



House of Commons
Home Affairs Committee

Government Response to the Committee's Third Report: Justice and Home Affairs Issues at European Union Level

**First Special Report of Session
2006–07**

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The Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies; and the administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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First Special Report

On 5 June 2007 the Home Affairs Committee published its Third Report of Session 2006-07, *Justice and Home Affairs Issues at European Union Level*, HC 76-I. The Government's response to the Report was received on 6 September 2007. We have also received a letter from Commissioner Franco Frattini, giving a response on behalf of the European Commission. We publish both these documents as an Appendix to this Special Report.

In the Government Response, our original conclusions and recommendations are in bold text, the Government's response is in plain text.

Appendix

A: Government response

Our approach in the inquiry

1. What we have aimed to do is to look at selected issues from the perspective of the actual challenges faced by EU countries, particularly those of cross-border crime and border control. We have then attempted to assess the current and future effectiveness of EU action in meeting those challenges. Throughout our evidence sessions, we consistently asked our witnesses "How big is the problem? What's the evidence that action x, y or z is necessary?" (Paragraph 6)

2. One consistent theme emerging from the responses has been that policy-makers often lack sufficient information about the practical problems which action at EU level ought to be aimed at tackling. In our view, policy initiatives at EU level should only be pursued if there is a solid evidence-base that they are likely to make a real practical difference to the effectiveness with which the common challenges facing EU Member States in the JHA field can be tackled. If what is being contemplated is a change to the decision-making processes of the EU itself—such as abandoning the current requirement that decisions on policing, legal migration and judicial co-operation on criminal matters should be made on the basis of unanimity amongst Member States—it is all the more important that a proper case should be made out for the practical benefits to be brought by such changes. (Paragraph 7)

3. Throughout this report, therefore, we have tried to set the current debates about policy and institutional change against the test of problem-based and evidence-based action. However, we recognise also the danger that if action is not taken in certain areas through the central EU institutions, groups of individual Member States may collaborate amongst themselves in ad hoc arrangements, which then become adopted formally by the EU, as is in process of happening with the Prüm Treaty. We recognise that future UK governments may have to weigh the disadvantages of engaging with

initiatives they deem to be insufficiently evidence-based against those of being excluded from key negotiations on what may ultimately be adopted as EU policy. (Paragraph 8)

4. A key question for our inquiry has been whether these alleged difficulties with the current arrangements are significantly affecting the ability of the UK and the EU to tackle crime and manage migration. A subsidiary question is whether failure to tackle these difficulties is driving, and will drive, some EU Member States to make their own arrangements for co-operation outside the formal structures of the Union. (Paragraph 50)

The Government welcomes this comprehensive report on the key issues relevant to JHA co-operation within the EU at present, which offers an insight into some of the opportunities and challenges that exist in this area. The responses to points 35-39 (institutional issues) below will address the points raised about changes to decision-making within JHA and the use of co-operation mechanisms outside the formal Council structures.

Policing co-operation across the EU

5. We welcome the Government's assurance that it will give consideration to setting up some central mechanism for co-ordinating liaison between UK police and their counterparts in other EU states on crime other than serious organised crime. It is clear from the comments made to us by police representatives that the absence of such a mechanism causes difficulties. We are therefore surprised that prior to our evidence session on 9 January it appears that the Government was not aware of ACPO's and SOCA's concerns in this regard—which in turn suggests a failure of liaison between the Government and its senior police advisers. (Paragraph 77)

The Government agrees that it is in everyone's interests for the Government to maintain an effective avenue of communication with key law enforcement organisations, and we have always sought to do so. Indeed, we are very keen to work with ACPO, SOCA, and others on the establishment of a police co-operation strategy that will allow us to develop a more proactive approach to EU police co-operation, in terms of both serious organised crime and of general crime. The Law Enforcement Forum, to which Joan Ryan referred in her letter of 27 February, has now been created and will provide a platform for discussing such issues and of finding solutions to existing concerns.

6. We believe that the creation of Europol has been a positive development in facilitating police co-operation, particularly by building confidence and knowledge between Member States. We do not believe Europol has yet achieved its full potential. A significant aspect of this is a lack of full trust and co-operation between Member States. Although the UK is fully engaged with the work of the agency, its work appears to be hampered by the varying degrees of co-operation it receives from other Member States. It is disappointing that the Commission has not done more to address the evident reluctance of some Member States to supply their national Europol liaison officers with needed information. We recommend that the UK Government should take such steps as are open to it to encourage all Member States to co-operate fully with Europol. We recommend that the Commission should consider practical ways to promote Member States' confidence in Europol and encourage better data-sharing; and also that it should

draw public attention to the failure of some individual Member States fully to cooperate with Europol. (Paragraph 99)

The Government agrees that Europol has yet to reach its full potential. We expect the modification of Europol's legal framework to improve flexibility and to increase Europol's operational effectiveness and this might encourage increased participation by other Member States. However the United Kingdom has not been alone in registering concerns over the security of one of the main databases, the Europol Information System. This will inevitably provide a disincentive for Member States inputting particularly sensitive data onto the system. We will continue to press Europol to address this security issue. However in the case of other Europol databases where such security concerns do not arise, such as the analytical work files and the information exchange mechanism between Europol liaison bureaux, we derive far more benefit.

7. The Commission's recent proposal further to extend the powers of Europol will require careful examination by the UK Government. In the light of the evidence we have received from UK police, it does not appear to us that there is a pressing need for a further extension of powers on top of the significant extension recently approved. (Paragraph 100)

The Government agrees that an extension of Europol's mandate to cover its possible involvement in serious crime that is not necessarily linked to organised criminality is something that should be carefully considered. But we are aware there are occasions where Europol liaison officers have to refuse to exchange information with Member State law enforcement authorities for the reason that it is not covered by Europol's mandate. This sends the message that Europol is not supporting law enforcement as well as it could and calls into question the benefit of the organisation to Member States. That said, and while we are determined not to distract Europol from its core business, we feel that limited engagement by Europol in the most serious occurrences of other criminality, where it affects two or more Member States and requires a common approach to address the problem, would provide an added law enforcement benefit. To this end the Government indicated at the JHA Council on 12 June that it could accept the revised text of Article 4 (Chapter 1) of the proposed Council Decision.

8. We are also concerned that the Commission's proposal contains no reference to scrutiny of Europol by national parliaments. In this respect it marks a step backwards from the proposals in the Constitutional Treaty. We recommend that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament. (Paragraph 101)

The Government agrees that parliamentary oversight of Europol is important. However, existing provisions and those contained in the draft Council Decision already provide for a significant amount of regulation at varying levels. For instance there are very clearly defined data protection roles for the National Supervisory Body and the independent Joint Supervisory Body, and we welcome the formal introduction of an independent Data Protection Officer. There is already a role envisaged for the European Parliament to be consulted when Europol proposes establishing new systems for processing personal data; as well as in the development of implementing rules for storing additional personal details

on Analysis Work Files; and where Europol wishes to establish new relations with third bodies for the exchange of information. There is also a clearly defined role for both the Council and the Commission in the adoption of Europol's budget, its work programme and its annual report. And with the introduction of Community financing of Europol the European Parliament will have a voice in the ongoing activities and future direction of the organisation. The Government remains to be convinced that any additional oversight would add further value and believes that a sensible balance has been achieved that delivers the required safeguards whilst not unduly hampering Europol in the achievement of its objectives.

9. We support the UK Government in its efforts to persuade the relevant EU institutions and other Member States that enabling UK police to access Article 96 data would be in the best interests both of the UK and the EU at large. It is not acceptable that crime-fighting should be hindered simply in an attempt to force the UK to take a different attitude towards participation in the Schengen border-control regime. (Paragraph 109)

The Government agrees with the Committee that UK access to this data would benefit the overall security of the EU and the UK, as set out in the Prime Minister's statement to the House of Commons on 25 July.

Addressing deficiencies in data exchange

10. The EU Council Decision in 2005 on exchange of information about criminal records provides a good example of both the value of action and the limitations of decision-making at European level. On the positive side, the decision redressed a real deficiency in the practice of Member States, including the UK, and prompted them to set up more effective systems for exchanging information. We consider that this is a significant step forward and to be welcomed. (Paragraph 122)

11. However, it has also become clear that the Council Decision itself was only a 'half-way house', which replicates some of the weaknesses of the original 1959 Convention, in particular the lack of specificity about the format and content of the information exchanged. We also note that some EU countries are being more vigorous than others in implementing the 2005 decision. This is therefore to be regarded as unfinished business. We recommend that the UK Government should pursue energetically in all relevant EU forums the objective of strengthening the 2005 decision by imposing requirements on Member States to supply full and usable information in a common format on convictions by other States' nationals. (Paragraph 123)

The Government agrees with the Committee's observation that the current legislative framework for exchange of information on convictions between EU Member States needs to be enhanced. It therefore welcomes the general approach on the *Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States* that was reached by the JHA Council of 12-13 June. This instrument is an important step toward achieving the aim of substantially improving the exchange of information on criminal convictions handed down against nationals of EU Member States and will replace the 2005 Council Decision. It includes rules on the types of data that must be collected by all Member States and how information must be transmitted

and stored. It also lays down the framework for an electronic information-exchange system. A second Council Decision will be required to develop that mechanism and the Government looks forward to the commencement of work on that instrument.

12. We look forward to the results of the Home Secretary's review of information on criminality, and urge that this should address in particular the current deficiency whereby police are not notified when an individual convicted abroad is released from custody or re-enters this country. (Paragraph 124)

The previous Home Secretary asked Sir Ian Magee to undertake an independent review of criminality information and the work is now underway. It is beginning with an intensive scoping phase and the overall timescale will not be fixed until that is complete. The review will consider how criminality information is recorded, used and shared in support of public protection. It will look at issues within the UK, as well as between the UK and Europe and with the rest of the world. One of the specific issues it will examine will be the importance of notifying the police when our citizens convicted abroad are released from custody or re-enter the UK.

13. We congratulate ACPO on drawing our attention, and thereby that of the wider public, to the highly unsatisfactory situation that had obtained in the UK prior to the 2005 decision, with information about overseas convictions being received by the Home Office and allowed to moulder on shelves rather than being made available to the police and the courts. We note the findings of the internal Home Office report, which reveal disfunctionality and poor performance within the Department; but we welcome the action that has been taken to tackle the deficiencies revealed in the report. (Paragraph 125)

14. We fully support the Government's wish to sign up without delay to the pilot project on interoperability of criminal records data. It is very regrettable that the UK missed the opportunity to be one of the original pilot participants, and thus influence the project from the start. The fact that the UK has, in its own interests, opted out of certain EU initiatives (the single currency, the borders part of the Schengen Convention) makes it all the more important that it should be an effective player in all the other areas. (Paragraph 129)

The UK has now been formally welcomed into the pilot project and work to facilitate interconnection is underway. Regarding the Government's decision not to participate in the pilot project from the outset; given the work undertaken by Unisys on behalf of the EU Commission on the interconnection of national criminal records systems, the Government wanted to establish the added value of the pilot project before committing funds and resources.

15. We believe that adopting the principle of availability has great potential to speed up and improve the quality of information shared between law enforcement agencies. Given the premium placed on good information-sharing by police practitioners, this will be an important development. However, there is a danger that if it is not implemented with sufficiently rigorous safeguards, in particular robust data-protection arrangements, the principle risks the dissemination of personal data of UK citizens without sufficient control over the subsequent use of that data. We recommend that the

Government should insist that an appropriate impact assessment by an independent body be commissioned at EU level on the potential use of data under the principle before the principle is adopted (in whatever form that takes) and that the Opinion of the European Data Protection Supervisor be fully taken into account in so doing. We also recommend that appropriate monitoring arrangements are set up by the national information commissioners to pick up any abuse of the systems. We recommend that particular attention be paid to the admissibility of evidence obtained under the principle of availability, in particular if such evidence has been obtained by coercive measures. (Paragraph 137)

The Government agrees that the Principle of Availability as enshrined in the Hague Programme is a key tool to combat organised crime and criminality in general. In 2005 the Commission put forward a proposal for the implementation of the Principle of Availability listing DNA, fingerprint, ballistics, vehicle registration information and telephone numbers amongst other things, as data which should be shared. However, in light of the Prüm arrangements, which will enable Member States to share data on fingerprints, DNA and vehicle registration, it has been decided that a new proposal on the Principle of Availability should be put forward addressing the remaining types of data. The Government will consider carefully any renewed proposal to implement the Principle of Availability; once the details of such a proposal are available, the Government will be in a better position to comment on the appropriate form of impact assessment and by whom this should be carried out. We will work closely with the Information Commissioner's Office (ICO) once a proposal is received and will consider the opinion of the European Data Protection Supervisor with interest.

The Prüm Treaty

16. The proposed transposition of the Prüm Treaty into the legal framework of the EU raises serious questions. In the case of Prüm, just as in the case of the pilot project on interoperability of criminal records (see paragraphs 126 to 129 above), the UK has missed out on an opportunity to influence a major European multi-country project from the start. Even more importantly, Prüm sets a worrying precedent whereby a small group of Member States may reach an agreement amongst themselves which then is presented to *the wider* EU almost as a *fait accompli*. Thus it raises the danger of a 'two-track Europe' developing. We deal with these issues of principle in section 4 of this report. We also note with alarm that if the draft Framework Decision implementing the principle of availability is superseded by the Prüm Treaty then the original design of an instrument introducing radical change to EU data-sharing will have been carried out outside the democratic processes of the EU. (Paragraph 144)

17. Notwithstanding these concerns, we consider that the provisions within Prüm for more effective police co-operation are, in themselves, welcome. We support the UK Government's decision to sign up to those provisions, and welcome the fact that it has secured agreement to drop Article 18. (Paragraph 145)

As the Committee recognises, the information sharing elements of the Prüm Convention which have been brought into the EU will provide for more effective policing by aiding in the investigation, prevention and detection of crime. The Government has therefore welcomed the initiative of the German Presidency.

Indeed the Government seriously considered signing up to the full Prüm Convention as we believe that the information sharing aspects of the Convention will bring real value to the fight against terrorism and cross border crime. There were however aspects of the Prüm Convention, such as the provisions on air marshals, a measure on action to be taken in urgent situations and those on immigration that prevented our firm support for the original Convention and consequent accession.

Prüm was presented to the European Union as a proposal like any other and was therefore dependent on unanimity and subject to the usual negotiating process. The Presidency devoted considerable resources both on a bilateral basis and through Ministerial and expert level meetings of all Member States in Brussels, Wiesbaden and Potsdam to discuss and examine the detail of the Council Decision. We will continue to influence the development of the Prüm systems through the negotiation of the implementing agreement. We strongly believe that the approach taken has led to a positive result which will benefit our citizens.

The Prüm Decision does not supersede the Principle of Availability, nor any proposal to implement it, but provides a concrete method for the implementation of the principle for three specific types of data. The Presidency has indicated that whilst this Council Decision is under negotiation the separate Commission proposal for a Framework Decision on the exchange of information under the Principle of Availability will not be discussed. We expect the Commission to put forward a revised proposal on the implementation of further elements of the Principle of Availability in the near future.

Judicial co-operation: mutual recognition instruments and harmonisation

18. Eurojust provides an excellent example of what can be done to build mutual trust between practitioners and through them Member States in one another's systems. This kind of contact and practical co-operation is absolutely critical in enhancing trust and co-operation. (Paragraph 157)

The Government is pleased that the Committee values the work of Eurojust. We agree entirely that its work is crucial in increasing trust and co-operation between Member States and are pleased that the Annual Report shows there has been a continued increase in the number of cases being referred to Eurojust.

19. We believe that there should be no objection to arresting and surrendering a UK national for an act that is a crime in another EU country in whose territory it was committed. We agree with the Government that the abolition of dual criminality for a defined and agreed set of offences is acceptable. Nonetheless, there is continuing anxiety in some quarters about the abolition of dual criminality in respect of the 32 offences; it remains to be seen whether particular cases throw up anomalies or perceived injustices which might undermine public support for the EAW. A number of the categories on the list, such as racketeering or xenophobia, cause us concern. We recommend that both the UK Government and the Commission should monitor the application of the EAW to see whether problems are emerging. It may be that in the light of several years' experience, some fine-tuning of the EAW system and the list of 32 offences may be desirable. (Under present arrangements, of course, any modifications will themselves require the unanimous approval of Member States. If there were to be a move to first-pillar decision-making on JHA issues, as the Commission wishes, changes

to the list of offences would be made under qualified majority voting, which raises the possibility that they might be imposed on individual Member States against their wishes.) (Paragraph 178)

The Government notes the Committee's concern about the abolition of dual criminality in areas such as racketeering or xenophobia and agree that the UK and the Commission should monitor the application of the EAW to ensure that it is working effectively. To that end we have recently participated in an evaluation by the Council of the UK's practical application of the EAW as part of the wider peer evaluation process.

We welcome the Committee's conclusion that there should be no objection to arresting and surrendering a UK national for an act that is a crime in another EU country in whose territory it was committed. For conduct committed outside the territory of the State seeking surrender, the UK has of course availed itself of the safeguard in the European Arrest Warrant that states that the executing judicial authority (i.e. the UK) may refuse to execute an EAW where the warrant relates to offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory (the territoriality ground for refusal).

It is possible that any future proposal to amend the EAW might result in unwelcome amendments to the list of offences as a result of the qualified majority voting regime proposed in the new Treaty. However, the Committee will be aware that the mandate for that Treaty, as agreed at the European Council on 22 June, includes the extension of the UK's Opt-in Protocol to the police and criminal judicial co-operation provisions (see also response to points 35-39).

20. The implementation of the EAW demonstrates that sufficient political will can drive agreement in the field of mutual recognition, even against institutional challenges. The EAW was passed and implemented despite the alleged problems with reaching agreement in the third pillar. However, given the special circumstances of its inception, in the aftermath of 9/11—and at a time when unanimity was required from only 15 Member States rather than the present 27—we conclude that the EAW is not typical of a third pillar measure and that it is likely to be much more difficult to reach agreement on other mutual recognition instruments. (Paragraph 190)

21. The European Evidence Warrant provides an interesting comparison to the EAW. Without the same degree of political pressure under which the EAW was passed, this important measure has fallen foul of difficulties in getting agreement under unanimity. (Paragraph 191)

22. The difficulties in passing mutual recognition instruments may not reflect a failure of the core principle of mutual recognition. It may simply be that the current procedures do not allow progress to be made if there is little desire amongst Member States to make progress, or if there are significant failings in the proposals. It should not be assumed that these hurdles to agreement are necessarily a bad thing, or that removing them would produce better and more satisfactory outcomes. (Paragraph 192)

We agree that the circumstances which existed at the time of the EAW's inception were unusual and that the process by which it was negotiated was not typical of other third pillar

measures. We also agree that it is possible that agreement on further third pillar mutual recognition instruments may be more difficult to achieve. However, we are committed to mutual recognition as the basis for judicial co-operation and believe that agreement can be reached in the Council where a proposal can be shown to have the potential to bring practical benefits to Member States.

23. We agree with the UK Government, and a wide number of practitioners, that there is no case for a full-scale harmonisation of European criminal justice or legal systems. There would be very significant difficulties, if not impossibilities, in trying to marry nearly 30 different systems. We have seen no evidence that the Commission, or Member States, desire “full scale” harmonisation. (Paragraph 200)

The Government is pleased that the Committee endorses our position. We remain committed to the mutual recognition agenda as are the Commission and other Member States. The Government has acknowledged that at times it is necessary for the EU to adopt minimum standards for certain offences and penalties for some particularly serious types of crime which may have a cross border element.

24. We think it logical that for mutual recognition in the field of judicial co-operation to be effective, and for Member States to trust each other, some degree of common standards in tightly limited areas may be desirable. Nonetheless, we caution that even in the case of proposals for common standards no proposal should be considered without powerful evidence of the scale and nature of the problem to be tackled, and the gains to be delivered by any such proposal. (Paragraph 207)

The Government agrees with the Committee’s assessment. Indeed the Council has recently deferred any discussion on the need for minimum standards in relation to the definitions of offences for which dual criminality is not required in existing mutual recognition instruments until those instruments have been implemented for a number of years. Only with practical experience of operation can we effectively establish whether there is a problem that needs addressing.

EU procedural rights

25. On the basis of evidence we have received, particularly from Fair Trials Abroad, there are reasonable grounds for concern about the absence of procedural safeguards for UK citizens in some other EU Member States. However, it is difficult to quantify the problem, or to know whether the injustices that result from a lack of binding common procedures are sufficient to justify radical change. We note that the level of procedural rights provided for defendants in the UK is high and that any EU-wide binding agreement must also offer high standards. (Paragraph 228)

26. There is a real risk that setting common standards in EU criminal procedures might set up an alternative rights regime in Europe, operating in parallel with the ECHR, and opening the prospect of conflicting litigation at the European Court of Justice and the European Court of Human Rights. We support the UK Government’s view that the starting point, which would benefit both UK citizens in other Member States and the citizens of those States, should be to use existing mechanisms to ensure that the rights enshrined in the ECHR are uniformly observed across the EU. Detailed and

independent monitoring of the extent of rights abuses in Member States is a precondition for taking remedial action against offending States. We recommend that the UK Government puts proposals before the Council of Ministers for a system of such monitoring to be established, with central EU funding, and for it to consider the best means by which sanctions could be brought against Member States which fail to comply with the ECHR in procedural matters. This should be done in full liaison with the relevant organs of the Council of Europe, which has responsibility for overseeing the working of the ECHR. (Paragraph 229)

The Government agrees that there may be no added value to binding EU common standards in addition to the jurisdiction of the ECHR. However, last year the UK, with 5 other Member States, tabled a proposal for a Resolution which encouraged each Member State to consider practical action points, in consultation with representatives of civil society, and to prepare an Action Plan to enhance compliance with procedural rights. There was little support at the June JHA Council for the Resolution and there seems no prospect of success for stronger new proposals on the lines recommended by the Committee.

27. With regard to the choice which currently confronts the Council of Ministers, between a watered down draft Framework Decision and a non-binding Resolution, we do not feel that either in its current form is an attractive proposition. Some of the contents of the Resolution are worthwhile, but we would wish to see it strengthened by inclusion of tape recording of police interviews as a right. Unfortunately, a non-binding Resolution, of its nature, cannot be used as a lever to produce improvements in the rights situation in the States most likely to cause problems. (Paragraph 230)

The Government fully supports the introduction of tape-recording of police interviews, and the Resolution which we co-sponsored proposed Commission assistance for Member States to introduce it. However, several Member States have made clear they have no current intention of introducing tape-recording and would not therefore support a Resolution which introduces tape recording as a right in police interviews across the EU.

28. There is also a danger that if, as looks very possible, most other EU countries press ahead with an equivalent to a Framework Decision, but binding only on themselves, then as happened with the Prüm Treaty the UK will miss the chance to influence negotiations when they matter, and may have little option later but to sign up to an agreement that has already been negotiated. We therefore urge the Government to reconsider its current support for a Resolution and give renewed consideration to the proposals in the Framework Decision. (Paragraph 231)

In their report published on 25 May the European Scrutiny Committee repeated their 'strong support for a resolution, rather than a Framework Decision. We believe a resolution will minimise the risk of conflict with the ECHR and do more to promote the adoption of practical measures of benefit to the citizen'. The Government agrees, but work on both the Resolution and the Framework Decision on procedural rights has ceased since the June JHA Council. The UK remains ready to engage in negotiations, though it has made clear that it will not support a binding measure which includes within its scope cases wholly within the domestic jurisdiction.

Borders and migration

29. We believe that the relationship between legal and illegal migration is a complex one which merits further debate. To the extent that there is an economic need for migration, legal migration will always be the preferred approach and the justification for tackling illegal migration. What is less clear is whether the EU has the capacity to take a common approach to legal migration, given the very different pressures and needs of individual Member States. At the same time, the EU has not yet shown the capacity to develop an effective common approach to illegal migration (although it is improving). Our view is that the development of effective action on illegal migration remains the priority and the case for developing an EU approach to legal migration is less clear. However, the UK needs to recognise that the decisions of other EU states on legal migration have direct implications for the level of legal migration to this country, given the right of movement within the EU. There is room for debate as to whether, in the future, it may be in the UK's interest to accept a stronger common EU approach to legal migration. Members of the Committee hold different views as to whether it might ever be acceptable to agree to this. (Paragraph 242)

The Government shares the Committee's view on the very different pressures and needs of individual Member States and notes the Committee's observation about the lack of clarity on whether the EU has the capacity to take a common approach to legal migration. We await with interest the Commission's forthcoming proposals (due in September) on Directives on migrants' rights and highly skilled migrants and will consider whether to opt in to any proposals taking into account the development of our Points Based System and the four Strategic Objectives of the IND Review. The Committee notes that "the UK needs to recognise that the decisions of other EU states on legal migration have direct implications for the level of legal migration to this country." The Government shares this perspective; indeed, it is something that was explicitly recognised in the G6 Migration Paper to the JHA Council in 2006. The UK works with EU Member States in different ways (bilaterally, multilaterally and at EU-27) in order to tackle the multifaceted challenges of illegal migration.

30. Frontex is a young organisation which has already carried out valuable work in securing the external borders of the EU. The agency has much untapped potential if it were to be properly resourced and staffed for the future. To this end the Government should encourage Member States to contribute the promised equipment and encourage the Commission to ensure sufficient funds to attract the right staff. We caution, however, that Frontex is not a panacea to problems of illegal migration, nor are emergency operations its *raison d'être*. Increased resourcing should not generate the expectation that Frontex can provide a much increased 'returns' service. (Paragraph 261)

The Government agrees that Frontex has the potential to positively contribute to the challenges of illegal migration but should not be tasked with work it does not have the capacity to deliver, or which is not provided for in the Frontex Regulation. We support the sustainable growth of the organisation. In particular, we back Member States contributions to the Centralised Record of Available Technical Equipment and have offered the loan of New Detection Technology resource kits to assist with operations.

There had been some difficulty in attracting high quality staff to Frontex because of the lower pay rates on offer at headquarters in Warsaw. The Commission is aware of these difficulties and is looking at ways to resolve them.

31. We support the Government's bid for the UK to become a full member of Frontex. The lack of a vote on the management board may not be a serious disadvantage, but the inability of Frontex to undertake operations on UK territory is a matter of serious concern. We therefore encourage the Government to take every step open to it to reverse this situation. (Paragraph 262)

We are awaiting the result of the UK's ECJ challenge against exclusion from the Frontex Regulation. If the UK is successful in the case before the ECJ we will be able to opt into the Frontex and RABITs Regulations. We do not anticipate that the UK would need to request a joint operation on UK territory to assist with an influx of irregular migrants. However, we will develop a mechanism for consulting Parliament beforehand, in the unlikely event that the UK needs to make such a request.

32. We agree with the Minister that different Member States sign up to measures in varying degrees and that this is part of the natural give-and-take at the EU. It could be argued that the UK position is qualitatively different because it has a wide variety of opt-in arrangements across the whole Schengen system. The UK may continue to be in the uncomfortable position of being excluded from important measures as a consequence of its selective participation. Nonetheless, the good reasons which led the UK to choose not to opt in to Schengen remain in force: in particular, the UK's unusual geographical position arising from its island status, long sea borders, and lack of land borders (other than with the Irish Republic, which has also chosen not to opt in to Schengen). We believe that on balance the UK is right to remain outside the Schengen border-control regime. We recommend that the UK Government should continue to explain to other EU countries why this is the case, while stressing the benefits of fuller co-operation on all other aspects of Schengen. The Government should also treat as its top priority the need to enforce immigration controls effectively within the UK; we made detailed recommendations as to how this can best be done in our report on *Immigration Control* published in 2006. (Paragraph 270)

The Government welcomes the Committee's analysis and will continue to explain our special position to other Member States. We participate as fully as possible in borders and migration matters at EU level; our participation is subject to the provisions of our Title IV, Schengen and Frontier Protocols.

The Government takes managing migration seriously, over the past year we have published a series of documents setting out our approach to Border Management: the IND Review, complemented by *Securing the UK Border* and *Managing Global Migration*, our Border Management and International Strategies respectively, place working with EU partners at the heart of our approach. These strategies are further complemented by "Enforcing the Rules" our enforcement and compliance strategy. Furthermore, our approach to enforcing immigration controls has a focus both *within* the UK and offshore, working with EU and other international partners.

Data protection

33. We consider that in the area of data protection there is evidence of insufficient political appetite for protective measures as compared to law enforcement ones. We note the Minister's expression of continuing Government support for the Data Protection Framework Decision. However, if proposals for a Framework Decision were to be superseded by the data protection provisions in the Prüm Treaty, we would have serious concerns as to whether these were adequate. We note the lack of EU-wide consultation over the contents of the Prüm Treaty, arising from its origins as an agreement between a small group of Member States which did not include the UK. We recommend that the Government should continue to support the principle of making provision for data protection in the EU third pillar through a Framework Decision. (Paragraph 285)

The Government welcomes the Committee's recommendation. The Government has always supported the principle of a minimum standard of data protection in the third pillar in the context of greater information exchange between Member States and is keen to agree the draft Framework Decision as soon as possible. The UK is keen to ensure that the final text strikes an appropriate balance between data sharing for law enforcement purposes and the privacy rights of individuals.

With regard to the Prüm Council Decision, the UK worked closely with the Presidency to overcome our concerns about the original draft text and to ensure the final draft was consistent with the UK Data Protection Act. The Government believes the data protection safeguards in the Prüm Council Decision are appropriate for the specific type of data sharing which would take place under that instrument.

The DPFD has not been superseded by the agreement reached on the Prüm Council Decision and nor would the Government wish this to be the case. Council Conclusions were adopted at the JHA Council on 12 June stating that agreement would be reached on the DPFD by the end of 2007 at the latest. The implementation timetable is currently two years for the DPFD and three years for full implementation the Prüm Council Decision. Therefore, if this timetable is adhered to, the DPFD will in fact be in force before the Prüm Council Decision takes full effect. Those aspects of the Prüm Council Decision to be implemented within one year of the Decision taking effect will be subject to the data protection safeguards in the Decision and, in relation to the UK, to the UK Data Protection Act.

34. Both the Passenger Name Record and SWIFT cases give cause for serious concern. We consider that the casual use of data about millions of EU citizens, without adequate safeguards to protect privacy, is an issue of much greater significance than many of the other EU-related matters put to the UK Government and Parliament for consideration. We recommend that the Government and the European Commission should prioritise the question of provision of personal information to countries outside the EU as an issue of the greatest practical concern to its citizens. We repeat our earlier recommendation that the Government should seek urgent agreement on a comprehensive EU-wide data protection framework in the third pillar and ensure that specific minimum standards ensuring adequate data protection are agreed for data exchange with third countries. We also recommend that the Government should give

due consideration to the proposal of the European Parliament rapporteur that the joint supervisory authority advise the Council to ensure an appropriate level of data transfer with third countries. (Paragraph 299)

The Government considers that the EU-US PNR Agreement provides an appropriate level of protection for the processing of that data. The transfers of personal data between SWIFT (who are based in Belgium) and the SWIFT US are in accordance with the Data Protection Directive, although the Government does support recent efforts to make available information about the transfers to data subjects.

The Government has emphasised its commitment to agreeing the third pillar Data Protection Framework Decision as soon as possible. The DPF, once agreed, will set minimum data protection standards in the EU for the cross-border transfer of data in the field of police and judicial co-operation. The draft Framework Decision does address the issue of transfers to third countries but it is sometimes necessary to share data with countries lacking the desired level of data protection, for example, when dealing with extradition and deportation cases, or when aiding criminal investigations such as the murder of a UK national abroad; criminal record checks and employee vetting procedures to enable UK nationals to work in third countries are further examples.

With regard to the Committee's comments on a joint supervisory body, a proposal has been made for the establishment of such a body in the third pillar. The UK has welcomed this proposal in principle but has also requested further details about its practical implications. The European Data Protection Supervisor has been consulted on the DPF as negotiations have progressed and the Government also regularly consults the UK Information Commissioner's Office.

Institutional changes

35. We are aware that EU Member States are currently discussing how to revise decision-making procedures in the wake of the failure of the proposed EU constitution to win support in a number of Member States. The Constitutional Treaty proposed significant changes to decision-making in JHA issues. The most controversial would have made elements of criminal law subject to qualified majority voting in the Council of Ministers. The implications of this for the UK would be significant. If elements of criminal law and procedure were to be brought under QMV then, at least in principle, the Government could be outvoted in the Council. In this case both the Government and Parliament would be required to pass legislation on issues of particular principle and sensitivity which neither the Government nor Parliament had desired. (Paragraph 341)

36. At present a number of Directives which have been agreed under the first pillar have been implemented in UK law by secondary legislation. It would be even more unacceptable for EU measures on criminal justice to be introduced without primary legislation, as happens with some existing EU measures under QMV. We also note that any future changes to the list of 32 offences in relation to which both the European Arrest Warrant and the proposed European Evidence Warrant are applicable would be approved under QMV, and thus might be imposed on individual Member States which opposed the changes. (Paragraph 342)

37. Throughout this report we have looked at a range of current initiatives at EU level. The evidence we have seen does not persuade us that, as things stand at present, there are sufficient benefits in terms of tackling crime, either here in the UK or across the EU, to justify such a major transfer of power away from individual Member States as would be entailed by a switch of criminal law from the third to the first pillar. It is true that the level of real risk to UK interests can be overstated. The UK has sufficient power and influence to ensure that it would rarely, if ever, be outvoted or required to accept something against its interests. But the constitutional principle cannot be lightly set aside. The examples of the European Arrest Warrant and the recent measure on transfer of prisoners suggest that it is by no means impossible for good decision-making to take place within third-pillar procedures. (Paragraph 343)

38. Having said this, we believe that the UK Government must also recognise that an equally strong risk to our effective sovereignty may be posed by a proliferation of informal decision-making structures such as those devised by the participants in the Prüm treaty. It is highly regrettable that the UK did not participate in the Prüm process from the start. Similar informal arrangements within small groups of Member States may produce de facto changes over which we have less influence than we would through the mechanisms of QMV. This is one reason why the UK should not absent itself again from such informal discussions. (Paragraph 344)

39. We recommend that the UK Government should make clear to its EU partners that at present the case for moving criminal law matters from the third pillar has not been made. There is room for debate as to whether, in the future, it may be in the UK's interests to accept such a change. Members of our Committee hold different views as to whether it might ever be acceptable to agree to this. It is indisputable that such a change would be of great significance. The UK Government should not agree to any such proposal without full and specific parliamentary consideration of the issue. (Paragraph 345)

Before the June European Council the Government made it clear that the concept of a Constitutional Treaty for Europe had to be abandoned, and that we should agree instead a conventional amending treaty like the Nice, Amsterdam and Maastricht Treaties and the Single European Act. This has been successfully achieved.

The Committee will be aware that at the June European Council a mandate was agreed for an Inter-Governmental Conference to amend the EU Treaties including moving police and criminal judicial co-operation and criminal law to qualified majority voting. At the same time it was agreed to extend to those JHA areas the Opt-In Protocol which currently applies to asylum, immigration and civil justice matters. This will give the UK the right to choose whether or not to participate in individual JHA measures.

The Government does not consider proposals formulated by a small group of Member States as necessarily negative. We want an EU that adds value to the efforts of Member States and which provides the opportunities and tools for better practical co-operation. If a sensible proposal is put forward by a Member State or a group of Member States that appears to meet these criteria then the Government will react positively as long as it is consistent with the national interest and democratic accountability.

The Government agrees with the Committee that a balance needs to be struck between engaging at an early level and the importance of evidence based policy making. The Government always endeavours in its engagement with both national and international policy to ensure that policy is sufficiently evidence based and that the UK enters into dialogue at a time that is appropriate for the benefit of UK citizens.

Parliamentary scrutiny of EU business

40. We regret the absence of opportunity for debate on the Modernisation Committee’s report, and urge the Government’s business managers to find time for a debate in the near future. (Paragraph 353)

The Government has been giving close attention to the recommendations of the Modernisation Committee report, including whether alternative approaches to reform, beyond those identified in the Modernisation Committee report, might be feasible. Some of the particular recommendations of the Committee might not now be as relevant to present circumstances (for example, the proposals for a joint Committee with the Lords were to some extent predicated on the then forthcoming UK presidency) as at the time of the report. The Government is keen to examine measures to improve the links between the work of the European Scrutiny Committee and the work of European Standing Committees. The Government hopes to bring forward specific proposals for consideration by the House in due course.

41. We consider it is desirable for the House and its committees to take concrete steps to bridge the current divide in EU scrutiny between the document-focused work of ESC and the policy-based work of DSCs (which too often ignores developments at European level). We note that the ESC itself has recently begun to extend its activities beyond its traditional (and of course very valuable) sifting role, by carrying out some thematically-based inquiries. We welcome this development. (Paragraph 354)

42. We believe this should be complemented by greater efforts to ‘mainstream’ EU scrutiny by engaging DSCs more fully in the process of examining key EU proposals. We therefore invite the European Scrutiny Committee to consider making more frequent use of its existing power to request opinions from DSCs on significant issues. (Paragraph 355)

The Government welcomes and looks forward to increased co-operation in the Committees. As stated in a response to the chairman of the Liaison Committee, the Cabinet Office is reviewing Government consultation policy and associated guidance for Government departments and will consider how best to use this guidance to encourage departments to bring consultation documents to the attention of departmental select committees.

43. We recommend that the Home Office should undertake to consult us directly when major EU developments in the JHA field are at a formative stage. We request the Home Office to supply us with a quarterly report on progress with JHA developments—with an emphasis on proposals on which the UK Government has not yet reached its final settled position. (Paragraph 356)

Parliament is consulted throughout all negotiations for European Union legislation and action through the workings of the European Scrutiny Committee (House of Commons) and European Union Committee (House of Lords), which hold the primary role in scrutinising EU proposals in the Justice and Home Affairs field. In line with recent developments on how Government departments should interact with Departmental Select Committees, the Home Office will commence sending consultation documents to the Committee clerk, for information, at the same time as they are deposited for scrutiny. These will be accompanied, where appropriate, by information about the Government's plans for wider consultation on the document.

44. On the specific issue of the future of Europol, we noted earlier in this report that the Commission's December 2006 proposal contains no mention of scrutiny of Europol by national parliaments. We repeat here our recommendation that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament. (Paragraph 357)

Please see the response to conclusion 8.

45. We have taken such steps as are open to us as an individual committee to mainstream EU business within our programme. (Paragraph 358)

46. We agree with these comments by our colleagues from the European Parliament. Our exchange with MEPs during the course of this inquiry was very valuable. Whilst it might not be necessary to institute formal joint scrutiny with MEPs, we will attempt to maintain a high level of informal dialogue with British MEPs on key issues, using the services of the UK National Parliament Office in Brussels. (Paragraph 368)

The Home Office values both formal and informal dialogue with UK MEPs to discuss the Government policy line. This contact can be direct or through the UK Permanent Representation in Brussels. It is therefore logical that a parallel system is devised whereby Members of National Parliament can engage with their European Parliament colleagues on a political basis.

47. We will do our best to increase the quality and quantity of our scrutiny of the European dimension to Home Office decision-making. In particular, we propose to discuss with colleagues on the ESC, Lords Sub-Committee F and the LIBE Committee how we can build on recent encouraging contacts so as to create mechanisms for regular contact and liaison. (Paragraph 369)

This is a welcome commitment by the Committee. Whilst the primary scrutiny of all EU proposals is carried out by the specific EU Committees in the Commons and Lords, the contribution of the Home Affairs Committee in the field of Justice and Home Affairs could usefully enhance Parliament's engagement on European issues. We look forward to the constructive contributions that we are sure the Committee will provide.

B: Letter received from Franco Frattini, Vice President of the European Commission, to David Winnick MP, as acting Chairman of the Committee.

I was grateful to receive a copy of your report, *Justice and Home Affairs Issues at European Union Level*. I welcome the scrutiny of EU Issues by your committee, which compliments the work of the Commons European Scrutiny Committee, and the relevant Sub Committees of the House of Lords.

The European Commission must be accountable to citizens. I am pleased that your report covered such a wide range of Justice and Home Affairs issues including police and judicial co-operation in criminal matters, data exchange and data protection, borders and migration. These are all of central concern to EU citizens. I will focus here on two issues you raised—institutional changes and national parliamentary scrutiny of EU business—especially in light of the June 2007 European Council.

EU level action must add value. The Commission is guided by the principles of proportionality and subsidiarity in all its actions. We agree with you that EU action must be based on evidence that it would make a real practical difference to the common challenges we face. In Justice and Home Affairs there has been much progress in working towards making the EU ‘a unique area of freedom, security and justice’ as set out by EU leaders in the summit in Tampere, Finland in 1999 and The Hague Programme.

The EU must deliver for citizens. To do this we need the correct institutional set-up. I welcome EU leaders’ agreement to an intergovernmental conference to agree the text for a new treaty. This must end the uncertainty over the European Union’s Treaty reform. In Justice and Home Affairs there has been stalemate over too many policies especially in the area of police and judicial co-operation in criminal matters [the so-called third pillar]. Uncertainty is in no-one’s interest, including UK citizens.

On institutional change, you expressed particular concerns about incorporating EU action into UK law [through secondary legislation only], moving away from the third-pillar and the proliferation of ‘informal decision-making structures’, citing the example of the Prüm Treaty. The first point is for the UK. I will set out the Commission’s position on the last two—why we welcome and support the European Council conclusions.

The abolition of the three pillars structure agreed by European leaders in June will end the artificial divide between different parts of justice and home affairs work. EU leaders agreed to “communitarise” almost all justice and home affairs policies. This will mean quicker, more transparent and accountable decisions for EU citizens.

The extension of the codecision procedure (Member States to agree by Qualified Majority Voting and a bigger role for the European Parliament as co-legislator), for police and judicial co-operation in criminal matters, will help end the stalemate in third pillar areas. Police co-operation, prevention of organised crime and judicial co-operation in criminal matters are all subject to this stalemate. Yes, we made commendable progress with the European Arrest Warrant, which is often cited as the example of EU agreement on legislation in the Third Pillar. However the timing of the European Arrest Warrant,

adopted very shortly after the 2001 terrorist attacks in Washington and New York, must be acknowledged. Moreover it is the only example we have of legislation being enacted quickly. The delays with a similar piece of legislation—the European Evidence Warrant (parts of which are necessary to benefit from the European Arrest Warrant)—must not be overlooked. The European Evidence Warrant provides a more realistic picture of the delays and blockages which we experience too often in police and judicial co-operation in criminal matters. Practical police operations and judicial co-operation therefore take place in a legal vacuum. The move to extend the codecision procedure will enable us to provide the required certainty for necessary cross border operations which benefit citizens in the UK and the rest of the EU. The UK secured an extension of its opt-in previously agreed for migration, asylum and immigration issues. The UK can opt in on individual measures. This will enable the UK to act in accordance with the British interest. I hope the UK will work with us and participate to advance UK, and the rest of the EU's, interests.

EU leaders agreed to make 'enhanced co-operation' more effective. Through this, a minimum of nine Member States will be able to move forward and adopt legislation. I do not like the idea of a two speed Europe; you also express concern. But I like even less to see work blocked due to one or two Member States who oppose the wishes of the majority. Of course Member States wish safeguards, which will remain for Member States' Governments. We see this in the most sensitive areas, such as police co-operation. Unanimity will be maintained for operational actions. Governments will be able to use an 'emergency brake' if they have major objections, for points of national sovereignty. This emergency brake will bring issues to the attention of EU leaders. But an emergency brake must not be a way to block a decision. It will suspend it for high level discussion in the European Council, for a while.

You express concern about the proliferation of 'informal decision making structures' such as Prüm. In an enlarged EU we must work together. Member States cannot view the EU as an à la carte menu from which they can pick and choose. If they do we will likely see the proliferation about which you have concerns as Member States which wish to see specific further measures implemented press ahead. However we need to ensure **convergence** among the different forms of co-operation. We must consider how we make shared interest or regional mechanisms compatible with EC/EU law. Such developments must compliment the EU framework not challenge or seek to replace it.

The Court of Justice will become fully competent in all justice, freedom and security areas. This is a major improvement which has important consequences. I have concerns about poor national implementation of decisions previously agreed by EU leaders. These changes will help national courts to get the support of the European Court of Justice when having to apply or to interpret matters of EU law. This dialogue between EU and national jurisdictions is of the utmost importance in bringing the EU closer to citizens. But these changes will also help ensure a better application of EU legislation at national level as those Member States failing to transpose or incorrectly transposing texts could be brought before the Court of Justice in the future. This is essential to ensure that EU law does not remain virtual and is effectively implemented by Member States. What is the purpose of having adopted the European arrest warrant for facilitating the surrender of criminals and terrorists throughout Europe if some Member States are still lacking in ensuring the legal transposition? Why, having agreed to a common definition of terrorist acts, do divergent approaches remain?

Turning to Parliamentary scrutiny, I welcome the agreement to enhance the role of the European Parliament and National Parliaments. National Parliaments will now have eight weeks (previously six) to scrutinise Commission proposals. If a majority of National Parliaments opposes an initiative they can ask the Commission to reconsider or revise it. These measures give real power to national parliaments. It is important that we all work together for the benefit of EU citizens. I welcome your desire to work closely with other committees in the UK and at EU level—such as the LIBE committee, with whom I frequently discuss issues both formally and informally. I also am pleased that officials in my Directorate General are asked to provide evidence to your and other UK Parliamentary committees. This interaction is essential for accountability to the public.

Brussels, 27 July 2007