



House of Commons
European Scrutiny Committee

**Twelfth Report of
Session 2009–10**

**Documents considered by the Committee on 24 February 2010,
including the following recommendations for debate:**

Pre-accession assistance to the Western Balkan states and
Turkey

Financial services

Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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1 Pre-accession assistance to the Western Balkan states and Turkey

(a) (31251) 5226/10 + ADD 1 COM(09) 700	Commission 2008 Annual Report on PHARE, Turkey pre-accession instrument, CARDS and transition facility.
(b) (31268) 5516/10 —	Court of Auditors' Special Report: European Commission Management of Pre-accession Assistance to Turkey

<i>Legal base</i>	(a) — (b) Article 248 EC; —
<i>Document originated</i>	(a) 21 December 2009
<i>Deposited in Parliament</i>	(both) 12 May 2009
<i>Department</i>	International Development
<i>Basis of consideration</i>	EM of 4 February 2010
<i>Previous Committee Report</i>	None; but see (31099) 15368/09; (31255) 5271/010; and (31030) 14685/09: HC 5–x (2009–10), chapters 1 and 2 (9 February 2010)
<i>To be discussed in Council</i>	To be determined
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Not cleared; for debate in European Committee B, together with Commission Communication 14685/09, Commission 2008 Annual Report 5271/10 and Commission Annual Report 15365/09

Background

1.1 During the previous financial perspective, a number of programmes of assistance applied to acceding and candidate countries. The main ones were:

- the PHARE programme, principally involving institution-building measures (with accompanying investment) as well as measures designed to promote economic and social cohesion;
- the ISPA programme, which dealt with large-scale environment and transport investment support; and
- the SAPARD programme, which supported agricultural and rural development.

1.2 The others included Community Assistance for Reconstruction, Development and Stabilisation (CARDS) programme. This supported Western Balkans countries (Albania, Bosnia and Herzegovina, Croatia, Macedonia, and the then Federal Republic of

Yugoslavia) to make progress on post-conflict stabilisation and accession to EU membership, as part of the Stabilisation and Association Process. €5.13 billion was provided under CARDS between 2000 and 2006.

1.3 The Turkey Pre-Accession instrument (TPA) ran from 2000 to the end of 2006.

1.4 All involved a process, which, over time, seeks to ensure that candidate countries are prepared for and finally enabled to access post-accession funding effectively and efficiently on their own. This process of increasingly decentralised management — the Decentralised Implementation System (DIS) and Extended Decentralised Implementation System (EDIS) — is explained at Annex 1 of this chapter of our Report.

1.5 All these instruments were replaced from 1 January 2007 by the new single, focussed Instrument for Pre-accession Assistance (IPA). Existing projects under these former programmes continued, but all new pre-accession actions came under the new IPA. It has five components: transition assistance and institution building measures (with accompanying investment); cross-border cooperation; regional development; human resources development; and rural development. The latter three are for candidate countries and are designed to mirror structural funds, thus necessitating the relevant management structures to be in place. Potential candidates can benefit from similar measures implemented through the component for transition assistance and institution building.¹

1.6 The ten new Member States that joined the EU in 2004 received a Transition Facility in 2004–2006. Contracting was envisaged to continue until 2008 and payment of funds until 2009. Bulgaria and Romania received a Transition Facility in 2007; implementation is expected to continue until 2010. These Transition Facilities provide continued financial assistance in a number of core areas requiring further reinforcement, as identified in the last Comprehensive Monitoring Reports before accession. Assistance is implemented under the EDIS.

1.7 The Court of Auditors carries out audits, through which it assesses the collection and spending of EU funds. It examines whether financial operations have been properly recorded and disclosed, and legally and regularly executed. It also, via its Special Reports, carries out audits designed to assess how well EU funds have been managed so as to ensure economy, efficiency and effectiveness.

The 2008 Annual Report on PHARE, Turkey Pre-accession Instrument, CARDS and the Transition Facility

1.8 The 2008 Annual report details the implementation during 2008 of three pre-accession aid instruments — CARDS, PHARE and the Turkey pre-accession aid instrument — and the 2008 implementation of the Transition Facility. For CARDS, PHARE, and the Turkey pre-accession instrument, the focus during 2008 was on the implementation of projects agreed in 2005 and 2006.

¹ See http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/index_en.htm full information on the history and present arrangements pertaining to EU pre- and post-accession financial assistance.

1.9 In Croatia, implementation of PHARE 2006 projects was temporarily suspended on 21 December 2007 because of serious concerns over the capacity of implementing agencies to ensure a sound management of EU funds. By July 2008 Croatia had demonstrated sufficient performance improvement under the DIS for the Commission to decide to restore its endorsement of PHARE 2006 contracts, and Croatia managed to contract 84.8% of contracts by the 30 November 2008 deadline.

1.10 In Bulgaria, most of the PHARE 2006 programme was eventually cancelled. In February 2008, the pre-accession financing managed by two of the accredited Bulgarian agencies was suspended, pending the implementation of corrective measures; and in July, the Commission decided to withdraw completely the right of those agencies to manage PHARE and Transition Facility programmes. In total, only 17.4% of PHARE programmes had been contracted by the deadline.

1.11 In Romania, 78% of the PHARE 2006 programme was contracted by the deadline. The European Commission had expressed some concerns in 2007 over the capacity of Romanian agencies to ensure sound management of EU funds. Although there were improvements during 2008, delays in implementation undermined the programme, and some significant and priority projects were lost as a result.

1.12 Three programmes under the TPA were under implementation in 2008. By the end of 2008, 78.4% of the 2008 national programme had been placed under contract.

1.13 The Transition Facility for Bulgaria and Romania was established to fund certain Institution Building (IB) actions and, as such, is an extension of the assistance provided until accession under the PHARE programme. It is governed by separate Memorandums of Understanding between the Bulgarian and Romanian authorities respectively and the Commission. The Commission says that, during 2008, “Bulgaria and Romania carried on with the contracting and implementation of the 2007 Transition Facility programme allocated to both countries” and notes that the contracting deadline expires on 15 December 2009.

The Government's view

1.14 The Parliamentary Secretary at the Department for International Development (Mr Michael Foster) begins by saying that he has combined these two documents into his one Explanatory Memorandum of 4 February 2010 “given the considerable overlap in their content”. He comments on this first Report as follows:

“The UK accepts the 2008 Report and is encouraging lessons learned to be included into the implementation of programmes under IPA. We share the Commission’s concerns and welcome the prompt action taken over the inadequate management of EC funds. We support and encourage the Commission to take action as necessary, including assistance for capacity-building, in order to address weaknesses in the management of EC funds.

“It is encouraging to note that the latest funding report on Bulgaria states that positive steps have been taken since July 2008. Two other EC instruments SAPARD (the agriculture fund), and ISPA (infrastructure and cohesion) have now had their

suspensions lifted because of a concerted effort by the Bulgarian authorities. However, PHARE and the Transition Facility are still currently suspended pending a detailed assessment of system weaknesses and a proposal for financial corrections by Bulgaria.”

The Court of Auditors’ report

1.15 In its introduction, the Court of Auditors explain that Turkey is currently one of three candidate countries for EU membership, along with Croatia and Macedonia; that each has an Accession Partnership; and that it sets out the priorities each candidate needs to address in order to make progress in the accession negotiations.

1.16 The ECA report on TPA addressed three questions:

- Did the European Commission ensure that EU assistance was directed to the projects that add most value in achieving the EU’s Accession Partnership priorities?
- Did the European Commission ensure that the Decentralised Implementation System resulted in timely and successful achievement of project outputs and objectives?
- Did the European Commission ensure that there was an effective system of performance monitoring and evaluation?

1.17 The Court’s audit examined a sample of completed projects (11 out of 82 TPA projects from the 2002 to 2004 National Programmes), the system for the strategic planning and procedures for setting new projects for 2007 — the first programming year of the IPA — and the functioning of the DIS.

1.18 The Court found that TPA projects suffered from many weaknesses, namely: excessive delays, implementation problems, inadequate monitoring, and evaluation. Nonetheless the Court found that the audited projects did achieve their intended results, and that these results are likely to be sustained in future.

1.19 Many of the Court’s specific criticisms focus on the weaknesses in the DIS. The Court notes, however, that the Commission has introduced measures aimed at addressing many of the weaknesses of the DIS system, in particular since the introduction of IPA and the Multi-Annual Indicative Planning Document (MIPD). But it notes that the impact of these changes can only be assessed as the IPA projects are implemented in the coming years. As of now, it judges that there is still work to do to ensure that MIPDs offer precise indicators and objectives.

1.20 The Court notes that 236 objectives were spelled out in the EU Accession Partnership and argues that it is impossible to judge Turkey’s performance on the basis of these goals. Specifically, the Court says that:

“The Council and Commission strategy documents were insufficient in directing the EU assistance towards an achievable set of objectives within the pre-accession process. Moreover, the strategic and project objectives were not sufficiently specific to allow assessment of the project outcomes. The Commission did not have the information to demonstrate the effectiveness of the pre-accession assistance ...

“On the basis of these observations, the Court recommends that the Commission address the remaining weaknesses in overall programming and performance management.”

1.21 In its Conclusions and Recommendations, the Court says of its three questions:

Did the European Commission ensure that EU assistance was directed to the projects that add most value in achieving the EU’s Accession Partnership priorities?

There was no mechanism to ensure that the projects proposed and selected were those that represented the best use of EU financial resources in achieving the Accession Partnership priorities. A multitude of priorities was set, with no clear hierarchy of objectives from the Accession Partnership down through the annual national programmes and approved projects to the individual project components and activities. There was a lack of specific criteria and a robust framework to determine the priorities to which the EU assistance should be directed. Specific, measurable and achievable objectives were not set and timescales were not realistic. Consequently, there was not a sound basis for monitoring performance. Although project selection procedures were improved considerably with the IPA, proposals were still not assessed for how effective and efficient they were likely to be in achieving a strategic objective, thereby allowing meaningful comparison between alternatives or the selection of projects likely to have the greatest impact. The Commission should improve programming with a robust methodology to determine the strategic objectives for which the EU financial assistance is most needed. The methodology should ensure that the logic for EU intervention in achieving each strategic objective is clearly demonstrated.

1.22 The Commission says that its framework is adequate, and that work to improve strategic objectives and indicators “is underway”.

Did the European Commission ensure that the Decentralised Implementation System resulted in timely and successful achievement of project outputs and objectives?

Despite having been approved by the Commission, the DIS institutions were understaffed for the 2002 to 2004 National Programmes and did not achieve timely implementation of the projects audited or for the programmes as a whole. Nevertheless, although beset by implementation problems and delays, the DIS ensured that the audited projects mostly achieved their planned outputs and the results were likely to be sustained. The Commission has introduced measures aimed at addressing many of the weaknesses in the DIS. The full impact can only be assessed as the IPA projects are implemented in the coming years. The Commission should continue with initiatives to improve project design and implementation by the DIS institutions. Measures such as compulsory needs assessments and better scheduling of contracting should be appropriately applied.

1.23 The Commission says that it now links the allocation of funds to staffing targets and expects an increase from 80 to 300 in total.

Did the European Commission ensure that there was an effective system of performance monitoring and evaluation?

The Commission did not have the information to demonstrate the effectiveness of the pre-accession assistance. The objectives set were often not Specific, Measurable, Achievable, Relevant and Time-bound, and the indicators were not sufficient to monitor achievement. Such SMART objectives were needed so that each project's contribution to achieving the strategic objectives can be demonstrated. The mechanism and indicators for reporting and monitoring performance on implementation of objectives and delivery of activities and outputs need improvement. Project outcomes (results and impacts) should be reported at the end of each project and at appropriate intervals thereafter in order to provide performance information to inform future planning. The Commission should launch an evaluation of the entire programme of pre-accession assistance to Turkey.

1.24 The Commission says that the IPA requires SMART objectives and RACER (Relevant, Accepted, Credible, Easy and Robust) indicators for monitoring performance, and compliance is being strictly verified. It will evaluate all 2002–06 TPA projects on completion, and has concluded a contract for the assessment of the contribution to the accession process of assistance provided in 2005–08.

The Government's view

1.25 The Minister says that he has “taken careful note of the Court of Auditor's [sic] criticisms of the TPA”, and that he “will continue to closely scrutinise the Commission's funding under the IPA.” He continues thus:

“Of particular concern are the weaknesses identified in strategic planning and prioritisation. It should be recognised that the Court states that the situation has improved considerably with the implementation of IPA. More systematic and documented checks are now made on each project proposal prior to inclusion in the IPA National Programme. Nonetheless we will ensure that all future MIPDs are scrutinised with this in mind.”

1.26 The Minister also draws attention to the fact that all IPA projects are required to have SMART objectives and RACER indicators, and that this is being systematically verified. He regards the problems the Commission had with DIS being “largely as a result of not having enough Turkish government officials working in the Central Finance and Contracts Unit (CFCU)” and says that staff numbers in the CFCU increased from 20 in 2002 to over 100 in 2008, and should eventually reach 300.

Conclusion

1.27 Assistance to Turkey began with €126 million in 2002 and will be worth around €900 million by 2012. The 2007–13 budget for the IPA as a whole is €11.47 billion — so a lot of taxpayers' money is involved.

1.28 The Commission and the Minister's view appears to be that problems thus far were due primarily to inadequate staff numbers and that everything will be done better, by more staff, under the IPA. It seems to us to be more complex than that. For example, when looking at project monitoring and implementation under the pre-2007 regime, the Court of Auditors found that, although the EU Secretariat General was responsible for reviewing progress in implementation and, where appropriate, recommending corrective measures, it was not present (as it should have been) at any of the progress monitoring meetings in the projects covered by the audit.

1.29 We are also not sure how he concludes that the Court states that the situation has improved considerably with the implementation of IPA. It does not: instead, it says that how effective the IPA machinery will prove to be remains to be seen and that proposals thus far "were still not assessed for how effective and efficient they were likely to be in achieving a strategic objective, thereby allowing meaningful comparison between alternatives or the selection of projects likely to have the greatest impact."

1.30 At our most recent meeting, on 9 February, we considered Commission Communications on the IPA 2008 Annual Report, the Instrument for Structural Policy for Pre-accession (ISPA) in 2008 and the 2011–13 IPA Multi-annual Indicative Financial Framework (MIFF). We noted the Committee's sustained interest in the need for the lessons identified by the accession of Bulgaria and Romania to be effectively incorporated into subsequent accessions, and specifically that of Croatia.

1.31 As the Court of Auditors also notes here, Bulgaria has shown itself to be delinquent with regard to the proper spending of post-accession funding, again reinforcing the need to ensure that there will be safeguards in place prior to Croatia's accession in order to ensure that there is no such possibility arising there after accession. In neither the ISPA Report nor the Minister's response did we find anything reassuring in this regard, nor anything to substantiate the statement that the Minister attributed to the Commission that "many of the reasons for the delays in the early stages of ISPA had been addressed". Once again, "no programme level evaluation was carried out during 2008 as the implementation of the first and second year of IPA only began in 2008 so no lessons can be identified". All in all, we were still unable to see clear indications that the right lessons from the pre-2007 processes were being implemented either in the present accession negotiations or more widely in the post-2007 arrangements. We therefore recommended that the 2008 ISPA and IPA Annual Reports be debated, along with the Commission Communication on the 2011–13 MIFF, in European Committee, so as to enable the Minister to provide the House with the level of assurance that there should have been by now, but which we consider is lacking, that the pre-accession funding process is now being effectively, efficiently and economically controlled and managed.

1.32 We are left with the same feelings of uncertainty here (not least because of, once again, the sketchy nature of the Minister's Explanatory Memorandum) and accordingly

recommend that these documents be debated in European Committee along with the ones already recommended for debate there on pre-accession financial support.²

Annex: Decentralisation in the contracting process³

Decentralisation involves the transfer of responsibility in the programming and implementation of the pre-accession instruments from the Commission to the Contracting Authority of the recipient country. The latter becomes responsible for the tendering and contracting, as well as the financial and administrative management of the projects. There are two steps in the decentralisation process: the first and usual one based on ex-ante approval (DIS) and the second “extended” one based on ex-post control (EDIS). Under the Commission’s ex-ante controls, decisions concerning procurement and the award of contracts require prior approval by the Commission Delegation in the recipient country before they are taken by the Contracting Authority.

The ex-ante decentralisation procedure

The ex-ante control carried out by the Commission Delegations involves:

1. Approving the content of the tender dossier before the tender is launched.
2. Approving the composition of the evaluation committee (which is responsible for recommending a bidder to the Contracting Authority).
3. Checking and approving the evaluation report.
4. Endorsing the contract, through the signature of the Head of Delegation on the contract itself, not as a party to the contract but to confirm that the project can receive EU financing.

The main actors are the National Aid Co-ordinator, the National Authorising Officer, the National Fund, the Programme Authorising Officer in the respective Implementing Agency, EC Delegations and the final beneficiaries.

The National Aid Co-ordinator (NAC) is responsible for ensuring co-ordination both at the level of programming (with the aim of ensuring a close link between the general accession process and the use of Community financial assistance) and at the level of monitoring and assessment. This person is usually a high-ranking official appointed by the government.

The National Authorising Officer (NAO) is the NAC’s financial counterweight (also appointed by the government) and is responsible for the National Fund, which deals with:

2 See headnote: (31099) 15368/09; (31255) 5271/010; and (31030) 14685/09: HC 19–x (2009–10), chapters 1 and 2 (9 February 2010).

3 See http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/decentralisation_en.htm for full information.

- financial management of all programmes
- requests to and the receipt of funds from the Commission
- redistribution of funds to the relevant beneficiaries
- financial reporting to the Commission

It is located in a national ministry with central budgetary competence, such as the Ministry of Finance.

The Implementing Agencies (IAs) are located within a ministry or administration in the recipient country and fall under the authority of the NAO. A Programme Authorising Officer (PAO) is in charge of each agency and is responsible for the sound financial management of the programme(s) to be implemented by the IA and monitoring project implementation. One of the implementing agencies is the Central Financing and Contracting Unit (CFCU). The role of the Implementing Agencies is to carry out the tendering and contracting elements of the programme whereas project selection and monitoring remain the responsibility of the ministries/administrations directly benefiting from the assistance. In addition, the CFCUs manage Institution Building programmes, which are multi-sectoral by nature, as well as being the specialised agency for the administrative and financial management of twinning operations.

Extended Decentralisation

The participation of the new Member States in Community funds (above all in the area of regional and agricultural policy) and the replacement of large EC Delegations by smaller Representations (as in the older Member States), whose primary function is information and communication, requires Member States to adapt their administrations in order to cope with a framework of ex-post control. As such, all countries which previously were eligible for the Phare programme, Bulgaria and Romania, Croatia and Turkey are presently moving towards an Extended Decentralisation Implementation System (EDIS) whereby the Commission's ex-ante approval on project selection, tendering and contracting is waived in accordance with Council regulation 1266/1999.

Four procedural stages have to be undergone before EDIS can be granted. With the assistance of the Commission, candidate and acceding countries are required to undertake the first three themselves:

1. Gap assessment: assessing the target national institutions (principally the National Fund and the Implementing Agencies) in order to determine to what extent the conditions for EDIS are currently met and to identify specific actions, changes and improvements required.
2. Gap filling: the responsible national authorities must then implement the recommendations of the Gap Assessment Report (GAR).
3. Compliance Assessment: the national authorities determine whether the pre-conditions are fulfilled so that a formal EDIS application can be submitted to the Commission.

The fourth and final stage — Preparation for a Commission decision to confer decentralised management under Article 12(2) of the Co-ordination Regulation 1266/1999 — remains the exclusive responsibility of the Commission services.

2 Financial services

(31056) 15049/09 + ADDs 1–3 COM(09) 561	Commission Communication: <i>An EU framework for cross-border crisis management in the banking sector</i>
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<i>Legal base</i>	—
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	Minister’s letter of 10 February 2010
<i>Previous Committee Report</i>	HC 5–iii (2009–10), chapter 3 (9 December 2009)
<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 (decision reported 9 December 2009)

Background

2.1 In its Communication for the Spring 2009 European Council, *Driving European Recovery*, the Commission noted a perceived need for a framework for cross-border crisis management in financial services.⁴ That European Council concluded, amongst other matters, that:

“It is equally important to further advance work on building a comprehensive cross-border framework for the prevention and management of financial crises. The European Council invites the Commission to make concrete proposals for how the European System of Financial Supervisors⁵ could play a strong coordinating role among supervisors in crisis situations, while fully respecting the responsibilities of national authorities in preserving financial stability and in crisis management in relation to potential fiscal consequences and fully respecting central banks’ responsibilities, in particular with regard to the provision of emergency liquidity assistance.”⁶

4 (30474) 7084/09 + ADD 1: see HC 19–xii (2008–09), chapter 1 (25 March 2009), HC 547 and *Stg Co Debs*, European Committee B, 29 June 2009, cols. 3–24.

5 That is the proposed European Supervisory Authorities — ((30952)-(30954) 13652/09–13654/09: see HC 19–xxviii (2008–09), chapter 6 (21 October 2009), HC 19–xxx (2008–09), chapter 2 (4 November 2009) and HC 5–i (2009–10), chapter 2 (19 November 2009).

6 See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf.

2.1 This Communication, and an accompanying staff working document, presented the Commission's views on the development of a regulatory framework for stabilising and controlling the systemic impact of a failing cross-border bank. The Commission said that the recent crisis had exposed the absence of an effective EU crisis management framework for cross-border banks, presented an overview of the problem, proposed policy objectives and invited comments on a number of potential policy responses, with 25 specific questions, by 20 January 2010.

2.2 When we considered this document, in December 2009, we said that an EU framework for cross-border crisis management in the banking sector clearly had important implications for regulation and supervision of financial services. We recommended that the document should be debated in European Committee B, when Members might explore what such a framework should, and perhaps should not, contain. But we added that if the Government intended to respond to the Commission's invitation for comments we would wish to see that response at least a fortnight before the date set for the debate, which is now scheduled for 2 March 2010.⁷

The Minister's letter

2.3 The Financial Services Secretary to the Treasury (Lord Myners) now sends us a joint response to the Commission from the Treasury, the Bank of England and the Financial Services Authority. The covering letter submitting this 30 page response, both of which will be in the pack for Members taking part in the debate, summarises the key elements of the response. Points included in the summary are:

- scope — the Government supports an approach to work on resolution frameworks which, first, focuses on deposit-taking banks and, secondly, undertakes analysis to consider the development of resolution tools for non-bank financial institutions, in particular investment banks and insurers;
- resolution toolkits — the Government considers a common EU framework for resolution should consist of a series of agreed objectives; a common minimum set of resolution tools which is capable of delivering specific outcomes; and triggers for resolution tools that are based on a mix of indicators. And a common EU crisis management framework should be supported by the development of recovery and resolution plans;
- coordination or integration of resolution and insolvency — the Government believes a common minimum set of national resolution tools for Member States is a necessary but not sufficient condition for improved coordination in the resolution of cross-border banking groups. It favours a coordinated framework for resolution and insolvency over an integrated framework. But it sees difficulties in the proposals for integrated resolution through a European Resolution Authority and/or the introduction of a single European insolvency regime;

7 See headnote.

- early intervention — all supervisors should have access to a common minimum set of supervisory tools. Modifications to the framework for supervision of bank branches are necessary and the Government would welcome a thorough review of the supervision of cross-border European Economic Area bank branches; and
- funding a resolution — the Government supports Member States being able to use deposit guarantee schemes to fund resolution actions, provided this is subject to a cap that it incurs no more cost to the deposit guarantee scheme (net of recoveries) than liquidation. Beyond deposit insurance funds, further consideration needs to be given to ensuring that the cost of bank resolution can be borne, as far as possible, by the banks' uninsured creditors and shareholders of the broader banking industry, rather than general taxpayers.

Conclusion

2.4 We are grateful to the Minister for this information which will assist Members taking part in the debate we have recommended.

3 Enforcement of Patent Rights

(31127)
7928/09

Draft Agreement on the European and Community Patents Court
and Draft Statute

<i>Legal base</i>	Art. 81 and 218(8) TFEU; Co-decision — to be confirmed in amended proposal
<i>Department</i>	Business, Innovation and Skills
<i>Basis of consideration</i>	Minister's Letter of 24 January 2010
<i>Previous Committee Report</i>	HC 5–iv (2009–10), chapter 4 (15 December 2009)
<i>To be discussed in Council</i>	No date fixed
<i>Committee's assessment</i>	Legally and politically important.
<i>Committee's decision</i>	Not cleared; further information requested.

Background

3.1 This proposal has to be seen in the context of the related recent proposal for the creation of a Community Patent,⁸ which is designed to operate as an alternative to the existing national and European 'bundle' patents administered by the European Patent Office. At present all patents have to be enforced in the national courts.

8 Proposal for a Council Regulation on the Community Patent (13706/09).

The Document

3.2 The Community Patent is designed to be uniformly enforceable throughout the EU and a number of other countries, and the holder of a Community Patent would no longer require a separate patent for each of these states. Without the new European and Patents Court (ECPC) system proposed in this draft Agreement, the Community Patent cannot work effectively or reduce litigation costs.

3.3 The ECPC would be a new specialist court system which is designed to be separate from the EU courts as well as national courts, although it would be subject to the supremacy of EU law. Its jurisdiction would extend to the EU Member States and the non-EU European Patent Convention Contracting States. The proposal would confer on the ECPC exclusive jurisdiction over European and Community patents in relation to, inter alia, all infringements actions, declarations of non-infringements and actions for the revocation of patents. National courts would have a residual jurisdiction. The draft Agreement sets out the details defining the ECPC's proposed scope of jurisdiction as well as the further provisions on applicable law, eligibility criteria for judicial appointments, its relationship with the Court of Justice of the European Union, language arrangements and enforcement of its judgments. The draft Agreement also contains a first draft for the Court's Statute which remains incomplete. The Rules of Procedure will be drawn up by the Commission following consultation with a panel of experts. This panel includes judges and industry representatives from the UK.

3.4 When we originally looked at this proposal we acknowledged the potential advantages of a new specialist court system in this area. At the same time we expressed a number of reservations. We were unclear in particular about the need for an entirely separate court system and wondered whether the proposed patents courts could not be accommodated within the existing structures of the ECJ and the European Patent Office (EPO). We also asked the Minister to clarify the Government's position and the conditions under which the UK would be able to participate in the measure.

The Minister's Letter

3.5 The Minister (David Lammy) has now replied to our questions. He emphasises in particular the need for a separate patents court system at EU level and beyond, which has been the preferred option of the UK Government and British business for some time:

“In order to deliver maximum benefits to innovative companies, the European patent court needs to provide similar benefits to companies enforcing or challenging patents as the [European Patent Office] provides to companies seeking patents. In particular, those benefits need to include wide coverage — so that the court is able to hear disputes relating to EU and national patents granted by the EPO, including patents validated in non-EU countries — and high levels of quality and consistency.

“The only way to deliver a Court with such levels of quality and coverage is to create a bespoke, specialist jurisdiction via an international treaty. A system created within the established framework of the Court of Justice would only apply to EU patents, and would not be able to hear disputes concerning European patents granted for

individual countries, whether EU member states or not. Such a system would be unable to provide the required levels of legal quality and consistency of judgments.

“In fact, establishment of a system separate to the European Court of Justice has been the preference of UK business and judges for many years. In its 2007 Communication ‘Enhancing the patent system in Europe’, the European Commission acknowledged the lack of support among European businesses, judges and lawyers for a system established as part of the Court of Justice. In its Explanatory Memorandum on this Communication,⁹ the government [sic] expressed support for an independent jurisdiction covering both EU and national patents, in both EU and non-EU countries. Negotiations following this Communication have proceeded towards this objective.”

3.6 The Minister then makes the case for combining the Court’s specialist jurisdiction with a de-centralised first-instance level of judicial oversight:

“A decentralised first-instance tier for the new Court is important to promote access to the court for individuals and SMEs, as it will help reduce costs for users and ensure fair access to justice. Such an arrangement will also allow the best use of existing patent court capacity and judges. Current court arrangements for Community Trade Marks and Designs allow national courts to act as Community courts to deal with infringement and validity actions on these cases. Referrals are then made from these courts to the European Court of Justice. This arrangement allows businesses, particularly SMEs, to access a court based in their country.

“However, it would not be feasible to create such a system for a European patent court as many EU Member States do not possess the technically-qualified judges, experts or suitable court procedures required to deal with technically-complex patent disputes. Most importantly, the European Court of Justice itself also does not possess the technically qualified judges, experts or suitable procedures, and is currently not equipped to hear private-party civil disputes. The European Court of Justice is also reported to be overloaded with trade mark cases and is perceived by many as being slow and inefficient. For these reasons, UK and European businesses are keen for the European Court of Justice to play a minimal role in court structure.

“The current proposed arrangements for the patent court would allow for the creation of a number of national or regional first-instance divisions. This system would help promote access for industry, particularly SMEs, by providing them with local access. These first-instance divisions would be able to use the existing EU referral system to send questions to the European Court of Justice on the interpretation of EU law. As you say in your letter, this will ensure the uniform application of Community law through appropriate referrals to the European Court of Justice.

“There is strong support across all EU Member States for a decentralised Court system. The recent Council Conclusions included a commitment to a decentralised

first-instance court system. There is also strong support by both businesses and the judiciary in the UK.”

3.7 The Minister also clarifies the residual jurisdiction of national courts and briefly comments on the proposed referral system for the ECPC:

“The current agreement only covers European and EU patents granted by the EPO. This means that domestic courts will retain exclusive jurisdiction for patents granted by national patent offices. There are also agreed transitional arrangements for the court. These transitional arrangements would allow:

- For patents granted or applied for before the proposed European court is operational, patent owners will be able to opt-out of using the new Court system if they register within the first five years of the court’s operation. This means national jurisdictions will continue to be used for these cases until the patent dies.
- For five years, litigants will be able to choose to bring disputes before the European patent court for Europe-wide judgments or before separate national courts for individual national judgments. After five years, they will only be able to use a national jurisdiction if they have opted out.

“As explained above, the European Patent Court will use a referral system to ensure the consistent application of EU law. This system will mirror existing arrangements for national courts. However, parties will not be able to appeal cases directly to the ECJ. This arrangement is subject to the opinion of the European Court of Justice, which is expected to report during the second half of 2010.”

3.8 The Minister emphasises that the proposal is still in its early stages, that it will only get off the ground if the Community Patent Regulation finds acceptance, and that the current text will be subject to very considerable revisions as a result of further future negotiations in the Council. As regards the UK Government’s position for voting in favour of the proposal, he understandably feels that he cannot outline any specific position and demands for future negotiations before the Court of Justice hands down its relevant Opinion 1/09 later in the year. He firmly expects the Opinion to result in the publication of further revised and more proposals. The Minister also explains that he cannot yet express any firm view as to the appropriate legal base for the proposed ECPC.

3.9 The Minister promises to keep us “updated on any further developments in relation to this matter as and when they arise.”

Conclusion

3.10 We thank the Minister for his detailed answer. As the Minister indicated in his original Explanatory Memorandum, we note that discussions of the proposal have been suspended until the publication by the Court of Justice of its relevant Opinion 1/2009, which is expected during the second half of 2010.

3.11 We shall hold the current proposal under scrutiny until its revival or replacement by a revised text in the light of the Court’s Opinion or until we have had further word from the Minister.

4 European Protection Order

(31237) 17513/09 + ADDs 1–2 —	Draft Directive on the European Protection Order
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<i>Legal base</i>	Article 82(1)(d) TFEU; QMV; co-decision
<i>Department</i>	Justice
<i>Basis of consideration</i>	Minister’s letter of 21 February 2010
<i>Previous Committee Report</i>	HC 5–x (2009–10), chapter 5 (9 February 2010)
<i>To be discussed in Council</i>	No date set
<i>Committee’s assessment</i>	Legally important
<i>Committee’s decision</i>	Not cleared; further information requested

Background

4.1 The Stockholm Programme, adopted in December 2009 by the European Council, called on the EU to examine “how to improve legislation and practical support measures for protection of victims and to improve implementation of existing measures”. This proposal is a follow-up to this request, and is an initiative of several Member States.¹⁰ Its central purpose is to assist victims who have obtained a protection order in one Member State and who subsequently move to another Member State. In the UK, protection orders are often used in domestic violence cases, although not exclusively so. Examples are non-molestation orders, occupation orders (regulating who can occupy a property), restraining orders and injunctions.

Legal base and opt-in

4.2 The proposal’s legal base is Article 82(1)(d) of the Treaty of the Functioning of the European Union (TFEU). Article 82(1) TFEU provides that “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to ... (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.”

¹⁰ Belgium, Bulgaria, Estonia, France, Italy, Hungary, Poland, Portugal, Romania, Finland and Sweden.

4.3 Under the TFEU, measures in the field of “Freedom Security and Justice” (FSJ — formerly JHA) are no longer adopted by a unanimous vote of the Member States without the participation of the European Parliament, but by QMV on the basis of the ordinary legislative procedure (formerly co-decision) with the European Parliament.

4.4 Measures adopted under Title V are not applicable to or binding upon the UK unless it decides to opt into them within three months of their presentation to the Council, or at any stage after their adoption. If the UK does not opt into a proposal within the three-month timeframe, it can nevertheless participate in the negotiations with a view to an acceptable text being adopted, and then opt into the legislation post-adoption by the Council.

4.5 The Committee has eight weeks from the publication to scrutinise whether the UK should opt into the measure, during which time the Government has agreed not to take a decision on opting in. This period expires on 2 March.

Previous scrutiny

4.6 The Committee reviewed this draft proposal in detail in its Report on 9 February 2010.¹¹ In the conclusion, the Committee asked the Government for a response to the following aspects of the proposal.

- Article 81(2)(d) TFEU addresses “proceedings in criminal matters”, but national protection measures such as injunctions and restraining orders are civil proceedings, the criminal penalty being a consequence of the breach of a civil order. In which case, there is an argument to say that the legal base should be founded on Article 81 TFEU — “Judicial Cooperation in Civil Matters”. We asked the Government for its views on the correct legal base.
- We asked for the results, even if preliminary, of the Government’s consultation process.
- We agreed with the Government that it makes more sense for the executing State to have jurisdiction of the EPO once transmitted by the issuing State. We also agreed that the “person causing danger” must in all circumstances be informed of the EPO. We asked whether “the person causing danger” would have a right to be heard if an EPO were to be executed in the UK, and for an update on these aspects of the negotiations.

The Minister’s letter

4.7 The Parliamentary Under-Secretary of State at the Ministry of Justice (Lord Bach) responded to our questions by letter dated 21 February.

4.8 On legal base, the Minister confirms that this was one of the first issues raised by the UK at working group level. It is a complex area and, given the fact that many of the UK’s domestic protection orders are civil with a criminal sanction for breach, he says the Government was unsure whether the proposed legal base would be adequate. In the discussion that followed, the Government learnt that some Member States have only civil protection orders with civil sanctions whilst, at the other end of the spectrum, some

¹¹ See headnote.

Member States only have criminal orders. It quickly became apparent that the issue of legal base was of concern to most Member States. Discussions have therefore been taking place in the Council about the adequacy of the legal base and the implications. The most recent discussion about this took place on Wednesday 17 February; in light of these discussions departmental and Whitehall lawyers are in the process of assessing the position. The Minister will keep us informed of progress.

4.9 On consultation, the Minister informs us that his Department has sent out copies of the proposal with a summary paper and questions to a number of organisations which represent victims and those people who are likely to use protection orders, groups who are involved in family justice and those who advocate on behalf of defendants and have an interest in the criminal law. In order to ensure that the Department can gather and analyse their views and evidence before the Government has to take a decision on the opt-in, the Department has invited groups to attend meetings in the week commencing the 22 February. It is then holding a meeting in Scotland on 1 March to ensure that the views of representatives and relevant groups in Scotland are taken into consideration. The Minister will share the outcome of these meetings with the Committee.

4.10 On the rights of the “person causing danger”, the Minister says that this was picked up by the UK and a number of other Member States. On whether such a person would have the right to be heard if an EPO were executed in the UK, the Government is still considering the basic mechanics of how the EPO would operate; so it is too early to take a view on what kind of hearings may be appropriate. He states that the Government will of course work to ensure that the ECHR rights of the “person causing danger” are respected.

4.11 Finally, the Minister states that the Government remains positive about the principle behind this draft Directive and is confident that the issue of legal base is being taken very seriously and considered carefully at an EU level. We are reassured that the issue is being looked at in detail. This considered approach to legal base does, however, mean that there may not be total resolution on this issue before the Committee is asked to provide an opinion on opt-in. The Minister hopes that the Committee are therefore able to focus on the principles underlying the order even without a conclusive steer on legal base being available.

Conclusion

4.12 We thank the Minister for the information on the legal base. We recognise that the issue is complicated by the different procedures within Member States; but we would be grateful for an idea of the Government’s view on the appropriate legal base, or legal bases, for the proposal. The Government’s view, even at this stage, will have an impact on our consideration of whether the Government should opt into this proposal.

4.13 We are grateful for the information on the consultation process. We had asked for the results, even if preliminary, of this process, given the timeframe for the Committee’s scrutiny of the opt-in decision. We would therefore be grateful for a general steer on the tenor of the responses received so far. For obvious reasons, the views of practitioners and interested parties will have an impact on our consideration of whether the Government should opt into this proposal.

4.14 We take note of the Minister’s response on the need to respect the fair trial rights of the “person causing danger” as identified in a European Protection Order.

4.15 Our time-limit for scrutiny of the Government’s decision to opt in expires on 2 March, the day before our next meeting. But the Minister’s letter of 21 February was more explanatory of the state of play than a response to the questions we raised in our Report of 9 February, and so we are not in a position to give an opinion on whether the Government should opt in. We therefore ask the Minister to reply to the requests in the paragraphs above. We also fully expect that, when we report on the Minister’s further reply, he will take our views into account in deciding whether or not the UK should opt in, in line with Baroness Ashton’s undertaking to Parliament.

5 EU assistance implemented through UN organisations

(31266)	Court of Auditors’ Special Report No. 15/2009: <i>EU assistance</i>
5513/10	<i>implemented through UN organisations: decision-making and</i>
—	<i>monitoring and the Commission’s response</i>

<i>Legal base</i>	Article 287 TFEU
<i>Deposited in Parliament</i>	21 January 2010
<i>Department</i>	International Development
<i>Basis of consideration</i>	EM of 4 February 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	15 February 2010
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared, but further information requested

Background

5.1 The European Court of Auditors (ECA) is the EU institution established to audit EU finances. Under Article 287 TFEU (which lays down its functions), the ECA examines whether financial operations have been properly recorded and disclosed, legally and regularly executed and managed so as to ensure economy, efficiency and effectiveness. It also provides its opinion on financial management issues.

5.2 The Court may, at any time, also submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union.¹²

¹² See http://eca.europa.eu/portal/page/portal/eca_main_pages/home for full information on the Court of Auditors.

The Court of Auditors' Special Report 15/2009

5.3 The ECA's report considers the implementation of the EU development assistance that is channelled through UN organisations. EU funds channelled in this way increased from €500 million in 2002 to over €1 billion in 2008. The audit addresses two questions:

- Does the process for deciding to implement aid through the UN demonstrate that this is the most efficient and effective option?
- Do monitoring arrangements provide assurance on the robustness of financial procedures and on the achievement of objectives?

5.4 Regarding the process for deciding to implement aid through the UN, the ECA concludes that the strategic and legal requirements to select partners in an objective and transparent way are insufficiently translated into practical criteria to support decision-making, and judges that the Commission does not convincingly demonstrate, before deciding to work with a UN organisation, that it has assessed whether the advantages offset any disadvantages. The ECA opines that the choice of a UN organisation is not based on sufficient evidence that this approach is more efficient and effective than other ways of delivering aid, and that neither the Commission's EuropeAid Co-operation Office (responsible for implementing the Commission's development aid, including long-term rehabilitation) nor the Directorate-General for Humanitarian Aid (ECHO; responsible for the Commission's response to humanitarian crises) systematically carries out formal appraisals of alternative aid delivery mechanisms.

5.5 The Commission response is to note that, following a 2008 evaluation of the Commission's external cooperation with partner countries through UN organisations and also this audit, EuropeAid and EU Delegations in partner countries have been instructed to document more clearly their reasons and evidence for proposing to channel funds through the UN. They further note that each proposal submitted by an ECHO partner is assessed not only on its own merits but also in comparison to other proposals to ensure that the design and delivery of aid does not involve any unnecessary duplication of effort. The Commission undertakes to ensure better documentation of the outcome of these assessments.

5.6 Regarding the systems for monitoring aid delivered through the UN, the ECA notes that the Commission carries out a prior assessment of the financial control systems of its UN partners (styled "the four pillar analysis"), and seeks confirmation on the practical operation of these systems and the achievement of results through UN reports and its own field monitoring and verification missions. However, the ECA concludes that the Commission has not yet succeeded in obtaining from UN reports adequate information on the efficiency of implementation and the achievement of objectives; and that, whilst the Commission's own field monitoring provides complementary information, it is insufficient to fully compensate for these limitations.

5.7 The Commission say that the quality of UN reporting on financial aspects has improved since 2007, when the UN and the Commission agreed on joint reporting guidelines. With regard to objectives, the Commission says that a joint monitoring system is being developed.

5.8 The ECA also says that the UN Panel of Auditors has “continually questioned the Commission’s right to carry out financial checks”, and continues thus:

“It argues that its own audit arrangements are sufficient, but does not provide the Commission with satisfactory evidence that financial control procedures work in practice. The Court of Auditors has also encountered difficulties accessing information from UN organisations when carrying out its annual financial audit of the Commission’s accounts.”

5.9 On the basis of these observations, the ECA makes recommendations which it says will enable the Commission to “improve decision-making procedures and to focus on the achievement of results which could help the Commission to provide more efficient and effective aid.”

The Government’s view

5.10 In his Explanatory Memorandum of 4 February 2010, the Minister of State at the Department for International Development (Mr Gareth Thomas) says that he supports the Commission’s policy of routing some development funding through the UN where there is a clear case made for this option to be used. He describes this as “an important part of the principles enshrined in the 2005 Paris Declaration on Aid Effectiveness and the European Consensus on Development.”

5.11 Referring to the ECA recommendations that the Commission should issue, and ensure the implementation of, practical guidelines in order to improve the decision-making process for selecting the implementing channel, the Minister says that he notes the Commission’s response that EuropeAid and EU Delegations have been instructed to document more clearly their reasons for proposing to channel funds through the UN, and will push the Commission to demonstrate improvements in this area, both in respect of development assistance and humanitarian aid:

“HMG strongly supports ECHO’s channelling of funds through the UN wherever possible. We regard it as important to bolster a strong UN coordinated and led humanitarian system.”

5.12 With regard to the monitoring of EU-funded activities undertaken by the UN, the Minister agrees with the ECA that these should be fully robust.:

“We are encouraged that the Commission and the UN have agreed on an improved system of joint monitoring, and will urge the Commission to press the UN to improve its reporting on these activities. Monitoring systems that help us better track results and impact are especially important. This is why DFID has developed Performance Frameworks for the five UN Agencies receiving the majority of DFID’s core funds (UNDP, UNAIDS, WHO, UNFPA and UNICEF). Introduced in 2008, these link funding to agency performance and monitor how well the agencies deliver and meet agreed outputs and targets.”

5.13 The Minister also acknowledges the ECA’s concern that it does not have the ability to request additional external audits beyond the scope of the work of the UN Board of Auditors:

“However, HMG supports the UN’s single audit principle and we would not want to see duplication of effort. It would not be financially sustainable if all UN partners sought to do external audits on top of the work carried out by the UN Board of Auditors as this would lead to significant costs to the UN system. It is clear that under the terms of the Financial and Administrative Framework Agreement between the EU and the UN that the latter should provide all necessary supporting financial evidence. We will support all such reasonable requests by the Commission for access to appropriate information but this stops short of supporting the Court generating additional audit exercises for the UN outside the scope of its own plans.”

5.14 The Minister concludes by saying that he understands that the Council will discuss the ECA report on Monday 15 February.

Conclusion

5.15 **There is, in our estimation, strength in both approaches to the single/dual audit issue, and we see no need to raise any questions about the Commission response or the Minister’s own evaluation. But the issues are nonetheless important, and warrant being drawn to the attention of the House.**

5.16 **We clear the document, but ask that the Minister informs us of the outcome of the Council discussion.**

6 Restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova

(31320)	Council Decision extending restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova
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<i>Legal base</i>	Article 29 TEU; unanimity
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 15 February 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	22 February 2010 Foreign Affairs Council
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared, but further information requested

Background

6.1 Following Moldova’s independence, a separatist movement in the Transnistrian region on the eastern bank of the Nistru River declared itself a Republic. Attempts to find a settlement to this situation have thus far failed.

6.2 EU concern about the threats to security and stability in eastern Europe posed by the activities of the illegal separatist regime go back over six years. The first Common Position was in the form of an EU-wide ban on travel in the EU against 17 members of the Transnistrian leadership for obstruction of the negotiating process to resolve the conflict. In August 2004, the scope of the restrictive measures was expanded to include ten persons responsible for the intimidation campaign and closure of Latin-script Moldovan schools.

6.3 Each EU Member State enacts the necessary legislation to implement the travel ban; but, to be effective at an EU level, a Council Decision (previously, a Common Position) is necessary due to the free movement of people across the Schengen area. Each Common Position has been valid for 12 months.

6.4 A year ago, we considered and cleared the most recent such Common Position. The then Minister for Europe at the Foreign and Commonwealth Office (Caroline Flint) welcomed the renewal, which she said sent “a strong political signal that the behaviour of the Transnistrian leadership remains unacceptable to the EU.” The then Minister said that the EU continued to encourage both parties to return to the negotiating table, to pursue any negotiations as transparently as possible and conclude a settlement acceptable to all concerned. She also said that the sanctions regime was regularly monitored to ensure that the most appropriate measures are being taken, giving as an example the fact that eight of the ten individuals who had been designated for forcing the closure of Latin script schools were delisted in December 2005 when the majority of the schools were re-opened.

The draft Council Decision

6.5 This draft Council Decision (which was adopted by the 22 February 2010 Foreign Affairs Council) extends Common Position 2004/179/CFSP for a further 12 months.

6.6 In his Explanatory Memorandum of 15 February 2010, the Minister for Europe at the Foreign and Commonwealth Office (Chris Bryant) says that the list of the names on the travel ban list will be better targeted by the removal of three names which no longer meet the criteria for listing. He also says that the measures will also be suspended until 30 September 2010 “in the hope that this will encourage the Transnistrian leadership to engage with the Moldovan Government and the EU.”

The Government’s view

6.7 The Minister for Europe (Chris Bryant) welcomes the renewal of the travel ban in similar terms to his ante-predecessor and likewise notes that the sanctions regime is regularly monitored to ensure that the most appropriate measures are being taken, and says that for this reason he supports lifting the travel ban on three individuals whom it is felt no longer meet the criteria for listing.

6.8 He also explains that, if at the end of the suspension, consensus within the EU is not reached to renew the suspension, or lift the sanctions, then the travel ban will be re-imposed by default, which, he says, “ensures the sanctions measures do not simply lapse.”

The Minister's letter of 12 February 2010

6.9 The Minister writes to express his “regret that we have not been able to provide you with the Explanatory Memorandum in sufficient time for it to be considered by your Committee before the Decision must be adopted in the EU.”

6.10 He then continues as follows:

“It is necessary to adopt the measures in this Council Decision at the FAC on 22 February so they are in effect before the current measures expire on 27 February. There is a Justice and Home Affairs Council on 25 February, but this would not provide sufficient time for both Committees to scrutinise the proposals. As a result, I will have to agree to the adoption of this Decision before your Committee has cleared it from scrutiny.

“This failure to allow your Committee to fully scrutinise the Decision has come about as negotiations on the rollover of restrictive measures continued until 10 February, after your last meeting before the FAC.¹³

6.11 The Minister then refers to the commitment made in February 2009 by his antepredecessor, “which I too take seriously,” to keep the Committee better informed on issues concerning sanctions, and says that:

“since then we have written to you on several occasions to keep you updated. I wrote to you in January forewarning you of the impending rollover and again in February when I updated you on the progress of the negotiations.”

Conclusion

6.12 **The Committee has hitherto judged that neither the original imposition of these restrictions in 2004 nor the annual renewals were of sufficient political importance to warrant a substantive Report to the House. On this occasion, however, the Council has — after some discussion both with the Moldovan government and among Member States, in which there were, presumably, differing views about the right way forward — decided on a change of tack. As the Minister makes clear, it is now up to those whom the measures affect to respond appropriately.**

6.13 **With regard to the scrutiny override, we find the Minister's explanation disappointing and unconvincing. The Minister did indeed inform the Committee, in a general letter of 14 January 2010 about EU targeted measures against Zimbabwe and other countries, that there were differing views among Member States about whether or not to maintain at least some measures, explaining that his view was that it was too early to lift them completely but that he agreed with the Moldovan authorities that the list should be reviewed and become more targeted; he also noted that the present measures would expire on 27 February 2010. But neither we nor our Lords counterpart (nor the Minister's office) can locate the second letter to which the Minister refers.**

13 A reference to the Committee's meeting on Tuesday 9 February, on the eve of the February recess.

6.14 In any case, since the Minister knew that we were due to meet on 24 February, we see no reason why he could not have arranged for the proposal to be submitted to the Justice and Home Affairs Council on 25 February, since there would then have been at least the possibility of there being no override. We ask the Minister to explain how we came not to receive both the letters that he prays in aid and what he intends to do to ensure that such a failure does not recur. We also ask him to assure us that on any such future occasion he will seek to postpone adoption by the Council until this Committee has had the chance to scrutinise the document in question before it is adopted.

6.15 We now clear the document. In so doing, however, we ask the Minister to let us know, in good time ahead of the Council meeting concerned, what the reaction has been to the suspension, what his views are on that reaction, and what course of action he will be seeking to pursue in the Council prior to the September review.

7 EU support for the International Criminal Tribunal for the former Yugoslavia (ICTY)

(31332)	Council Decision renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)
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<i>Legal base</i>	Article 29 TFEU; unanimity
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 19 February 2010
<i>Previous Committee Report</i>	None; but see (29497) HC 16–xiv (2007–08), chapter 8 (5 March 2008); and (29213) 15616/07, (29214) 15690/07 and (29427) —: HC 5–vii (2009–10), chapter 8 (20 January 2010)
<i>To be discussed in Council</i>	1 March 2010 Competitiveness Council
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared; further information requested

Background

7.1 The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by UN Security Council resolution 827(1993). This resolution was decided on 25 May 1993 in the face of serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.

7.2 The ICTY’s mission is to bring to justice those responsible for serious violations of international humanitarian law, render justice to the victims and deter further crimes,

whilst contributing to the restoration of peace by holding those responsible personally accountable. Although judicially independent, the ICTY relies on co-operation by States and international organisations in order to carry out its mandate successfully, particularly with regard to the collection of evidence and the detention and transfer of accused persons.

7.3 The Stabilisation and Association Process is the process devised by the EU to bring the countries of the Western Balkans closer to the EU and to help prepare them for eventual membership. The Stabilisation and Association Agreement (SAA) is a key step on the path to EU membership — not only a major practical and legal but, above all, a symbolic next step.

Previous consideration

7.4 Two years ago, the Committee cleared a further 12 month extension of Council Common Position 2004/293/CFSP, which imposed an EU travel ban on persons who help those indicted by the ICTY evade capture or otherwise obstruct the ICTY's effective implementation of its mandate. No amendments were made to the list of targeted individuals. These measures work in conjunction with the EU asset freeze on all funds and economic resources belonging to persons indicted by the ICTY imposed by Common Position 2004/693/CFSP.

7.5 In his Explanatory Memorandum of 28 February 2008, the then Minister for Europe at the Foreign and Commonwealth Office (Mr Jim Murphy) stated that “supporting the mandate of the ICTY is a central pillar of UK policy in the Western Balkans region”. He noted that the Chief Prosecutor of the ICTY makes regular reports on the level of co-operation of relevant countries with the tribunal, and said that “full co-operation with the ICTY is a key condition for signature of Bosnia and Herzegovina's, and Serbia's Stabilisation and Association Agreements (SAA) with the EU.” He also said that the UK and EU continued to exert pressure on regional governments to improve their co-operation with the ICTY, and that it was therefore important that the UK play its part in supporting the ICTY's efforts to bring justice to the countries of the former Yugoslavia by keeping up pressure on those individuals wanted for trial, including on their support networks.

7.6 At that time, the “Accused at Large” on the ICTY website¹⁴ included Radovan Karadžić and Ratko Mladić, who were generally recognised as the most egregious of those involved in the horrors that were perpetrated in the Balkans during the dissolution of the former Yugoslavia. We noted that, hitherto, “full cooperation” with the ICTY by Serbia had been seen as certification by the ICTY of whole-hearted support by the Serbian authorities in seeking their apprehension and surrender — it being the lack thereof that had held up signature and implementation of Serbia's SAA. We had no wish to hold up the EU's support for the ICTY — on the contrary — and cleared the extension. Our concern, however, was that the EU's vital support of the ICTY was being undermined by a desire to compensate Serbia for her opposition to the EU's then recent action in recognising Kosovo's declaration of independence. We therefore considered it relevant to the then upcoming debate in European Committee on Serbia and the accession process in the

14 See <http://www.icty.org/> for full details of the ICTY's rationale and operations.

Western Balkans, which we hoped would provide an opportunity to explore what the Minister meant about full co-operation with the ICTY being a key condition for signature of Serbia’s — and Bosnia and Herzegovina’s — SAA.

7.7 That debate was centred on two separate Council Decisions: the purpose of the first was to obtain Council approval to the text of the SAA and “to engage the procedures for the signature and final conclusion” of the Agreement; the purpose of the second was to authorise signature of an Interim Agreement, comprising the Community competence elements (trade, agriculture, industrial and competition provisions of the SAA) at the same time as the SAA, to come into force as soon as possible after signature, to take account of the fact that ratification of the SAA may take up to a year following signature.

7.8 In the event, they were resolved among Member States in such a way that the 29 April 2008 GAERC approved the Council Decisions, whereupon the two agreements were signed. On the same day, European Committee B debated the documents and a collection of annual progress reports on the Western Balkan EU aspirants.¹⁵

7.9 Since then, the Committee had been engaged in prolonged discussion with successive Ministers for Europe about signature of these Council Decisions and, given differences among Member States, on the signing of the Interim Agreement and its ratification. As we have noted in the relevant Committee Reports, we have had no concerns over the nature of the SAA or of its conclusion with Serbia *per se*: however, what has bedevilled this process all along has been the behaviour of the Serbian authorities with respect to the ICTY. Although the ICTY had been prepared to indicate to the Commission and Council that cooperation had improved sufficiently to warrant continued negotiation and, subsequently, initialling of a text, it was plainly not able to certify that “full cooperation” had been obtained. The Committee’s concern has thus revolved, then and subsequently, around this associated ICTY Conditionality. The most recent exchange with the Minister for Europe is set out the relevant chapter of our Report on 20 January 2010.

7.10 In essence, on the basis of a 3 December 2009 report to the UN Security Council by the ICTY Chief Prosecutor — described in his letter to the Committee by the Minister for Europe as “Brammertz’s most positive report on Serbia to date” — the Government indicated its preparedness both to sign and to begin the ratification process of the Interim Agreement. This was because Mr Brammertz had assessed that:

- Serbia’s co-operation had continued to improve and develop;
- the Serbian authorities were providing timely responses to requests arising during trials at The Hague for access to documents and archives, with no requests outstanding;
- they had responded quickly to facilitate the appearance of witnesses before the tribunal and made the necessary arrangements to safeguard them;
- they were actively conducting search operations for the two remaining indictees.

¹⁵ See <http://www.publications.parliament.uk/pa/cm200708/cmgeneral/euro/080429/80429s01.htm>. for the record of that debate.

7.11 Mr Brammertz regarded this as “satisfactory”. The Government, however, judged that this met its own “full cooperation” benchmark, and thus favoured signature and starting the ratification process (which it confirmed in a Written Ministerial Statement on 7 December 2009). The Conclusions subsequently adopted by the Council were, however, significantly different — signing the agreement, but not yet authorising the beginning of the ratification process, with a further review in six month’s time, which we presumed would be after the next Brammertz report.¹⁶

The draft Council Decision

7.12 This Council Decision will extend for a further year the EU travel ban on persons helping those indicted by the ICTY to evade justice or who otherwise obstruct the ICTY’s effective implementation of its mandate. Current measures expire on 16 March. Again, no amendments will be made to the list of targeted individuals.

7.13 In his 19 February 2009 Explanatory Memorandum, the Minister for Europe at the Foreign and Commonwealth Office (Chris Bryant) notes that two persons indicted by the ICTY are still at large, namely Ratko Mladić and Goran Hadžić.

7.14 He also recalls that these measures work in conjunction with the EU asset freeze on all funds and economic resources belonging to persons indicted by the ICTY imposed by Common Position 2004/694/CFSP, which is due to expire on 10 October 2010.

7.15 The Minister also reiterates that

— procedures for designating individuals under the EU visa ban are fully compliant with fundamental rights, viz:

- individuals may only be listed where evidence exists that they are engaged in the activities listed under Article 1 of Council Decision;
- individuals subject to a visa ban would be entitled to challenge such a measure in the Member States’ courts;
- in addition, Council Common Position 2004/293/CFSP provides that Member States may grant exemptions from the travel ban for specified reasons including, inter alia, where travel is justified on the grounds of urgent humanitarian need;

— the travel ban is enforced in the UK using secondary legislation under Section 8B of the Immigration Act 1971 (as inserted by Section 8 of the Immigration and Asylum Act 1999) currently the Immigration (Designation of Travel Bans)(Amendment) Order 2007, which will require amendment to reflect the renewal.

The Government’s view

7.16 The Minister supports the renewal in familiar terms:

¹⁶ See headnote: (29213) (29214) and (29427): HC 5–vii (2009–10), chapter 8 (20 January 2010).

“Supporting the mandate of the ICTY is a central pillar of UK policy in the Western Balkans region. The Chief Prosecutor of the ICTY makes regular reports on the level of co-operation of relevant countries with the tribunal. Full cooperation with the ICTY constitutes an essential element of the Stabilisation and Association Agreement between both Bosnia and Herzegovina and Serbia and the EU.

“The UK and EU continue to exert pressure on regional governments to improve their co-operation with the ICTY. It is therefore important that we play our part in supporting the ICTY’s efforts to bring justice to the countries of the Former Yugoslavia by keeping up pressure on those individuals wanted for trial, including on their support networks. Extending these restrictive measures through a Council Decision will support the work of the ICTY and increase the likelihood of the successful detention and trial of indicted individuals.”

Conclusion

7.17 As before, we have no wish to hold up this matter, and clear the document. But, in reporting it, we think it important to remind the House of our enduring concerns about the application of “conditionality” to the integration and accession process.

7.18 We also note that we can find no trace of the Common Position having been submitted for scrutiny a year ago, when authorisation by the Council of the further 12 month extension that is now coming to an end would have been required. We ask the Minister to investigate this and explain what happened.

8 Financial services

(31264)	ECB Opinion of 8 January 2010 on three Draft Regulations
5413/10	establishing a European Banking Authority, a European Insurance
—	and Occupational Pensions Authority and a European Securities
	and Markets Authority

<i>Legal base</i>	—
<i>Document originated</i>	—
<i>Deposited in Parliament</i>	21 January 2010
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 4 February 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	Not known
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared

Background

8.1 In September 2009 the Commission proposed draft Regulations which would establish three new European Supervisory Authorities — respectively a European Banking Authority, a European Insurance and Occupational Pensions Authority, and a European Securities and Markets Authority. The proposals included significant detail of how the new bodies would operate, be staffed and be funded, and of their powers and roles. The key proposed powers and roles were:

- rulemaking — the authorities would develop technical standards in all sectors (with current legislation being amended to set out where they can make rules);
- enforcement — the authorities would have powers to ensure consistent application of Community rules, in a process similar to the current infraction process, except that it would be the authority finding a Member State or supervisor in non-compliance with the law;
- emergency powers — the authorities would have powers over firms and supervisors in emergency situations;
- direct supervisory powers — the authorities would have powers to directly supervise cross-border institutions where provided for in Community legislation;
- settlement of disagreements — the authorities would have powers to mediate in disputes between supervisory authorities, being able to settle disputes and decide on an appropriate outcome;
- peer review — the authorities would be required to conduct peer review of supervisors and ensure a common supervisory culture;
- other — the authorities would maintain a database of supervisory information, take part in colleges of supervisors, have an international role and provide information to the European Systemic Risk Board; and
- safeguard clause — the mediation and emergency powers would be subject to a safeguard clause, whereby a Member State could opt-out of an authority decision if it believed the decision impinged on its fiscal responsibilities, but subject to approval by a qualified majority vote in the Council.

The three authorities would take over the role of the Lamfalussy Level 3 Committees¹⁷ and would have, jointly, a Board of Appeal, to consider appeals against their decisions.

17 The Lamfalussy processes are a four-level approach to regulation of the European financial services industry. At the first level the European Parliament and Council adopt legislation, setting framework principles and the Commission's implementing powers, on the basis of Commission proposals on which it is advised by sector-specific committees of high-level representatives of Member States chaired by the Commission. At the second level sector-specific committees of national regulators prepare and advise on implementing measures to be adopted by the Commission. At this level the committees of high-level representatives perform a "comitology" role (comitology procedures regulate exercise by the Commission of implementing powers conferred on it by the Council and the European Parliament and are essentially intended for detailed measures to implement Community legislation) of voting on the Commission's implementing measures before their adoption. At the third level the committees of national regulators work on strengthening co-ordination of regulation, for instance by establishing common interpretations of legislation and peer group review of regulatory practice. At the fourth level the Commission strengthens compliance with and enforcement of EU rules.

8.2 The proposals were cleared from scrutiny after debate on the Floor of the House on 4 December 2009.¹⁸

8.3 While the European Central Bank (ECB) has no direct role in the proposed Regulations, they contain provisions affecting the European System of Central Banks (ESCB)'s contribution to the smooth conduct of policies relating to prudential supervision of credit institutions and the stability of the financial system. Moreover the proposals for the supervisory authorities form part of the package of legislation for the EU's institutional framework for supervision and, as such, are closely linked with the proposals for a Regulation on macro-prudential oversight of the financial system and establishing a European Systemic Risk Board and a Council Decision entrusting the ECB with specific tasks concerning the functioning of the board, including provision of the resources for the Board's Secretariat.¹⁹

The document

8.4 In this document the ECB gives the Council its formal Opinion on the draft legislation to establish the European Supervisory Authorities. It broadly welcomes the proposed institutional framework and recommends 13 amendments to the draft Regulations, suggesting:

- an amendment to make clear that decisions adopted by the supervisory authorities in the context of emergency situations are without prejudice to the competence of ESCB central banks to provide emergency liquidity assistance to individual financial institutions;
- a new recital referring to the duty of the supervisory authorities to cooperate with the ECB and national central banks of the ESCB and the need for appropriate gateways for sharing information;
- an additional task for the supervisory authorities — to cooperate closely with the ECB and, where appropriate, central banks of the ESCB, as well as to provide any relevant information necessary for the fulfilment of their tasks;
- inclusion of the ECB in the list of authorities entitled to formulate requests to the Commission to adopt Decisions determining the existence of an emergency situation and the list of authorities to be consulted before the adoption of such Decisions;
- adding a requirement for the supervisory authorities to notify the ECB of any potential emergency situations without delay;

18 (30952) 13652/09 (30953) 13653/09 (30954) 13654/09: see HC 19–xxviii (2008–09), chapter 6 (21 October 2009), HC 19–xxx (2008–09), chapter 2 (4 November 2009) HC 5–i (2009–10), chapter 2 (19 November 2009) and *HC Deb*, 1 December 2009, cols 989–1030.

19 (30950)-(30951) 13645/09 13648/09: see HC 19–xxviii (2008–09), chapter 6 (21 October 2009), HC 19–xxx (2008–09), chapter 2 (4 November 2009) and HC 5–i (2009–10), chapter 2 (19 November 2009) and *HC Deb*, 1 December 2009, cols. 989–1026 and (31177) 15615/09: see HC 5–iv (2009–10), chapter 6 (15 December 2009) and HC 5–vii (2009–10), chapter 11 (20 January 2010).

- an amendment to include the ECB as an observer in meetings of the Joint Committee of European Supervisory Authorities and the sub-committee on financial conglomerates;
- an amendment to ensure that the European Systemic Risk Board and ESCB are not prevented from being involved in the exchange of prudential information;
- an amendment to provide for the supervisory authorities, the European Systemic Risk Board and the ECB to provide an opinion to the Commission ahead of it publishing its general reports;
- an amendment to ensure that central banks benefit from an independent right of participation in the Board of Supervisors of the European Banking Authority as non-voting members;
- an amendment to allow non-voting representatives of Member States' central banks with substantial involvement in the field of banking supervision to participate in confidential discussions relating to individual financial institutions;
- adding a recital to the proposed European Securities and Market Authority Regulation, providing that the existing cooperation between the Committee of European Securities Regulators and central banks continues between the authority and central banks in matters of common interest;
- an amendment to the proposed European Securities and Market Authority Regulation to ensure that any tasks conferred upon the authority should take account of the existing competences of the ECB and central banks of the ESCB in the field of clearing and settlement; and
- an amendment to the proposed European Securities and Market Authority and European Insurance and Occupational Pensions Authority Regulations to include the ECB as a non-voting member on the Board of Supervisors.

The Government's view

8.5 The Financial Services Secretary to the Treasury (Lord Myners) reminds us that the Government supports establishment of three new European Supervisory Authorities, saying that they will improve the quality and consistency of regulation and supervision in the EU. The Minister then comments *seriatim* on each of the ECB's suggestions, saying that the Government:

- is generally supportive of the amendment proposed in relation to emergency situations, but does not believe that the supervisory authorities will undermine the competences of national central banks. It therefore does not see this as an essential amendment;
- agrees with the principle that the supervisory authorities should not be prevented from sharing information, but would want to look very closely at any requirements for them to do so;

- does not agree with the inclusion of a requirement for the supervisory authorities to share information with the ECB — there are provisions in the proposed legislation to ensure that the European Systemic Risk Board receives the information it requires to fulfil its tasks and its Secretariat, provided by the ECB, will therefore receive such information to enable it to support the work of the board. However, the Secretariat should be independent from the ECB. The Financial Services Authority routinely shares information with the Bank of England — where appropriate, the Bank can choose whether to share this information with the ECB. The Government believes that this is the correct channel for such information sharing, and that it is not necessary to require that the ECB or national central banks should receive information directly from the supervisory authorities;
- does not believe that an amendment to include the ECB in the list of bodies to be consulted about emergency situations is necessary — central banks, including the ECB, are to be represented on the European Systemic Risk Board, which is included in this list of authorities, and there is no need for the ECB to be consulted separately in the determination of an emergency situation;
- does not believe that adding a requirement for the supervisory authorities to notify the ECB of any potential emergency situations without delay is necessary — central banks, including the ECB, are to be represented on the European Systemic Risk Board and it is the right body to interface with the supervisory authorities on issues of EU-wide financial stability;
- does not support an amendment to include the ECB as an observer in meetings of the Joint Committee of European Supervisory Authorities and the sub-committee on financial conglomerates — the Joint Committee exists to encourage cooperation between the supervisory authorities. It may be right to establish other cooperation arrangements, however the Government believes that the board is the appropriate body to attend these meetings, not the ECB. Other central banks are not to be represented here;
- agrees it is sensible for the supervisory authorities to be able to share information with central banks and the European Systemic Risk Board as they see appropriate, subject to confidentiality requirements and so could support clarification with an amendment to ensure that the European Systemic Risk Board and ESCB are not prevented from being involved in the exchange of prudential information;
- would support an amendment requiring the European Systemic Risk Board and supervisory authorities to submit an opinion to the Commission but does not support a similar provision for the ECB — while it would be right for the ECB to have a role in reviewing the board (a similar review clause is contained in the Council agreed text on the draft Regulation to set up the board), the role of the supervisory authorities is different. The ECB does not have a role in supervision policy and, in particular, is excluded in the Treaty on the Functioning of the European Union (TFEU) from having any such role for insurers;

- does not think an amendment to ensure that central banks benefit from an independent right of participation in the Board of Supervisors of the European Banking Authority as non-voting members is necessary — the Government supports the Council text for the Regulation for this authority, which provides for a representative from a Member State’s central bank to accompany the representative from the competent authority responsible for the supervision of credit institutions as an observer, where this authority is not a central bank, for common representatives in cases where more than one authority is competent for the supervision and, where the item to be discussed does not fall within the competence of this authority, a representative from the relevant national authority to attend as an observer;
- in relation to the amendment to allow non-voting representatives of central banks with substantial involvement in the field of banking supervision to participate in confidential discussions relating to individual financial institutions, notes that central banks with a substantial involvement are already to be represented in the European Banking Authority where they are supervisors and does not think that it is appropriate for central banks to participate in meetings of the European Securities and Market Authority and the European Insurance and Occupational Pensions Authority;
- could support a recital in the proposed European Securities and Market Authority Regulation, providing that the existing cooperation between the Committee of European Securities Regulators and central banks continues between authority and central banks in matters of common interest if it was amended to include national supervisors, to reflect more clearly their role in addition to central banks and the authority;
- would support an amendment to the proposed European Securities and Market Authority Regulation to ensure that any tasks conferred upon authority should take account of the existing competences of the ECB and central banks of the ESCB in the field of clearing and settlement, if national supervisors were also added, to recognise their role in addition to central banks; and
- believes it is right for the ECB to participate only in the European Banking Authority and therefore supports the Council position against an amendment to the European Securities and Market Authority and the European Insurance and Occupational Pensions Authority Regulations to include the ECB as a non-voting member on the Board of Supervisors.

Conclusion

8.6 Whilst clearing the document, we draw this additional information about the proposals for the European Supervisory Authorities to the attention of the House.

9 Financial services

(31265) 5420/10 —	ECB Opinion of 11 January 2010 on a draft Directive amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
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<i>Legal base</i>	—
<i>Document originated</i>	—
<i>Deposited in Parliament</i>	21 January 2010
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 4 February 2010
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	Not known
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

9.1 Directive 2003/71/EC sets out Community requirements on prospectuses that must be published when securities are offered to the public or admitted to trading. Directive 2004/109/EC sets out transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market in the Community. In November 2009 we cleared from scrutiny a draft Directive, amending Directive 2003/71/EC and Directive 2004/109/EC, which the Commission had proposed in order to simplify and improve the application of the Directives by reducing legal uncertainties, reducing unjustified burdensome requirements on market participants and further enhancing investor protection. The proposal was presented as part of the Commission's programme to simplify legislation and reduce administrative burdens.²⁰

The document

9.2 In this formal Opinion on the draft Directive the European Central Bank broadly supports the Commission's proposals and welcomes the aim of strengthening investor protection, by making information in prospectuses simpler and easier to read. In specific comments, the bank:

- says that it considers that a clear legal framework for the disclosure of central banks' lending operations should be put in place in order to facilitate the smooth and rapid conduct of central banks' lending or other liquidity facilities, including in crisis situations;

- says that “information on central banks’ lending or other liquidity facilities provided to a particular credit institution, including emergency liquidity assistance, needs to be kept confidential in order to contribute to the stability of the financial system as a whole and maintain public confidence in a period of crisis”;
- proposes that it, and other central banks, are exempt from disclosure obligations in EU legislation; and
- suggests specific drafting proposals for a provision that persons or entities that are treated on request as non-professional clients, in accordance with the Markets in Financial Instruments Directive, shall not be considered as qualified investors for the purposes of the Prospectus Directive and for inclusion of explicit public interest exceptions from reporting requirements for central banks, similar to that contained in Article 8(2) of Directive 2003/71/EC.

The Government’s view

9.3 The Financial Services Secretary to the Treasury (Lord Myners) reminds us that the Government supports the process of review of the existing legislation and the resulting proposal for amendments to improve the balance between the goals of investor protection, consumer confidence, efficiency, legal clarity, and reduction of administrative burdens. He then comments that the Government supports:

- the European Central Bank’s aim to clarify what regime is applicable to professional clients which are treated on request as non-professionals, in accordance with the Markets in Financial Instruments Directive — the proposed amendment is consistent with the Commission’s proposal to harmonise the term “qualified investor” with that of “professional clients” used in that Directive; and
- the Bank’s objectives for the provision of emergency liquidity assistance and wishes to see Member States looking to possible amendments to the Prospectus, Transparency and Market Abuse Directives to enable delayed disclosure of the provision of emergency liquidity assistance by central banks.

Conclusion

9.4 Whilst clearing the document, we draw this additional information about the proposals for amending Directive 2003/71/EC and Directive 2004/109/EC to the attention of the House.

10 Terrorist finances

(31305) 17702/09 COM(09) 703	Draft Council Decision on the conclusion of an Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme
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<i>Legal base</i>	Articles 82(1)(d), 87 (2)(a) and 218(6)(a) TFEU; consent; QMV
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	EM of 9 February 2010 and Minister's letter of 13 February 2010
<i>Previous Committee Report</i>	HC 5–x (2009–10), chapter 3 (9 February 2010)
<i>Discussed in Council</i>	None now planned
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Cleared

Background

10.1 Following the September 2001 terrorist attacks, the United States Department of the Treasury developed a Terrorist Finance Tracking Program (TFTP) to identify, track, and pursue terrorists and their financial supporters. The TFTP uses payment information carried by SWIFT (the Society for Worldwide Interbank Financial Telecommunications), a Belgian company, which is the world's main system for passing international payment instructions between financial institutions. This information is provided on the basis of an administrative subpoena requiring that the US branch of SWIFT should provide the US Treasury with specified financial transaction record data, which are stored in the United States. This data is held by the US Government in a highly secure database and is used exclusively for terrorist finance tracking purposes.

10.2 Changes to the operation of the SWIFT system from the beginning of 2010 have placed most payment information outside the scope of US administrative subpoenas. This would lead to such information being unavailable to the TFTP, seriously impairing its scope and coverage.

10.3 In November 2009 we cleared from scrutiny a draft Council Decision to authorise the signing, but not the conclusion, of an agreement, referred to as the SWIFT Agreement, between the EU and the US in order to allow transfer of SWIFT data to the US Treasury for the purposes of the TFTP. The agreement would make financial payment messaging data stored in the EU available to the US, subject to strict compliance with safeguards for the protection of personal data and is intended to maintain the availability of data stored in the EU to the TFTP and so ensure that the TFTP continues both to have coverage of all regions and to support counter-terrorism authorities in the US and EU.

10.4 The agreement was to come into operation provisionally on 1 February 2010, pending its entry into force, once “the Parties have exchanged notifications indicating that they have completed their internal procedures for this purpose.”

10.5 In reporting our decision to clear the draft Council Decision we noted:

- the Government’s endorsement of the assessment that the TFTP is a valuable counter-terrorist tool;
- the data-protection safeguards built into the proposed agreement;
- the temporary nature of the agreement, designed to last for no more than a year;
- the Commission’s intention to make a Recommendation regarding a long-term agreement in early 2010, which would be subject to greater democratic scrutiny;
- that although this temporary agreement would be signed before the Lisbon Treaty took effect, it would be concluded under the Article 217 of that Treaty and would require the assent of the European Parliament; and
- the Government’s support for the draft Council Decision, despite its reservation in relation to the operation of the EU-US Agreement on Mutual Legal Assistance in criminal matters.²¹

10.6 This present draft Council Decision is the one anticipated to conclude, on the EU’s part, the SWIFT Agreement. Unlike the Council Decision on signature of the agreement the present proposal is subject to qualified majority voting, rather than unanimity, and to the European Parliament’s consent. It is also necessary, if it wishes the UK to take part in conclusion of the agreement, for the Government to opt-in to the process.

10.7 When we considered this document, earlier this month, we had yet to receive an Explanatory Memorandum, so we were unable to give substantive consideration to the matter, although we noted that, given it was implicit in agreeing to signature of the SWIFT Agreement that conclusion of the agreement would follow, we thought it unlikely that we would be unable to clear the draft Council Decision quickly once we had the Explanatory Memorandum.

10.8 However, we did consider and report on an important scrutiny issue. During the passage of the European Union (Amendment) Act 2008 Parliament was assured that it would have eight weeks to scrutinise any Government intention to opt-in to any EU matter. That was not happening on this occasion. In a letter of 4 February 2009 the Exchequer Secretary to the Treasury (Sarah McCarthy-Fry) argued the Government’s case, a case which she also made to the House on 4 February 2010,²² for ignoring the commitment to the eight-week scrutiny period. But there were still a number of issues which disturbed us. The first issue concerned the normal timetable for scrutinising a document:

²¹ (31170): see HC 5–ii (2009–10), chapter 16 (25 November 2009).

²² *HC Deb*, cols 455–61.

- the document was issued by the Council on 18 December 2009, but was not deposited soon afterwards, as is the normal practice;
- if the document had been deposited in a timely manner, we would have expected to see an Explanatory Memorandum by the middle of last month;
- this would have enabled us to have at least some time to consider the question of the opt-in before Council consideration.

We asked for an explanation from the Minister about this.

10.9 The second issue arose from an apparent inconsistency in the Minister's letter of justification for overriding Parliament's interest, where she said that:

- on the one hand, the Council is not required to give three months to the Government for consideration of an opt-in, where it believes, as it does in this case, that the measure needs to be adopted as a matter of urgency; and
- on the other, the Government decided not to exercise its right to the three-month period.

We commented that the Government was within its rights to waive its three months entitlement. But we were not sure why the Minister thought that excused ignoring the eight week commitment to Parliament. We asked for the Minister's further comment.

10.10 Finally, the preamble to the draft Council Decision says that the SWIFT Agreement was in operation provisionally from 1 February 2010. We asked to hear from the Minister why, if this was the case, there was a need to ignore the Government's commitment to Parliament.²³

The Explanatory Memorandum and the Minister's further letter

10.11 In her Explanatory Memorandum the Minister says that:

- the Government has decided, under the terms of Protocol 21 of the TFEU, to opt into this agreement when it is concluded by the Council;
- the Government has been an extremely vocal advocate of the need to conclude the interim agreement and has lobbied other Member States extensively on the matter, as it sees the programme as an important tool in fighting terrorism;
- a decision not to opt into the agreement would therefore unnecessarily jeopardise the potential for a long-term agreement by suggesting that the Government was no longer committed to the programme;
- the agreement, furthermore, is temporary;
- as put to us when considering the Decision to sign the agreement, the TFTP is a valuable and important counter-terrorist tool;

23 See headnote.

- information originating from the TFTP is provided by the US to the UK and to other Member States and is a valuable source of information for counter-terrorist authorities;
- continued availability to the TFTP of payment messaging information from all regions of the world is important to maintaining its coverage and, in particular, to maintaining the value of TFTP-generated information to the UK and the EU;
- the Government would therefore like to see the TFTP continue to have access to payment messaging information from EU-based providers;
- the Decision to conclude the agreement would not have any implications for the costs, risks, or benefits to UK businesses;
- the cost of compliance with data requests would not increase significantly as a result of the agreement and would fall on designated providers SWIFT, which are located outside the UK; and
- the administrative cost of receiving and processing US requests for information would fall to the Belgian and Netherlands authorities, in whose territories SWIFT is located.

10.12 Turning to the late deposit of the document the Minister says:

“This document was issued on 18 December 2009, but it was not deposited until 5 February 2010. The normal scrutiny process was followed on the Council Decision on [signature of] the agreement. It, however, became clear that the Proposal for a Council Decision concluding the agreement was also subject to scrutiny. This unfortunately delayed deposit of [this] document...

“In parallel, the process to reach a Conclusion on the Agreement has been accelerated at the European level. The Government was made aware in January 2010 that the Council would be expediting agreement. The letter[s] to [us and the Lords’ European Union Committee] dated 4 February outlined the Government’s decision to opt-in to the agreement in light of this and that this would regrettably not permit Parliament the eight weeks to scrutinise the opt-in decision.”

10.13 In her letter the Minister addresses the three scrutiny points we raised in our report of 9 February 2010. On the first, about the very late deposit of the document, the Minister says that:

- she agrees that this failure was extremely regrettable and apologises that this truncated further the time available to us to consider the matter;
- the error was in large part attributable, however, to the unique nature of this case and the resulting uncertainty that surrounded the appropriate protocol to be followed;
- this was compounded by the fact that Member States were only informed of the treaty basis for the draft Decision on 17 December 2009;

- the Treasury does not routinely deal with Justice and Home Affairs matters;
- nonetheless, that does not excuse the failure; and
- she has asked officials to review this incident and implement the appropriate procedures to ensure it is not repeated.

10.14 In answer to our second point, the situation regarding the three-month period available to the Government to opt into Decisions of this nature and the eight week period for parliamentary scrutiny, the Minister says that, in relation to the three-month period:

- Protocol 21 of the TFEU reads that the UK “may notify the President of the Council in writing, within three months after a proposal or initiative has been presented... that it wishes to take part in the adoption and application” of a proposed measure;
- in exceptional circumstances, however, the EU institutions may consider it essential to adopt measures urgently within a period of less than three months;
- in this case we were alerted in January 2010 to the intention of the Presidency to put the draft Decision on the agenda for adoption as soon as the European Parliament had given its assent;
- the vote in the European Parliament was initially expected by 10 February 2010, suggesting that adoption could happen at the next Council (whatever the formation) thereafter;
- the Government was aware that, consequently, if it was to participate in adoption of the draft Decision it would have to notify the Presidency within that timetable, cutting short the usual three month period in the protocol;
- although such circumstances are exceptional they are not unique and were recognised in the undertakings given by the Government during passage of the European Union (Amendment) Act 2008, where the statement gave as an example EU-third country readmission agreements that had been submitted for rapid adoption necessitating an early opt-in decision by the UK;
- while the Government could have informed the Presidency that it required three months in which to decide whether to opt-in to the agreement, it would by no means have been certain that that period would have been provided, and failure to opt-in by the date of adoption would have put in jeopardy our ability to opt-in at all; and
- for the reasons she had previously set out, the Government did not feel this would have been an appropriate course of action.

10.15 The Minister turns then to the Government’s commitment to Parliament to allow eight weeks for the scrutiny of opt-in decisions, saying that:

- the Government remains committed to the undertakings it gave to Parliament on this matter;

- but the commitment did acknowledge that this was a “general rule” which would not apply where an earlier opt-in decision was necessary and that “where the Government considers an early opt-in to be essential, it will explain its reasons to the Committee as soon as possible”; and
- this is such a case due to the unique set of circumstances she has set out, including the temporary nature of the agreement, its importance for the fight against terrorism, the decision by the Presidency to adopt as soon as the European Parliament had voted and the fact that it was signed and scrutinised before the new system came into force.

10.16 On the provisional entry into force of the agreement the Minister says that:

- provisional entry into force was subject to the formal conclusion of the agreement at a later date;
- if the draft Decision to conclude the agreement were adopted, the provisional basis for the agreement would no longer apply and the UK would have had to either opt into it, or risk exclusion from it.

10.17 In her letter the Minister tells us also that the draft Decision is now redundant, saying that:

- the European Parliament voted on 11 February 2010 to reject the agreement, with the consequence that it ceases being in force;
- prior to this, the Council sent a declaration to the European Parliament undertaking to take its views into account in the negotiation of the permanent agreement;²⁴
- the result of the rejection is that the draft Decision will not be concluded and the UK will therefore not be required to exercise its opt-in; and
- it is possible that negotiations will now commence on a permanent agreement, which be subject to Parliamentary scrutiny in the usual fashion.

Conclusion

10.18 **We note that the draft Decision in this document is in effect redundant and clear it from scrutiny.**

10.19 **Turning to the scrutiny issues, we note the Minister’s comments about the failure to deposit the document in a timely manner. Whilst we accept her apologies and her assurance that steps have been taken to avoid similar incidents in the future, we cannot let pass one part of the Minister’s explanation without comment. She says, in her Explanatory Memorandum, “It, however, became clear that the Proposal for a Council Decision concluding the agreement was [...] subject to scrutiny” and, in her letter, “the error [the failure to deposit in the normal manner] was in large part attributable to the**

²⁴ See <http://register.consilium.europa.eu/pdf/en/10/st06/st06170-re02.en10.pdf>.

unique nature of this case and the resulting uncertainty that surrounded the appropriate protocol to be followed”. However Standing Order No. 143, and the gloss put on it in the Cabinet Office guidance to departments about European scrutiny, makes it perfectly plain that from the outset this was a document about which there should have been no question as to its liability for deposit.

10.20 We note also the Minister’s comments on the second issue — an apparent inconsistency in the statements that:

- on the one hand, the Council is not required to give three months to the Government for consideration of an opt-in, where it believes, as it does in this case, that the measure needs to be adopted as a matter of urgency; and
- on the other, the Government decided not to exercise its right to the three-month period.

However, whilst we understand the Minister’s argument that, if the Council were moving unstoppably to legislation requiring a decision on a UK opt-in in much less than three months this might require also a decision to forego the Protocol 21 entitlement, we do not see anything in the protocol that allows the Council not to give three months notice. As for the Minister praying in aid the reservation made during passage of the European Union (Amendment) Act 2008 about the eight week commitment to Parliament, we note what she says and can only hope that the commitment will normally be met.

10.21 We note and accept the thrust of the Minister’s argument in relation to the relevance of the provisional operation of the agreement to the timing of a Government decision to opt-in to the agreement.

10.22 Finally, the Government’s handling of the scrutiny of this document has been a sorry affair. We hope that lessons have been learnt and that the Government’s commitment to the eight week scrutiny period proves to have more substance than has proved the case in this first test of that undertaking.

11 Growth and Stability Pact

(a) (31306) 5891/10 COM(10) 10	Commission Communication: Assessment of the action taken by Latvia and Hungary in response to the Council Recommendations of 7 July 2009 with a view to bringing an end to the situation of excessive government deficit
(b) (31309) 6089/10 COM(10) 24	Commission Communication: Assessment of the action taken by Poland in response to the Council Recommendation to Poland with a view to bringing an end to the situation of excessive government deficit

<i>Legal base</i>	Article 126 TFEU; —; QMV without vote of subject Member State
<i>Document originated</i>	(a) 27 January 2010 (b) 3 February 2010
<i>Deposited in Parliament</i>	(a) 9 February 2010 (b) 10 February 2010
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	(a) EM of 15 February 2010 (b) EM of 16 February 2010
<i>Previous Committee Report</i>	None
<i>Discussed in Council</i>	16 February 2010
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared

Background

11.1 The Stability and Growth Pact adopted by the Amsterdam European Council in June 1997 emphasised the obligation of Member States to avoid excessive government deficits, defined as the ratio of a planned or actual deficit to gross domestic product (GDP) at market prices in excess of a “reference value” of 3%.²⁵ Each year the Council of Economic and Finance Ministers (ECOFIN) issues an Opinion on the updated stability or convergence programme of each Member State.²⁶ These Opinions, which are not binding on Member States, are based on a recommendation from the Commission. The economic content of the programmes is assessed with reference to the Commission's current economic forecasts. If a Member State's programme is found wanting, it may be invited by ECOFIN, in a Recommendation, to make adjustments to its economic policies, though

25 This obligation does not apply to Member States, including the UK, whilst they remain outside the eurozone, but they are required to endeavour to avoid excessive deficits.

26 The 16 Member States (Austria, Belgium, Cyprus, Germany, Greece, Finland, France, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain) that have adopted the euro have Stability Programmes, whereas the other 11 Member States (including the UK) produce Convergence Programmes.

such Recommendations are likewise not binding on Member States. This whole procedure is essentially the Pact’s preventative arm.

11.2 On the other hand, the Pact also endorsed a dissuasive or corrective arm involving action in cases of an excessive government deficit — the excessive deficit procedure provided for in Article 126 TFEU (formerly Article 104 EC) and the relevant Protocol. This procedure consists of Commission reports followed by a stepped series of Council Recommendations (the final two steps do not apply to non-members of the eurozone). Failure to comply with the final stage of Recommendations allows ECOFIN to require publication of additional information by the Member State concerned before issuing bonds and securities, to invite the European Investment Bank to reconsider its lending policy for the Member State concerned, to require a non-interest-bearing deposit from the Member State concerned whilst its deficit remains uncorrected, or to impose appropriate fines on the Member State concerned.

11.3 On 7 July 2009 the Council issued Recommendations to Latvia, Hungary (the fourth such Recommendation for this Member State) and Poland with a view to ending the excessive government deficits of these Member States.²⁷

The documents

11.4 In these Communications the Commission reports its assessments of the actions taken by Latvia, Hungary and Poland in response to the Council Recommendations of July 2009. The first, document (a), deals with Latvia and Hungary. The Council had recommended that Latvia correct its excessive deficit by 2012 at the latest and in line with the consolidation path set out in the country’s EU Balance of Payments financial support programme. To meet this deadline Latvia was asked to ensure an average annual fiscal effort of at least 2.75% of GDP over the period 2010–12, to strengthen fiscal governance and transparency (that is, improve the budgetary framework) and to improve financial market regulation and supervision. The Commission assesses that Latvia has made “adequate progress” and can therefore be considered to have taken effective action. It notes particularly that Latvia has:

- tightly implemented the 2009 budget that even allowed some flexibility for increased expenditure, enabling Latvia to draw more from the EU Structural Funds;
- adopted a budget for 2010 that includes consolidation measures roughly equivalent to 4.2% of GDP — these measures also provide some leeway for unexpected events without jeopardising efforts to meet the deficit target;
- has a 2010 budget represents a significant structural adjustment “well above” 2.75% of GDP;
- showed signs in preparation of the 2010 budget of improvement in fiscal governance; and

²⁷ (30773) 11660/09 (30763) 11400/09 (30766) 11404/09: see HC 19–xxvi (2008–09), chapters 23 and 25 (10 September 2009).

- has taken “significant steps” towards strengthening financial market regulation and supervision.

The Commission also notes that:

- the main risk to Latvia meeting the Council recommendations stem from implementing expenditure cuts, particularly wage cuts, at local government level; and
- monitoring tax compliance and measures to combat the grey economy would be important in ensuring that tax revenues develop in line with expectations.

The Commission concludes that no further steps are recommended for Latvia under the excessive deficit procedure.

11.5 The latest Council Recommendation for Hungary had set a deadline of 2011 for correcting the excessive deficit and for bringing public debt on a downward path in line with the consolidation path set out in Hungary’s EU Balance of Payments financial support programme. To meet the Recommendation Hungary was asked to achieve the budget deficit target in 2009 by adopting additional fiscal consolidation measures if necessary; to ensure a cumulative improvement in the structural balance of 0.5% over 2010 and 2011, to implement fully the recently adopted fiscal responsibility law and to bring the debt-to-GDP ratio on a firm downward trajectory. The Commission assesses that Hungary has made “adequate progress” towards correcting the excessive deficit and can therefore be considered to have taken effective action. It notes particularly that Hungary:

- is likely to meet the budget deficit target of 3.9% of GDP in 2009 by adopting cumulative fiscal consolidation measures equivalent to 1.5% of GDP throughout the year;
- has adopted a budget for 2010 that is in line with achieving a budget deficit of 3.8% of GDP and is underpinned by several structural measures;
- has backed the expenditure-reducing measures with appropriate laws;
- has included a sufficient level of reserves in the 2010 budget; and
- has started to introduce the new fiscal framework for preparation of the 2010 budget and has initiated work towards making further improvements in the budget planning process.

The Commission identifies “considerable” risks in meeting the 2010 deficit target, including a number of ways that government expenditure or revenue could be higher or lower than expected. It suggests that, therefore, further fiscal consolidation measures may be necessary to meet the 2010 deficit target. The Commission concludes that no further steps are needed for Hungary under the excessive deficit procedure.

11.6 The second Communication, document (b), deals with Poland. The Council had recommended that Poland correct its excessive deficit by 2012 in a credible and sustainable manner. To meet this deadline Poland was asked to implement the fiscal stimulus measures in 2009 as planned, in particular the public investment plan, while structuring a

supplementary budget in such a way to avoid any further deterioration in public finances, to ensure an average annual fiscal effort of at least 1.25% of GDP starting in 2010, to spell out the detailed measures that are necessary to bring the deficit below the reference value by 2012 and reforms to contain primary current expenditure over the coming years and to limit risks to the adjustment by a strengthening of the medium-term budgetary framework. The Commission assesses that Poland has taken action towards correction of the excessive deficit within the time limits set. It notes particularly that Poland:

- adopted in January 2009 a consolidation package with an estimated impact of 0.75% of GDP;
- adopted in July 2009, immediately after the Council Recommendation, a supplementary budget including additional expenditure cuts of 0.2% of GDP and higher dividends from state-owned companies of 0.4% of GDP;
- took action to strengthen the fiscal framework, made the existing debt rule more restrictive by introducing additional specific provisions on the type of measures to be implemented once public debt exceeds 55% of GDP and extended the fiscal planning horizon for the central state budget from three to four years;
- is currently contemplating introduction of expenditure rules in the course of 2010, which would facilitate future consolidation;
- has a budget for 2010 which is consistent with a slight deterioration of the structural balance in 2010, foresees a sizeable increase in public investment and the continued full play of automatic stabilizers, which will imply a large increase in social transfers and includes a nominal freeze in public wages, nominal reductions in other current spending and increases in taxes on cigarettes and fuel oil;
- based the budget for 2010 on cautious macroeconomic assumptions, which might lead to positive revenue surprises in 2010; and
- announced in January 2010 the main measures of the consolidation plan for 2010–2012, which include a gradual increase and equalisation of the retirement age for men and women at 67 years, the inclusion of uniformed services personnel in the general security system, a broadening of the tax base and, additionally, an acceleration of privatisations starting from 2010.

The Commission says that, while not negligible, the fiscal effort implied by current policies for the period 2010–2012 is significantly smaller than that recommended by the Council and that, although the improvement of the economic outlook since the Commission's Spring 2009 forecast implies that a smaller structural fiscal effort may be sufficient to correct the excessive deficit by 2012, reducing the government deficit below 3% of GDP in 2012 will require an intensification of the fiscal effort in 2011 and 2012. The Commission concludes that no further steps in the excessive deficit procedure for Poland are needed at present.

The Government's view

11.7 The Economic Secretary to the Treasury (Ian Pearson) says that there are no policy implications for the UK arising from these document and that the Government is in broad agreement with the Commission's assessments.

Conclusion

11.8 Whilst clearing these documents, we draw them to the attention of the House for the information they have about progress of the excessive deficit procedure for Latvia, Hungary and Poland.

12 Extradition between the EU and Iceland and Norway

(31231) 17706/09 COM(09) 705	Draft Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.
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<i>Legal base</i>	Articles 82(1)(d) and 218(6)(a); QMV; consent
<i>Department</i>	Home Office
<i>Basis of consideration</i>	Minister's letter of 8 February 2010
<i>Previous Committee Report</i>	HC 5–ix (2009–10), chapter 1 (3 February 2010)
<i>To be discussed in Council</i>	No date set
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Cleared

Background

12.1 In 2002 the Council agreed that there would be benefit to applying extradition arrangements on the European Arrest Warrant model in relations with Iceland and Norway and the EU. Successive presidencies have since conducted negotiations with a view to adopting an Agreement on surrender procedure (extradition) with Iceland and Norway.

12.2 The signing of the Agreement was authorised by a Decision²⁸ of the Council on 27 June 2006, but the Agreement has yet to be concluded. With the entry into force of the Lisbon Treaty on 1 December 2009, the procedures to be followed for conclusion of an international agreement are governed by Article 218 of the Treaty on the Functioning of the European Union (TFEU). In the case of agreements covering fields to which the ordinary legislative procedure applies, the Council now has to obtain the consent of the European Parliament before adopting a Decision to conclude an international agreement.

28 2006/697/EC.

Previous scrutiny

12.3 When we reported on the draft Decision to conclude the Agreement on 3 February 2010, we asked the Minister to explain the delay in concluding the Agreement; whether the Government will opt into it; the likelihood of Iceland or Norway agreeing to waive the dual criminality requirement; and the delay in depositing the Explanatory Memorandum.

The Minister's letter

12.4 The Parliamentary Under-Secretary of State at the Home Office (Lord West) has responded to our questions by letter dated 8 February 2010.

12.5 On the delay in concluding the Agreement, the Minister informs us that other EU Member States have had to amend their laws in order to comply with the terms of the Agreement. For some this has taken considerable time.

12.6 On opting-in, the Minister repeats that the Government has not made a final decision; but the Minister is of the view that the UK should opt in. He invites the Committee to make any further representations it has in this regard, which will be carefully considered by the Government before making a final decision.

12.7 On dual criminality, the Minister repeats that the Government reached the view that it would not be appropriate to relieve Norway and Iceland of the requirement to establish dual criminality when making an extradition request to the UK. The Government does not plan at the current time therefore to make a declaration that the condition of dual criminality should not apply to extradition requests between the UK and Norway or Iceland. For these reasons the Government has not made enquiries as to whether either country would be likely to waive the dual criminality requirement.

12.8 On the delay in depositing the Explanatory Memorandum, the Minister states as follows:

“The delay was most regrettable and I would like to offer my deep apologies for any inconvenience that this may have caused the House. I fully accept that this contravened the undertaking in Baroness Ashton’s statement on JHA opt-ins. The delay in depositing the draft Council Decision occurred because the document was published just prior to the Christmas period and officials consequently only became aware of it in the New Year. The accompanying EM was delayed as a result, for which I also offer apologies.

“I assure you that we remain fully committed to the new procedures following the ratification of the Lisbon Treaty and that we take our responsibilities to the Scrutiny Committees very seriously. We will undertake to work closely with colleagues in the Cabinet Office and FCO to do all in our power to take a proactive approach in this area, to ensure that any such delays do not occur in the future.”

Conclusion

12.9 **We thank the Minister for his letter.**

12.10 We welcome the confirmation that the Government will not waive the dual criminality requirement in extradition proceedings with Iceland and Norway.

12.11 We note the Minister's apology and explanation for the delay in depositing the Explanatory Memorandum. The eight-week period which the Committee has to scrutinise opt-in decisions is tight, so a delay of four weeks in depositing an Explanatory Memorandum is unacceptable in any circumstances, including over the Christmas period. We very much hope that the Minister succeeds in ensuring that such delays will not occur in the future.

12.12 We would support a decision by the Government to opt into the conclusion of the Agreement and now clear the draft Decision from scrutiny.

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

Department for Business, Innovation and Skills

(31311) 6165/10 COM(10) 14	Draft Council Decision on a Union position within the EU-Mexico Joint Committee relating to Annex III to Decision No. 2/2000 of the EU-Mexico Joint Council concerning the definition of the concept of “originating products” and methods of administrative cooperation.
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Department for Environment, Food and Rural Affairs

(31196) 16750/09 + ADD 1 COM(09) 633	Commission Report on implementation of the community waste legislation, directive 2006/12/EC on waste, directive 91/689/EEC on hazardous waste, directive 75/439/EEC on waste oils, directive 86/278/eEC on sewage sludge, directive 94/62/EC on packaging and packaging waste, directive 1999/31/EC on the landfill of waste and directive 2002/96/EC on waste electrical and electronic equipment for the period 2004-2006.
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(31280) 5402/10 + ADDs 1-8 SEC(09) 1724	Peak Performance — New Insights into Mountain Farming in the European Union
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Department of Health

(31269) 5593/10 COM(10) 3	Commission Communication on the Application of Directive 2002/98/EC setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC.
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Home Office

(31321) 6213/10 COM(10) 15	Draft Council Regulation amending Decision 2008/839/JHA on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II).
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HM Treasury

(31175) 13665/09 SEC(09) 1251	Commission Staff Working Document on the follow up in retail financial services to the Consumer Markets Scoreboard.
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Department for Work and Pensions

(31307) Special Report No.17/2009 concerning vocational training actions for
6066/10 women co-financed by the European Social Fund.

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(31322) Commission Communication: *Proposal for the Joint Report on Social
6323/10 Protection and Social Inclusion 2010.*
+ ADDs 1–2
COM(10) 25

Formal minutes

Wednesday 24 February 2010

Members present:

Michael Connarty, in the Chair

Mr Adrian Bailey
Mr David S Borrow
Mr James Clappison
Jim Dobbin

Mr Greg Hands
Keith Hill
Kelvin Hopkins
Mr Anthony Steen

2. 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 4.14 read and agreed to.

Paragraph 4.15 read, amended and agreed to.

Paragraphs 5.1 to 13 read and agreed to.

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

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

[Adjourned till Wednesday 3 March at 2.30 pm.]

Standing order and membership

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

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

The expression “European Union document” covers —

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

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

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

Current membership

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