That the Report be the Seventh Report of the Committee to the House.

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

[Adjourned till Wednesday 20 January at 2.30 pm.]

## Standing order and membership

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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](http://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*)